District of Columbia Official Code

2001 Edition

TITLE 28

Commercial Instruments and Transactions (Subtitle I, Articles 4 to End; Subtitle II)

40th ANNIVERSARY
of
HOME RULE

DISTRICT OF COLUMBIA

OFFICIAL CODE

2001 EDITION

Containing the Laws, general and permanent in their nature, relating to or in force in the District of Columbia (Except such laws as are of application in the General and Permanent Laws of the United States) as of August 31, 2013.

VOLUME 14

Title 28

Commercial Instruments and Transactions
Subtitle I, Articles 4 to End
Subtitle II

LexisNexis®

46347-11

ISBN 978-0-7698-9762-2 (Volume 14)

ISBN 978-0-7698-6495-2 (Set)

Matthew Bender & Company, Inc.
701 East Water Street, Charlottesville, VA 22902
www.lexisnexis.com
Customer Service: 1-800-833-9844

(Pub.45948)

COUNCIL OF THE DISTRICT OF COLUMBIA

Phil Mendelson, *Chairman*

Yvette M. Alexander	Jack Evans
Marion Barry	Jim Graham
Anita Bonds	David Grosso
Muriel Bowser	Kenyan R. McDuffie
David A. Catania	Vincent B. Orange, Sr.
Mary M. Cheh	Tommy Wells

OFFICE OF THE GENERAL COUNSEL

Under Whose Direction This Volume Has Been Prepared

V. David Zvenyach, *General Counsel*

John Hoellen, *Legislative Counsel*

Benjamin F. Bryant, Jr., *Codification Counsel*

Karen R. Barbour, *Legal Assistant*

*

Foreword to 2013 Replacement Volume 14

LexisNexis is proud to continue its tradition of excellence with its District of Columbia Official Code, 2001 Edition. This 2013 Volume 14 replaces Volume 14 of the 2001 Official Edition and its 2013 Supplement, both of which may now be discarded, recycled, or retained for historical reference. Future supplements will be keyed to this 2013 Volume and not to any of its predecessors.

Title 28, Subtitle I, Articles 1 to 3 continue appear in Volume 13. Volume 14 now contains Title 28, Subtitle I, Articles 4 to 11 (end), and all of Title 28, Subtitle II. Subtitle II of Title 28 formerly appeared in Volume 15; now, Title 28 is contained completely within Volumes 13 and 14.

LexisNexis presents the 2013 republication of the District of Columbia Official Code, 2001 Edition to the D.C. bench and bar and to the citizens of the District of Columbia in a sincere belief that it will prove a material contribution to the orderly and efficient conduct of the government of the District and to the practice of law. LexisNexis is proud to help commemorate the 40th anniversary of Home Rule for the District of Columbia.

The District of Columbia Official Code, 2001 Edition, represents the eighth compilation of the laws of the District of Columbia and reflects an extensive renumbering of the 1981 Edition. Users should consult the historical citations at the end of each statute, and corresponding amendment notes, as guides to legislative currency. Research features such as case annotations, section references, effect of legislation notes, editor's notes, and the comprehensive index have been prepared by LexisNexis. Your set is kept up to date through regular supplementation, free access to the on-line Official Code at http://www.lexisnexis.com/hottopics/dccode and the periodic replacement of volumes. All case citations are Shepardized for accuracy and continued relevance. LexisNexis also publishes a District of Columbia Advance Legislative Service (ALS). The ALS gives you the latest session laws as they are passed, along with tables showing you which sections of the Code are affected.

We actively solicit your comments and suggestions. If you have questions or comments about the statutes, or if you have suggestions regarding index improvements, please write to us or call us toll-free at 1-800-833-9844; fax us toll free at 1-800-643-1280; E-mail us at customersupport@bender.com; or visit our website at http://www.lexisnexis.com. By providing us with your informed comments, you will be assured of having a working tool which increases in value each year.

LEXISNEXIS October 2013

PREFACE TO THE 2001 EDITION

The 2001 Edition of the District of Columbia Official Code marks the eighth time that a compilation of the Laws of the District of Columbia has been published by, or under the authority of, the government of the District of Columbia or that of the United States. The District of Columbia Code was first published in 1929; eleven years later, the Second Edition (1940) was published; another eleven years later, the Third Edition (1951); ten years later, the Fourth Edition (1961); six years later, the Fifth Edition (1967); another six years later, the Sixth Edition (1973); and 8 years later, the Seventh Edition (1981) was published. The time between the publication of the Seventh Edition and this Eighth Edition represents the longest period, by almost a decade, that the District of Columbia Code has gone unrevised in its 72 year history.

The District's Charter, which in 1973, established the current tripartite government of the District of Columbia, makes it incumbent upon the legislative branch to publish and codify every act of the Council, as the Council directs, upon becoming law, so that the residents of the District may have ready access to the laws by which they are governed. In 1973, however, the framers of the District's constitution could not have foreseen the incredible technological advances that would occur in the next 25 years nor the impact they would have on the Code.

With the close of the 20th Century the world has witnessed the triumph of the Information Age, the rise of the World Wide Web, and the explosion of word processing and data storage technology. These phenomena have helped make the reproduction of legal text and data a fast, easy, and inexpensive enterprise, giving rise to a plethora of publishing mediums, and have made it a relatively simple task to reproduce existing legal text, including the District of Columbia Code. The rapid rise of the Computer Age has allowed virtually anyone with an ordinary personal computer to reproduce and compile the laws of the District of Columbia.

The laws of the District, however, are fluid, not stagnant, as they are amended several times each year. The quality and accuracy of publications not directed by the Council are beyond its control. The Council can only warrant the Code for which it has authorized publication. Therefore, in order to ensure that the residents of the District may distinguish between the compilation of District laws as produced under the direction of the elected officials of the District of Columbia and those of other persons, we have added the word "Official" to the title of the Code. Also to ensure that the Council never loses the right to publish its own laws, the government of the District of Columbia has retained the copyright to the District of Columbia Official Code.

The codified laws of the District of Columbia are created as a result of legislative action on the part of 13 individuals elected by the residents of the

District of Columbia to enact the laws that govern the District, and by the Congress. Once the legislative process is complete, the Council, through its delegation of authority to its Office of the General Counsel, codifies the laws in the form of this Code. In the process of codification, the Office of the General Counsel interprets any discrepancies in the drafting of the laws using commonly recognized rules of statutory construction. No other entity is authorized by law to make these determinations. As set forth by federal law and recognized by the Courts of the District of Columbia, this Code establishes prima facie evidence of the laws in force in the District of Columbia.[1] It is this continuity of authority, from enactment to codification to judicial review that gives this Code its authenticity and officiality as the content of the laws of the District of Columbia.

The 2001 Edition represents a recodification of the 1981 Edition in that it contains a reorganization of the presentation of the laws, inclusion of some previously omitted legal provisions, and the omission of non-substantive extraneous provisions. The theory behind the recodification is to purify the organization of the Code which over many decades has seen the haphazard mixing of original ("organic") provisions of laws throughout the Code. In the 2001 Edition, we have established a system of codification that follows the legislative drafting principals established over many years in the Council's Office of the General Counsel.

The recodification is not an overhaul of the Code. Although a cleanup of the antiquated, repealed and omitted provisions is long overdue, it is not the province of the Office of the General Counsel to determine which laws should be expunged as obsolete. Such decisions should be left to a working group commissioned by the Council to recommend revisions to the Code. The Office of the General Counsel has simply separated the organic laws into discrete divisions and topical categories. As much as is possible, we have followed a rule that requires that all organic law remain intact: closely following the layout of the originating act. We have retained notes to repealed sections to aid in legal research and preserved the numbering style that was first introduced in the Second Edition. Thanks to the resourcefulness of the publisher and the Council's Office of the General Counsel staff, we have corrected provisions of law erroneously added to, or deleted from, prior editions.

The Code is organized into eight **Divisions** of practical law: government organization; judicial organization; decedent estates; criminal law; business law; education; property; and general laws. Each division is subdivided by subject matter called **Titles**, organic laws, called **Chapters** and **Subchapters**, and finally, individual **Sections** representing the individual sections of organic law. Occasionally, **Subtitles** are used to organize chapters of organic law, **Units** to organize subchapters, and **Parts** and **Subparts** to organize the additional divisions within the organic law. One important change that the user will notice, and hopefully appreciate, is that the District's Charter, the Home Rule Act, is codified in its entirety in one location so that the

---

1. *See* 1 U.S.C. § 204(b) (1994); *Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993).

framework of the current District government can be readily found. We hope that the organization of the 2001 Edition of the District of Columbia Official Code will serve as a foundation for further refinement by future law revision commissions or their equivalent.

The 2001 Edition has been prepared under the supervision of Benjamin. F. Bryant, Jr., Codification Counsel, Office of the General Counsel, Council of the District of Columbia.

____ /s/____________________

Linda W. Cropp

Chairman

Council of the District of Columbia

____ /s/______________________

Charlotte Brookins-Hudson

General Counsel

Council of the District of Columbia

USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the District of Columbia Code, a User's Guide has been included in Volume 1 of the Code. This guide contains comments and information on the many features found within the District of Columbia Code intended to increase the usefulness of the Code to the user.

Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Service
— Analyses
— Applied and Cited Notes
— Case Notes
— Court Rules
— Editor's Notes
— Effect of Amendment Notes
— Historical Citations
— Index
— Miscellaneous Annotations
— Replacement Volumes

If you have a question not addressed by the User's Guide, or comments about your Code service, please call us toll-free at (800) 833-9844, fax us at (800) 643-1280, email us at customer.support@bender.com, or write to: D.C. Code Editor, LexisNexis, 701 E. Water St., Charlottesville, Virginia 22902-5389.

TITLES OF DISTRICT OF COLUMBIA OFFICIAL CODE, 2001 EDITION

DIVISION I. GOVERNMENT OF DISTRICT

DIVISION II. JUDICIARY AND JUDICIAL PROCEDURE

DIVISION III. DECEDENTS' ESTATES AND FIDUCIARY RELATIONS

DIVISION IV. CRIMINAL LAW AND PROCEDURE AND PRISONERS

---

*Title has been enacted as law.

DIVISION V. LOCAL BUSINESS AFFAIRS

DIVISION VI. EDUCATION, LIBRARIES, AND CULTURAL INSTITUTIONS

DIVISION VII. PROPERTY

DIVISION VIII. GENERAL LAWS

---

*Title has been enacted as law.

CITE THIS BOOK

Thus: D.C. Official Code, § ________ (2001 Ed.)

Table of Contents

Title 28

Commercial Instruments and Transactions

Subtitle I, Articles 1 to 3 appear in Volume 13

SUBTITLE I. UNIFORM COMMERCIAL CODE.

Article 4. Bank Deposits and Collections.

Article 4A. Funds Transfers.

Article 5. Letters of Credit.

Article 6. Bulk Transfers.

Article 7. Documents of Title.

Article 8. Investment Securities.

Article 9. Secured Transactions.

Article 10. Construction With Other Laws.

Article 11. Effective Date and Transition Provisions.

SUBTITLE II. OTHER COMMERCIAL TRANSACTIONS.

CHAPTER

DIVISION V. LOCAL BUSINESS AFFAIRS.

TITLE 28. COMMERCIAL INSTRUMENTS AND TRANSACTIONS.

SUBTITLE II. OTHER COMMERCIAL TRANSACTIONS

SUBTITLE I. UNIFORM COMMERCIAL CODE

Article 4. Bank Deposits and Collections.

Part 1. General Provisions and Definitions.

§ 28:4-101. Short title.

This article may be cited as "Uniform Commercial Code—Bank Deposits and Collections".

(Dec. 30, 1963, 77 Stat. 695, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-101.

1973 Ed., § 28:4-101.

Legislative history of Law 10-249. — Law 10-249, the "Uniform Commercial Code—Negotiable Instruments Act of 1994," was introduced in Council and assigned Bill No. 10-240, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on January 18, 1995, it was assigned Act No. 10-396 and transmitted to both Houses of Congress for its review. D.C. Law 10-249 became effective on March 23, 1995.

UNIFORM COMMERCIAL CODE COMMENT

1. The great number of checks handled by banks and the country-wide nature of the bank collection process require uniformity in the law of bank collections. There is needed a uniform statement of the principal rules of the bank collection process with ample provision for flexibility to meet the needs of the large volume handled and the changing needs and conditions that are bound to come with the years. This Article meets that need.

2. In 1950 at the time Article 4 was drafted, 6.7 billion checks were written annually. By the time of the 1990 revision of Article 4 annual volume was estimated by the American Bankers Association to be about 50 billion checks. The banking system could not have coped with this increase in check volume had it not developed in the late 1950s and early 1960s an automated system for check collection based on encoding checks with machine-readable information by Magnetic Ink Character Recognition (MICR). An important goal of the 1990 revision of Article 4 is to promote the efficiency of the check collection process by making the provisions of Article 4 more compatible with the needs of an automated system and, by doing so, increase the speed and lower the cost of check collection for those who write and receive checks. An additional goal of the 1990 revision of Article 4 is to remove any statutory barriers in the Article to the ultimate adoption of programs allowing the presentment of checks to payor banks by electronic transmission of information captured from the MICR line on the checks. The potential of these programs for saving the time and expense of transporting the huge volume of checks from depositary to payor banks is evident.

3. Article 4 defines rights between parties with respect to bank deposits and collections. It is not a regulatory statute. It does not regulate the terms of the bank-customer agreement, nor does it prescribe what constraints different jurisdictions may wish to impose on that relationship in the interest of consumer protection. The revisions in Article 4 are intended to create a legal frame-work that accommodates automation and truncation for the benefit of all bank customers. This may raise consumer problems which enacting jurisdictions may wish to address in individual legislation. For example, with respect to Section 4-401(c), jurisdictions may wish to examine their unfair and deceptive practices laws to determine whether they are adequate to protect drawers who postdate checks from unscrupulous practices that may arise on the part of persons who induce drawers to issue postdated checks in erroneous belief that the checks will not be immediately payable. Another example arises from the fact that under various truncation plans customers will no longer receive their cancelled checks and will no longer have the cancelled check to prove payment. Individual legislation might provide that a copy of a bank statement along with a copy of the check is prima facie evidence of payment.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-102. Applicability.

(a) To the extent that items within this article are also within Articles 3 and 8, they are subject to those articles. If there is conflict, this Article governs Article 3, but Article 8 governs this article.

(b) The liability of a bank for action or nonaction with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or nonaction by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

(Dec. 30, 1963, 77 Stat. 695, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:1-301.

Prior Codifications. — 1981 Ed., § 28:4-102.

1973 Ed., § 28:4-102.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The rules of Article 3 governing negotiable instruments, their transfer, and the contracts of the parties thereto apply to the items collected through banking channels wherever no specific provision is found in this Article. In the case of conflict, this Article governs. See Section 3-102(b).

Bonds and like instruments constituting investment securities under Article 8 may also be handled by banks for collection purposes. Various sections of Article 8 prescribe rules of transfer some of which (see Sections 8-108 and 8-304) may conflict with provisions of this Article (Sections 4-205, 4-207, and 4-208). In the case of conflict, Article 8 governs. Amendments approved by the Permanent Editorial Board for Uniform Commercial Code November 4, 1995.

Section 4-210 deals specifically with overlapping problems and possible conflicts between this Article and Article 9. However, similar reconciling provisions are not necessary in the case of Articles 5 and 7. Sections 4-301 and 4-302 are consistent with Section 5-112. In the case of Article 7 documents of title frequently accompany items but they are not themselves items. See Section 4-104(a)(9).

In Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), the Court held that if the United States is a party to an instrument, its rights and duties are governed by federal common law in the absence of a specific federal statute or regulation. In United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), the Court stated a three-pronged test to ascertain whether the federal common-law rule should follow the state rule. In most instances courts under the Kimbell test have shown a willingness to adopt UCC rules in formulating federal common law on the subject. In Kimbell the Court adopted the priorities rules of Article 9.

In addition, applicable federal law may supersede provisions of this Article. One federal law that does so is the Expedited Funds Availability Act, 12 U.S.C. § 4001 et seq., and its implementing Regulation CC, 12 CFR Pt. 229. In some instances this law is alluded to in the statute, e.g., Section 4-215(e) and (f). In other instances, although not referred to in this Article, the provisions of the EFAA and Regulation CC control with respect to checks. For example, except between the depositary bank and its customer, all settlements are final and not provisional (Regulation CC, Section 229.36(d)), and the midnight deadline may be extended (Regulation CC, Section 229.30(c)). The comments to this Article suggest in most instances the relevant Regulation CC provisions.

2. Subsection (b) is designed to state a workable rule for the solution of otherwise vexatious problems of the conflicts of laws:

a. The routine and mechanical nature of bank collections makes it imperative that one law govern the activities of one office of a bank. The requirement found in some cases that to hold an indorser notice must be given in accordance with the law of the place of indorsement, since that method of notice became an implied term of the indorser's contract, is more theoretical than practical.

b. Adoption of what is in essence a tort theory of the conflict of laws is consistent with the general theory of this Article that the basic duty of a collecting bank is one of good faith and and the exercise of ordinary care. Justification

lies in the fact that, in using an ambulatory instrument, the drawer, payee, and indorsers must know that action will be taken with respect to it in other jurisdictions. This is especially pertinent with respect to the law of the place of payment.

c. The phrase "action or non-action with respect to any item handled by it for purposes of presentment, payment, or collection" is intended to make the conflicts rule of subsection (b) apply from the inception of the collection process of an item through all phases of deposit, forwarding, presentment, payment and remittance or credit of proceeds. Specifically the subsection applies to the initial act of a depositary bank in receiving an item and to the incidents of such receipt. The conflicts rule of Weissman v. Banque de Bruxelles, 254 N.Y. 488, 173 N.E. 835 (1930), is rejected. The subsection applies to questions of possible vicarious liability of a bank for action or non-action of sub-agents (see Section 4-202(c)), and tests these questions by the law of the state of the location of the bank which uses the sub-agent. The conflicts rule of St. Nicholas Bank of New York v. State Nat. Bank, 128 N.Y. 26, 27 N.E. 849, 13 L.R.A. 241 (1891), is rejected. The subsection applied to action or non-action of a payor bank in connection with handling an item (see Sections 4-215(a), 4-301, 4-302, 4-303) as well as action or non-action of a collecting bank (Sections 4-201 through 4-216); to action or non-action of a bank which suspends payment or is affected by another bank suspending payment (Section 4-216); to action or non-action of a bank with respect to an item under the rule of Part 4 of Article 4.

d. In a case in which subsection (b) makes this Article applicable, Section 4-103(a) leaves open the possibility of an agreement with respect to applicable law. This freedom of agreement follows the general policy of Section 1-105. Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a) of this section, whether or not specifically assented to by all parties interested in items handled.

(c) Action or nonaction approved by this article or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearing-house rules and the like or with a general banking usage not disapproved by this article, is prima facie the exercise of ordinary care.

(d) The specification or approval of certain procedures by this article is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

(Dec. 30, 1963, 77 Stat. 695, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-103.

1973 Ed., § 28:4-103.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 1-102 states the general principles and rules for variation of the effect of this Act by agreement and the limitations to this power. Section 4-103 states the specific rules for variation of Article 4 by agreement and also certain standards of ordinary care. In view of the technical complexity of the field of bank collections, the enormous number of items handled by banks, the certainty that there will be variations from the normal in each day's work in each bank, the certainty of changing conditions and the possibility of developing improved methods of collection to speed the process, it would be unwise to freeze present methods of operation by mandatory statutory rules. This section, therefore, permits within wide limits variation of the effect of provisions of the Article by agreement.

2. Subsection (a) confers blanket power to vary all provisions of the Article by agreements of the ordinary kind. The agreements may not disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care and may not limit the measure of damages for the lack or failure, but this subsection like Section 1-102(3) approves the practice of parties determining by agreement the standards by which the responsibility is to be measured. In the absence of a showing that the standards manifestly are unreasonable, the agreement controls. Owners of items and other interested parties are not affected by agreements under this subsection unless they are parties to the agreement or are bound by adoption, ratification, estoppel or the like.

As here used "agreement" has the meaning given to it by Section 1-201(3). The agreement may be direct, as between the owner and the depositary bank; or indirect, as in the case in which the owner authorizes a particular type of procedure and any bank in the collection chain acts pursuant to such authorization. It may be with respect to a single item; or to all items handled for a particular customer, e.g., a general agreement between the depositary bank and the customer at the time a deposit account is opened. Legends on deposit tickets, collection letters and acknowledgments of items, coupled with action by the affected party constituting acceptance, adoption, ratification, estoppel or the like, are agreements if they meet the tests of the definition of "agreement." See Section 1-201(3). First Nat. Bank of Denver v. Federal Reserve Bank, 6 F.2d 339 (8th Cir.1925) (deposit slip); Jefferson County Bldg. Ass'n v. Southern Bank & Trust Co., 225 Ala. 25, 142 So. 66 (1932) (signature card and deposit slip); Semingson v. Stock Yards Nat. Bank, 162 Minn. 424, 203 N.W. 412 (1925) (passbook); Farmers State Bank v. Union Nat. Bank, 42 N.D. 449, 454, 173 N.W. 789, 790 (1919) (acknowledgment of receipt of item).

3. Subsection (a) (subject to its limitations with respect to good faith and ordinary care) goes far to meet the requirements of flexibility. However, it does not by itself confer fully effective flexibility. Since it is recognized that banks handle a great number of items every business day and that the parties interested in each item include the owner of the item, the drawer (if it is a check), all nonbank indorsers, the payor bank and from one to five or more collecting banks, it is obvious that it is impossible, practically, to obtain direct agreements from all of these parties on all items. In total, the interested parties constitute virtually every adult person and business organization in the United States. On the other hand they may become bound to agreements on the principle that collecting banks acting as agents have authority to make binding agreements with respect to items being handled. This conclusion was assumed but was not flatly decided in Federal Reserve Bank of Richmond v. Malloy, 264 U.S. 160, at 167, 44 S.Ct. 296, at 298, 68 L.Ed. 617, 31 A.L.R. 1261 (1924).

To meet this problem subsection (b) provides that official or quasi-official rules of collection, that is Federal Reserve regulations and operating circulars, clearing-house rules, and the like, have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled. Consequently, such official or quasi-official rules may, standing by themselves but subject to the good faith and ordinary care limitations, vary the effect of the provisions of Article 4.

Federal Reserve regulations. Various sections of the Federal Reserve Act (12 U.S.C. § 221 et seq.) authorize the Board of Governors of the Federal Reserve System to direct the Federal Reserve banks to exercise bank collection functions. For example, Section 16 (12 U.S.C. § 248(o)) authorizes the Board to require each Federal Reserve bank to exercise the functions of a clearing house for its members and Section 13 (12 U.S.C. § 342) authorizes each Federal Reserve bank to receive deposits from nonmember banks solely for the purposes

of exchange or of collection. Under this statutory authorization the Board has issued Regulation J (Subpart A—Collection of Checks and Other Items). Under the supremacy clause of the Constitution, federal regulations prevail over state statutes. Moreover, the Expedited Funds Availability Act, 12 U.S.C. Section 4007(b) provides that the Act and Regulation CC, 12 CFR 229, supersede "any provision of the law of any State, including the Uniform Commercial Code as in effect in such State, which is inconsistent with this chapter or such regulations." See Comment 1 to Section 4-102.

Federal Reserve operating circulars. The regulations of the Federal Reserve Board authorize the Federal Reserve banks to promulgate operating circulars covering operating details. Regulation J, for example, provides that "Each Reserve Bank shall receive and handle items in accordance with this subpart, and shall issue operating circulars governing the details of its handling of items and other matters deemed appropriate by the Reserve Bank." This Article recognizes that "operating circulars" issued pursuant to the regulations and concerned with operating details as appropriate may, within their proper sphere, vary the effect of the Article.

Clearing-House Rules. Local clearing houses have long issued rules governing the details of clearing; hours of clearing, media of remittance, time for return of mis-sent items and the like. The case law has recognized these rules, within their proper sphere, as binding on affected parties and as appropriate sources for the courts to look to in filling out details of bank collection law. Subsection (b) in recognizing clearing-house rules as a means if preserving flexibility continues the sensible approach indicated in the cases. Included in the terms "clearing houses" are county and regional clearing houses as well as those within a single city or town. There is, of course, no intention of authorizing a local clearing house or a group of clearing houses to rewrite the basic law generally. The term "clearing-house rules" should be understood in the light of functions the clearing houses have exercised in the past.

And the like. This phrase is to be construed in the light of the foregoing. "Federal Reserve regulations and operating circulars" cover rules and regulations issued by public or quasi-public agencies under statutory authority. "Clearing-house rules" cover rules issued by a group of banks which have associated themselves to perform through a clearing house some of their collection, payment and clearing functions. Other agencies or associations of this kind may be established in the future whose rules and regulations could be appropriately looked on as constituting means of avoiding absolute statutory rigidity. The phrase "and the like" leaves open possibilities for future development. An agreement between a number of banks or even all the banks in an area simply because they are banks, would not of itself, by virtue of the phrase "and the like," meet the purposes and objectives of subsection (b).

4. Under this Article banks come under the general obligations of the use of good faith and the exercise of ordinary care. "Good faith" is defined in Section 3-103(a)(4). The term "ordinary care" is defined in Section 3-103(a)(7). These definitions are made to apply to Article 4 by Section 4-104(c). Section 4-202 states respects in which collecting banks must use ordinary care. Subsection (c) of Section 4-103 provides that action or non-action approved by the Article or pursuant to Federal Reserve regulations or operating circulars constitutes the exercise of ordinary care. Federal Reserve regulations and operating circulars constitute an affirmative standard of ordinary care equally with the provisions of Article 4 itself.

Subsection (c) further provides that, absent special instructions, action or non-action consistent with clearing-house rules and the like or with a general banking usage not disapproved by the Article, prima facie constitutes the exercise of ordinary care. Clearing-house rules and the phrase "and the like" have the significance set forth above in these Comments. The term "general banking usage" is not defined but should be taken to mean a general usage common to banks in the area concerned. See Section 1-205(2). In a case in which the adjective "general" is used, the intention is to require a usage broader than a mere practice between two or three banks but it is not intended to require anything as broad as a country-wide usage. A usage followed generally throughout a state, a substantial portion of a state, a metropolitan area or the like would certainly be sufficient. Consistently with the principle of Section 1-205(3), action or non-action consistent with clearing-house rules or the like or with banking usages prima facie constitutes the exercise of ordinary care. However, the phrase "in the absence of special instructions" affords owners of items an opportunity to prescribe other standards and although there may be no direct supervision or control of clearing houses or banking usages by official supervisory authorities, the confirmation of ordinary care by compliance with these standards is prima facie only, thus conferring on the courts the ultimate power to determine ordinary care in any case in which it should appear desirable to do so. The prima facie rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair as used by the particular bank.

5. Subsection (d), in line with the flexible approach required for the bank collection process is designed to make clear that a novel procedure adopted by a bank is not to be

considered unreasonable merely because that procedure is not specifically contemplated by this Article or by agreement, or because it has not yet been generally accepted as a bank usage. Changing conditions constantly call for new procedures and someone has to use the new procedure first. If this procedure is found to be reasonable under the circumstances, provided, of course, that it is not inconsistent with any provision of the Article or other law or agreement, the bank which has followed the new procedure should not be found to have failed in the exercise of ordinary care.

6. Subsection (e) sets forth a rule for determining the measure of damages for failure to exercise ordinary care which, under subsection (a), cannot be limited by agreement. In the absence of bad faith the maximum recovery is the amount of the item concerned. The term "bad faith" is not defined; the connotation is the absence of good faith (Section 3-103). When it is established that some part or all of the item could not have been collected even by the use of ordinary care the recovery is reduced by the amount that would have been in any event uncollectible. This limitation on recovery follows the case law. Finally, if bad faith is established the rule opens to allow the recovery of other damages, whose "proximateness" is to be tested by the ordinary rules applied in comparable cases. Of course, it continues to be as necessary under subsection (e) as it has been under ordinary common law principles that, before the damage rule of the subsection becomes operative, liability of the bank and some loss to the customer or owner must be established.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

CASE NOTES

ANALYSIS

Course of dealings.
Summary judgment.

Course of dealings.

Evidence was insufficient to establish that course of dealing between bank and bank's customer before time that bank paid on fraudulent checks drawn against customer's account reflected parties' agreement to shift from bank to customer the risk of loss caused by forgeries; none of facsimile signature resolutions executed by customer concerned account in which fraud occurred, and even considered in aggregate, resolutions were too few, and too closely clustered and far removed in time, to put customer on notice that bank had general policy concerning facsimile signatures that would govern account in which fraud occurred. D.C. Code 1981, §§ 28:1-205(1), 28:3-404(1). National Union Fire Ins. Co. v. Riggs Nat'l Bank, 93 F.3d 885, 1996 U.S. App. LEXIS 21971 (C.A.D.C. 1996).

Summary judgment.

Fact issues existed as to whether union local was adversely dominated by individual employees who engaged in scheme to embezzle union funds, as to whether local's officials could have discovered scheme earlier, and as to whether bank at which local maintained checking account used in scheme failed to exercise ordinary care, precluding summary judgment in union's action against bank seeking recredit of account. AFT v. Bullock, 539 F.Supp.2d 161, 2008 U.S. Dist. LEXIS 20019 (2008), vacated by 605 F. Supp. 2d 251, 2009 U.S. Dist. LEXIS 45791, 68 U.C.C. Rep. Serv. 2d (CBC) 424 (D.D.C. 2009).

Bank could shorten the one-year Uniform Commercial Code (U.C.C.) statute of repose period for reporting unauthorized checks or withdrawals to 60-days through contract with bank customer. Peters v. Riggs Nat'l Bank, N.A., 942 A.2d 1163, 2008 D.C. App. LEXIS 85 (2008).

§ 28:4-104. Definitions and index of definitions.

(a) In this article, unless the context otherwise requires, the term:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.

(2) "Afternoon" means the period of a day between noon and midnight.

(3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.

(4) "Clearing house" means an association of banks or other payors regularly clearing items.

(5) "Customer" means a person having an account with a bank or for

whom a bank has agreed to collect items, including a bank that maintains an account at another bank.

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (section 28:8-102) or instructions for uncertificated securities (section 28:8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft.

(7) "Draft" means a draft as defined in section 28:3-104 or an item, other than an instrument, that is an order.

(8) "Drawee" means a person ordered in a draft to make payment.

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A or a credit or debit card slip.

(10) "Midnight deadline", with respect to a bank, means midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.

(11) "Settle" means to pay in cash, by clearing-house settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final.

(12) "Suspends payments", with respect to a bank, means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this article and the sections in which they appear are:

"Agreement for electronic presentment".	Section 28:4-110.
"Collecting bank".	Section 28:4-105.
"Depositary bank".	Section 28:4-105.
"Intermediary bank".	Section 28:4-105.
"Payor bank".	Section 28:4-105.
"Presenting bank".	Section 28:4-105.
"Presentment notice".	Section 28:4-110.

(c) "Control" as provided in § 28:7-106 and the following definitions in other articles apply to this article:

"Acceptance".	Section 28:3-409.
"Alteration".	Section 28:3-407.
"Cashier's check".	Section 28:3-104.
"Certificate of deposit".	Section 28:3-104.
"Certified check".	Section 28:3-409.
"Check".	Section 28:3-104.
"Holder in due course".	Section 28:3-302.
"Instrument".	Section 28:3-104.
"Notice of dishonor".	Section 28:3-503.
"Order".	Section 28:3-103.
"Ordinary care".	Section 28:3-103.
"Person entitled to enforce".	Section 28:3-301.

"Presentment".	Section 28:3-501.
"Promise".	Section 28:3-103.
"Prove".	Section 28:3-103.
"Record".	Section 28:3-103.
"Remotely created consumer item".	Section 28:3-103.
"Teller's check".	Section 28:3-104.
"Unauthorized signature".	Section 28:3-403.

(d) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 696, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 9, 1997, D.C. Law 11-240, § 3(d), 44 DCR 1087; Apr. 27, 2013, D.C. Law 19-299, § 6(b), 60 DCR 2634.)

Section references. — This section is referenced in § 28:3-103, § 28:4A-105, and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:4-104.

1973 Ed., § 28:4-104.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 deleted the definition of "Bank" in (b); in (c), added "'Control' as provided in § 28:7-106 and" at the beginning of the introductory language, deleted the definition of "Good faith"; and added the definitions of "Record" and "Remotely created consumer item."

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Paragraph (a)(1): "Account" is defined to include both asset accounts in which a customer has deposited money and accounts from which a customer may draw on a line of credit. The limiting factor is that the account must be in a bank.

2. Paragraph (a)(3): "Banking day." Under this definition that part of a business day when a bank is open only for limited functions, e.g., to receive deposits and cash checks, but with loan, bookkeeping and other departments closed, is not part of a banking day.

3. Paragraph (a)(4): "Clearing house." Occasionally express companies, governmental agencies and other nonbanks deal directly with a clearing house; hence the definition does not limit the term to an association of banks.

4. Paragraph (a)(5): "Customer." It is to be noted that this term includes a bank carrying an account with another bank as well as the more typical nonbank customer or depositor.

5. Paragraph (a)(6): "Documentary draft" applies even though the documents do not accompany the draft but are to be received by the drawee or other payor before acceptance or payment of the draft.

6. Paragraph (a)(7): "Draft" is defined in Section 3-104 as a form of instrument. Since Article 4 applies to items that may not fall within the definition of instrument, the term is defined here to include an item that is a written order to pay money, even though the item may not qualify as an instrument. The term "order" is defined in Section 3-103.

7. Paragraph (a)(8): "Drawee" is defined in Section 3-103 in terms of an Article 3 draft which is a form of instrument. Here "drawee" is defined in terms of an Article 4 draft which includes items that may not be instruments.

8. Paragraph (a)(9): "Item" is defined broadly to include an instrument, as defined in Section 3-104, as well as promises or orders that may not be within the definition of "instrument." The terms "promise" and "order" are defined in

Section 3-103. A promise is a written undertaking to pay money. An order is a written instruction to pay money. But see Section 4-110(c). Since bonds and other investment securities under Article 8 may be within the term "instrument" or "promise," they are items and when handled by banks for collection are subject to this Article. See Comment 1 to Section 4-102. The functional limitation on the meaning of this term is the willingness of the banking system to handle the instrument, undertaking or instruction for collection or payment.

9. Paragraph (a)(10): "Midnight deadline." The use of this phrase is an example of the more mechanical approach used in this Article. Midnight is selected as a termination point or time limit to obtain greater uniformity and definiteness than would be possible from other possible terminating points, such as the close of the banking day or business day.

10. Paragraph (a)(11): The term "settle" has substantial importance throughout Article 4. In the American Bankers Association Bank Collection Code, in deferred posting statutes, in Federal Reserve regulations and operating circulars, in clearing-house rules, in agreements between banks and customers and in legends on deposit tickets and collection letters, there is repeated reference to "conditional" or "provisional" credits or payments. Tied in with this concept of credits or payments being in some way tentative, has been a related but somewhat different problem as to when an item is "paid" or "finally paid" either to determine the relative priority of the item as against attachments, stop-payment orders and the like or in insolvency situations. There has been extensive litigation in the various states on these problems. To a substantial extent the confusion, the litigation and even the resulting court decisions fail to take into account that in the collection process some debits or credits are provisional or tentative and others are final and that very many debits or credits are provisional or tentative for awhile but later become final.

Similarly, some cases fail to recognize that within a single bank, particularly a payor bank, each item goes through a series of processes and that in a payor bank most of these processes are preliminary to the basic act of payment or "final payment."

The term "settle" is used as a convenient term to characterize a broad variety of conditional, provisional, tentative and also final payments of items. Such a comprehensive term is needed because it is frequently difficult or unnecessary to determine whether a particular action is tentative or final or when a particular credit shifts from the tentative class to the final class. Therefore, its use throughout the Article indicates that in that particular context it is unnecessary or unwise to determine whether the debit or the credit or the payment is tentative or final. However, if qualified by the adjective "provisional" its tentative nature is intended, and if qualified by the adjective "final" its permanent nature is intended.

Examples of the various types of settlement contemplated by the term include payments in cash; the efficient but somewhat complicated process of payment through the adjustment and offsetting of balances through clearing houses; debit or credit entries in accounts between banks; the forwarding of various types of remittance instruments, sometimes to cover a particular item but more frequently to cover an entire group of items received on a particular day.

11. Paragraph (a)(12): "Suspends payments." This term is designed to afford an objective test to determine when a bank is no longer operating as a part of the banking system.

Reason for 1990 Change [D.C. Law 10-249]

The definition of "account" is amended to make clear that it includes both asset accounts in which a customer has deposited money and accounts from which a customer may draw on a line of credit. The remainder of the definition is amended to bring it more into conformity with the definition of "deposit account" in Section 9-105(1)(e).

The definition of "documentary draft" is amended to recognize the existence of uncertificated securities. The reference to "accompanying documents" is deleted as obsolete. It is enough that the documents are to be received by the drawee or other payor before acceptance or payment of the draft.

The definition of "draft" is new and is explained in the Official Comment.

The definition of "drawee" is new and is explained in the Official Comment.

The definition of "item" is amended because the term "instrument" as defined in Section 3-104 and as used in Article 4 is narrower than the term "item." See the Official Comment.

The definition of "properly payable" is deleted. In former Article 4 there is no affirmative definition of the term "properly payable." Former Section 4-104(1)(i) merely implies that if the customer's account is insufficient to pay the item the item is not properly payable. The phrase is defined in proposed Section 4-401(1) in terms of the items authorized by the customer and in accordance with the bank-customer agreement. This is done to give meaning to "properly payable" in Sections 4-401(1) and 4-402(1).

The latter provision makes clear that a bank that fails to pay an overdraft has not wrongfully dishonored unless it had agreed to pay the overdraft.

The definition of "settle" is amended in changing "instructed" to "agreed" to conform to Section 4-213.

The terms "remitting bank," "protest," and "second party" are deleted because they are not used in Article 4.

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

Unauthorized signature.

Where drawing on joint venture account with bank required signature of one of two contractors and signature of one of two other joint venturers, and bank paid upon the signatures of the contractors alone, neither signature was an "unauthorized signature" within Uniform Commercial Code section providing that customer's negligence in examining bank statement and notifying bank may preclude him from recovering from bank for payment of items bearing unauthorized signatures or material alterations. D.C. Code §§ 28:4-104(1)(e, g), 28:4-406, 28:4-406(1, 4), 41-311. G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 1975 U.S. App. LEXIS 11740 (C.A.D.C. 1975).

§ 28:4-105. Definitions of types of banks.

In this article, the term:

(1) "Bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company.

(2) "Depositary bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter.

(3) "Payor bank" means a bank that is the drawee of a draft.

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depositary or payor bank.

(5) "Collecting bank" means a bank handling an item for collection except the payor bank.

(6) "Presenting bank" means a bank presenting an item except a payor bank.

(Dec. 30, 1963, 77 Stat. 697, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(c), 60 DCR 2634.)

Section references. — This section is referenced in § 28:3-103 and § 28:4-104.

Prior Codifications. — 1981 Ed., § 28:4-105.

1973 Ed., § 28:4-105.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 rewrote the section heading, which read "Bank"; "depositary bank"; "payor bank"; "intermediary bank"; "collecting bank"; "presenting bank".

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — See note to § 28:4-104.

UNIFORM COMMERCIAL CODE COMMENT

1. The definitions in general exclude a bank to which an item is issued, as this bank does not take by transfer except in the particular case covered in which the item is issued to payee for collection, as in the case in which a corporation is transferring balances from one account to another. Thus, the definition of "depositary bank" does not include the bank to which a check is made payable if a check is given in payment of a mortgage. This bank has the status of a payee under Article 3 on Negotiable Instruments and not that of a collecting bank.

2. Paragraph (1): "Bank" is defined in Section 1-201(4) as meaning "any person engaged in the business of banking." The definition in paragraph (1) makes clear that "bank" includes savings banks, savings and loan associations, credit unions and trust companies, in addition to the commercial banks commonly denoted by use of the term "bank."

3. Paragraph (2): A bank that takes an "on us" item for collection, for application to a customer's loan, or first handles the item for other reasons is a depositary bank even though it is also the payor bank. However, if the holder presents the item for immediate payment over the counter, the payor bank is not a depositary bank.

4. Paragraph (3): The definition of "payor bank" is clarified by use of the term "drawee." That term is defined in Section 4-104 as meaning "a person ordered in a draft to make payment." An "order" is defined in Section 3-103 as meaning "a written instruction to pay money . . . An authorization to pay is not an order unless the person authorized to pay is also instructed to pay." The definition of order is incorporated into Article 4 by Section 4-104(c). Thus a payor bank is one instructed to pay in the item. A bank does not become a payor bank by being merely authorized to pay or by being given an instruction to pay not contained in the item.

5. Paragraph (4): The term "intermediary bank" includes the last bank in the collection process if the drawee is not a bank. Usually the last bank is also a presenting bank.

Reason for 1990 Change [D.C. Law 10-249]

The definition of "bank" is added and is in conformity with that found in Section 4A-105(a)(2). See the Official Comment.

The definition of "depositary bank" is amended. The term "transferred for collection" is too limiting as the purpose for which the item is taken. The amendment makes clear that a payor bank is not also a depositary bank with respect to an item presented for immediate payment over the counter.

The definition of "payor bank" is amended to require that in order for a bank to be a payor bank it must be instructed rather than authorized to pay and that the instruction must be contained in the item. As explained in the Official Comment, this result follows from the use of the defined terms "drawee" and "draft."

The definition of "remitting bank" is deleted because the term is not used in Article 4.

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-106. Payable through or payable at bank; collecting bank.

(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is "payable at" a bank identified in the item, the item is equivalent to a draft drawn on the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.

(Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-106.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section replaces former Sections 3-120 and 3-121. Some items are made "payable through" a particular bank. Subsection (a) states that such language makes the bank a collecting bank and not a payor bank. An item identifying a "payable through" bank can be presented for payment to the drawee only by the "payable through" bank. The item cannot be presented to the drawee over the counter for immediate payment or by a collecting bank other than the "payable through" bank.

2. Subsection (b) retains the alternative approach of the present law. Under Alternative A a note payable at a bank is the equivalent of a draft drawn on the bank and the midnight deadline provisions of Sections 4-301 and 4-302

apply. Under Alternative B a "payable at" bank is in the same position as a "payable through" bank under subsection (a).

3. Subsection (c) rejects the view of some cases that a bank named below the name of a drawee is itself a drawee. The commercial understanding is that this bank is a collecting bank and is not accountable under Section 4-302 for holding an item beyond its deadline. The liability of the bank is governed by Sections 4-202(a) and 4-103(e).

§ 28:4-107. Separate office of bank.

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notice or orders must be given under this article and under Article 3.

(Dec. 30, 1963, 77 Stat. 697, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-107.

1973 Ed., § 28:4-106.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. A rule with respect to the status of a branch or separate office of a bank as a part of any statute on bank collections is highly desirable if not absolutely necessary. However, practices in the operations of branches and separate offices vary substantially in the different states and it has not been possible to find any single rule that is logically correct, fair in all situations and workable under all different types of practices. The decision not to draft the section with greater specificity leaves to the courts the resolution of the issues arising under this section on the basis of the facts of each case.

2. In many states and for many purposes a branch or separate office of the bank should be treated as a separate bank. Many branches function as separate banks in the handling and payment of items and require time for doing so similar to that of a separate bank. This is particularly true if branch banking is permitted throughout a state or in different towns and cities. Similarly, if there is this separate functioning a particular branch or separate office is the only proper place for various types of action to be taken or orders or notices to be given. Examples include the drawing of a check on a particular branch by a customer whose account is carried at that branch; the presentment of that same check at that branch; the issuance of an order to the branch to stop payment on the check.

3. Section 1 of the American Bankers Association Bank Collection Code provided simply: "A branch or office of any such bank shall be deemed a bank." Although this rule appears to be brief and simple, as applied to particular sections of the ABA Code it produces illogical and, in some cases, unreasonable results. For example, under Section 11 of the ABA Code it seems anomalous for one branch of a bank to have charged an item to the account of the drawer and another branch to have the power to elect to treat the item as dishonored. Similar logical problems would flow from applying the same rule to Article 4. Warranties by one branch to another branch under Sections 4-207 and 4-208 (each considered a separate bank) do not make sense.

4. Assuming that it is not desirable to make each branch a separate bank for all purposes, this section provides that a branch or separate office is a separate bank for certain purposes. In so doing the single legal entity of the bank as a whole is preserved, thereby carrying with it the liability of the institution as a whole on such obligations as it may be under. On the other hand, in cases in which the Article provides a number of time limits for different types of action by banks, if a branch functions as a separate bank, it should have the time limits available to a separate bank. Similarly if in its relations to customers a branch functions as a separate bank, notices and orders with respect to accounts of customers of the branch should be given at the branch.

For example, whether a branch has notice sufficient to affect its status as a holder in due course of an item taken by it should depend upon what notice that branch has received with respect to the item. Similarly the receipt of a stop-payment order at one branch should not be notice to another branch so as to impair the

right of the second branch to be a holder in due course of the item, although in circumstances in which ordinary care requires the communication of a notice or order to the proper branch of a bank, the notice or order would be effective at the proper branch from the time it was or should have been received. See Section 1-201(27).

5. The bracketed language ("maintaining its own deposit ledger") in former Section 4-106 is deleted. Today banks keep records on customer accounts by electronic data storage. This has led most banks with branches to centralize to some degree their record keeping. The place where records are kept has little meaning if the information is electronically stored and is instantly retrievable at all branches of the bank. Hence, the inference to be drawn from the deletion of the bracketed language is that where record keeping is done is no longer an important factor in determining whether a branch is a separate bank.

Reason for 1990 Change [D.C. Law 10-249]

The bracketed language in former Section 4-106 is deleted. Today banks keep records on customer accounts by electronic data storage. This has led most banks with branches to centralize to some degree their record keeping. The place where records are kept has little meaning if the information is electronically stored and is instantly retrievable at all branches of the bank. Hence, the inference to be drawn from the deletion of the bracketed language is that where record keeping is done is no longer an important factor in determining whether a branch is a separate bank.

§ 28:4-108. Time of receipt of items.

(a) For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

(Dec. 30, 1963, 77 Stat. 697, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-108.

1973 Ed., § 28:4-107.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Each of the huge volume of checks processed each day must go through a series of accounting procedures that consume time. Many banks have found it necessary to establish a cutoff hour to allow time for these procedures to be completed within the time limits imposed by Article 4. Subsection (a) approves a cutoff hour of this type provided it is not earlier than 2 P.M. Subsection (b) provides that if such a cutoff hour is fixed, items received after the cutoff hour may be treated as being received at the opening of the next banking day. If the number of items received either through the mail or over the counter tends to taper off radically as the afternoon hours progress, a 2 P.M. cutoff hour does not involve a large portion of the items received but at the same time permits a bank using such a cutoff hour to leave its doors open later in the afternoon without forcing into the evening the completion of its settling and proving process.

2. The provision in subsection (b) that items or deposits received after the close of the banking day may be treated as received at the opening of the next banking day is important in cases in which a bank closes at twelve or one o'clock, e.g., on a Saturday, but continues to receive some items by mail or over the counter if, for example, it opens Saturday evening for the limited purpose of receiving deposits and cashing checks.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this article for a period not exceeding 2 additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this article or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.

(Dec. 30, 1963, 77 Stat. 697, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-109.

1973 Ed., § 28:4-108.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Sections 4-202(b), 4-214, 4-301, and 4-302 prescribe various time limits for the handling of items. These are the limits of time within which a bank, in fulfillment of its obligation to exercise ordinary care, must handle items entrusted to it for collection or payment. Under Section 4-103 they may be varied by agreement or by Federal Reserve regulations or operating circular, clearing-house rules, or the like. Subsection (a) permits a very limited extension of these time limits. It authorizes a collecting bank to take additional time in attempting to collect drafts drawn on nonbank payors with or without the approval of any interested party. The right of a collecting bank to waive time limits under subsection (a) does not apply to checks. The two-day extension can only by granted in a good faith effort to secure payment and only with respect to specific items. It cannot be exercised if the customer instructs otherwise. Thus limited the escape provision should afford a limited degree of flexibility in special cases but should not interfere with the overall requirement and objective of speedy collections.

2. An extension granted under subsection (a) is without discharge of drawers or indorsers. It therefore extends the times for presentment or payment as specified in Article 3.

3. Subsection (b) is another escape clause from time limits. This clause operates not only with respect to time limits imposed by the Article itself but also time limits imposed by special instructions, by agreement or by Federal regulations or operating circulars, clearing-house rules or the like. The latter time limits are "permitted" by the Code. For example, a payor bank that fails to make timely return of a dishonored item may be accountable for the amount of the item. Subsection (b) excuses a bank from this liability when its failure to meet its midnight deadline resulted from, for example, a computer breakdown that was beyond the control of the bank, so long as the bank exercised the degree of diligence that the circumstances required. In Port City State Bank v. American National Bank, 486 F.2d 196 (10th Cir. 1973), the court held that a bank exercised sufficient diligence to be excused under this subsection. If delay is sought to be excused under this subsection, the bank has the burden of proof on the issue of whether it exercised "such diligence as the circumstances require." The subsection is consistent with Regulation CC, Section 229.38(e).

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) is amended to exclude checks and other items drawn on banks from its application so that the provision will not impede the speedy collection of these items. The amended subsection authorizes a collecting bank to take additional time, not in excess of two days, in a good faith effort to collect drafts drawn on nonbank payors with or without the approval of

any interested party. The term "secondary parties" is deleted because it is no longer used in Articles 3 and 4. Subsection (b) is amended to make clear that the delay is excused for one of the reasons stated only if the bank exercises such diligence as the circumstances require. With the addition of references to the interruption of computer facilities and the failure of equipment, the permissible reasons for delay enumerated are made to conform to those stated in Regulation CC Section 229.38(e). The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-110. Electronic presentment.

(a) "Agreement for electronic presentment" means an agreement, clearing-house rule, or Federal Reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to "item" or "check" in this article means the presentment notice unless the context otherwise indicates.

(Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:4-104.

Prior Codifications. — 1981 Ed., § 28:4-110.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. "An agreement for electronic presentment" refers to an agreement under which presentment may be made to a payor bank by a presentment notice rather than by presentment of the item. Under imaging technology now under development, the presentment notice might be an image of the item. The electronic presentment agreement may provide that the item may be retained by a depositary bank, other collecting bank, or even a customer of the depositary bank, or it may provide that the item will follow the presentment notice. The identifying characteristic of an electronic presentment agreement is that presentment occurs when the presentment notice is received. "An agreement for electronic presentment" does not refer to the common case of retention of items by payor banks because the item itself is presented to the payor bank in these cases. Payor bank check retention is a matter of agreement between payor banks and their customers. Provisions on payor bank check retention are found in Section 4-406(b).

2. The assumptions under which the electronic presentment amendments are based are as follows: No bank will participate in an electronic presentment program without an agreement. These agreements may be either bilateral (Section 4-103(a)), under which two banks that frequently do business with each other may agree to depositary bank check retention, or multilateral (Section 4-103(b)), in which large segments of the banking industry may participate in such a program. In the latter case, federal or other uniform regulatory standards would likely supply the substance of the electronic presentment agreement, the application of which could be triggered by the use of some form of identifier on the item. Regulation CC, Section 229.36(c) authorizes truncation agreements but forbids them from extending return times or otherwise varying requirements of the part of Regulation CC governing check collection without the agreement of all parties interested in the check. For instance, an extension of return time could damage a depositary bank which must make funds available to its customers under mandatory availability schedules. The Expedited Funds Availability Act, 12 U.S.C. Section 4008(b)(2), directs the Federal Reserve Board to consider requiring that banks provide for check truncation.

3. The parties affected by an agreement for electronic presentment, with the exception of the customer, can be expected to protect themselves. For example, the payor bank can probably be expected to limit its risk of loss from drawer forgery by limiting the dollar amount of eligible items (Federal Reserve program), by reconcilement agreements (ABA Safekeeping program), by insurance (credit union share draft program), or by other means. Because agreements will exist, only minimal amendments are needed to make clear that the UCC does not prohibit electronic presentment.

§ 28:4-111. Statute of limitations.

An action to enforce an obligation, duty, or right arising under this article must be commenced within 3 years after the cause of action accrues.

(Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-111.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

This section conforms to the period of limitations set by Section 3-118(g) for actions for breach of warranty and to enforce other obligations, duties or rights arising under Article 3. Bracketing "cause of action" recognizes that some states use a different term, such as "claim for relief."

Part 2. Collection of Items: Depositary and Collecting Banks.

§ 28:4-201. Status of collecting bank as agent and provisional status of credits; applicability of article; item indorsed "pay any bank".

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this article apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder until the item has been:

(1) Returned to the customer initiating collection; or

(2) Specially indorsed by a bank to a person who is not a bank.

(Dec. 30, 1963, 77 Stat. 698, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-206.

Prior Codifications. — 1981 Ed., § 28:4-201.

1973 Ed., § 28:4-201.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section states certain basic rules of the bank collection process. One basic rule, appearing in the last sentence of subsection (a), is that, to the extent applicable, the provisions of the Article govern without regard to whether a bank handling an item owns the item or is an agent for collection. Historically, much time has been spent and effort expended in determining or attempting to determine whether a bank was a purchaser of an item or merely an agent for collection. See discussion of this subject and cases cited in 11 A.L.R. 1043, 16 A.L.R. 1084, 42 A.L.R. 492, 68 A.L.R. 725, 99 A.L.R. 486. See also Section 4 of the American Bankers Association Bank Collection Code. The general approach of Article 4, similar to that of other articles, is to provide, within reasonable limits, rules or answers to major problems known to exist in the bank collection process without regard to questions of status and ownership but to keep general principles such as status and ownership available to cover residual areas not covered by specific rules. In line with this approach, the last sentence of subsection (a) says in effect that Article 4 applies to practically every item moving through banks for the purpose of presentment, payment or collection.

2. Within this general rule of broad coverage, the first two sentences of subsection (a) state a rule of agency status.

"Unless a contrary intent clearly appears" the status of a collecting bank is that of an agent or sub-agent for the owner of the item. Although as indicated in Comment 1 it is much less important under Article 4 to determine status than has been the case heretofore, status may have importance in some residual areas not covered by specific rules. Further, since status has been considered so important in the past, to omit all reference to it might cause confusion. The status of agency "applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn." Thus questions heretofore litigated as to whether ordinary indorsements "for deposit," "for collection" or in blank have the effect of creating an agency status or a purchase, no longer have significance in varying the prima facie rule of agency. Similarly, the nature of the credit given for an item or whether it is subject to immediate withdrawal as of right or is in fact withdrawn, does not alter the agency status. See A.L.R. references supra in Comment 1.

A contrary intent can change agency status but this must be clear. An example of a clear contrary intent would be if collateral papers established or the item bore a legend stating that the item was sold absolutely to the depositary bank.

3. The prima facie agency status of collecting banks is consistent with prevailing law and practice today. Section 2 of the American Bankers Association Bank Collection Code so provided. Legends on deposit tickets, collection letters and acknowledgments of items and Federal Reserve operating circulars consistently so provide. The status is consistent with rights of charge-back (Section 4-214 and Section 11 of the ABA Code) and risk of loss in the event of insolvency (Section 4-216 and Section 13 of the ABA Code). The right of charge-back with respect to checks is limited by Regulation CC, Section 226.36(d).

4. Affirmative statement of a prima facie agency status for collecting banks requires certain limitations and qualifications. Under current practices substantially all bank collections sooner or later merge into bank credits, at least if collection is effected. Usually, this takes place within a few days of the initiation of collection. An intermediary bank receives final collection and evidences the result of its collection by a "credit" on its books to the depositary bank. The depositary bank evidences the results of its collection by a "credit" in the account of its customer. As used in these instances the term "credit" clearly indicates a debtor-creditor relationship. At some stage in the bank collection process the agency status of a collecting bank changes to that of debtor, a debtor of its customer. Usually at about the same time it also becomes a creditor for the amount of the item, a creditor of some intermediary, payor or other bank. Thus the collection is completed, all agency aspects are terminated and the identity of the item has become completely merged in bank accounts, that of the customer with the depositary bank and that of one bank with another.

Although Section 4-215(a) provides that an item is finally paid when the payor bank takes or fails to take certain action with respect to the item, the final payment of the item may or may not result in the simultaneous final settlement for the item in the case of all prior parties. If a series of provisional debits and credits for the item have been entered in accounts between

banks, the final payment of the item by the payor bank may result in the automatic firming up of all these provisional debits and credits under Section 4-215(c), and the consequent receipt of final settlement for the item by each collecting bank and the customer of the depositary bank simultaneously with such action of the payor bank. However, if the payor bank or some intermediary bank accounts for the item with a remittance draft, the next prior bank usually does not receive final settlement for the item until the remittance draft finally clears. See Section 4-213(c). The first sentence of subsection (a) provides that the agency status of a collecting bank (whether intermediary or depositary) continues until the settlement given by it for the item is or becomes final. In the case of the series of provisional credits covered by Section 4-215(c), this could be simultaneously with the final payment of the item by the payor bank. In cases in which remittance drafts are used or in straight noncash collections, this would not be until the times specified in Sections 4-213(c) and 4-215(d). With respect to checks Regulation CC Sections 229.31(c), 229.32(b) and 229.36(d) provide that all settlements between banks are final in both the forward collection and return of checks.

Under Section 4-213(a) settlements for items may be made by any means agreed to by the parties. Since it is impossible to contemplate all the kinds of settlements that will be utilized, no attempt is made in Article 4 to provide when settlement is final in all cases. The guiding principle is that settlements should be final when the presenting person has received usable funds. Section 4-213(c) and (d) and Section 4-215(c) provide when final settlement occurs with respect to certain kinds of settlement, but these provisions are not intended to be exclusive.

A number of practical results flow from the rule continuing the agency status of a collecting bank until its settlement for the item is or becomes final, some of which are specifically set forth in this Article. One is that risk of loss continues in the owner of the item rather than the agent bank. See Section 4-214. Offsetting rights favorable to the owner are that pending such final settlement, the owner has the preference rights of Section 4-216 and the direct rights of Section 4-302 against the payor bank. It also follows from this rule that the dollar limitations of Federal Deposit Insurance are measured by the claim of the owner of the item rather than that of the collecting bank. With respect to checks, rights of the parties in insolvency are determined by Regulation CC Section 229.39 and the liability of a bank handling a check to a subsequent bank that does not receive payment because of suspension of payments by another bank is stated in Regulation CC Section 229.35(b).

5. In those cases in which some period of time elapses between the final payment of the item by the payor bank and the time that the settlement of the collecting bank is or becomes final, e.g., if the payor bank or an intermediary bank accounts for the item with a remittance draft or in straight noncash collections, the continuance of the agency status of the collecting bank necessarily carries with it the continuance of the owner's status as principal. The second sentence of subsection (a) provides that whatever rights the owner has to proceeds of the item are subject to the rights of collecting banks for outstanding advances on the item and other valid rights, if any. The rule provides a sound rule to govern cases of attempted attachment of proceeds of a noncash item in the hands of the payor bank as property of the absent owner. If a collecting bank has made an advance on an item which is still outstanding, its right to obtain reimbursement for this advance should be superior to the rights of the owner to the proceeds or to the rights of a creditor of the owner. An intentional crediting of proceeds of an item to the account of a prior bank known to be insolvent, for the purpose of acquiring a right of setoff, would not produce a valid setoff. See 8 Zollman, Banks and Banking (1936) Sec. 5443.

6. This section and Article 4 as a whole represent an intentional abandonment of the approach to bank collection problems appearing in Section 4 of the American Bankers Association Bank Collection Code. Because the tremendous volume of items handled makes impossible the examination by all banks of all indorsements on all items and thus in fact this examination is not made, except perhaps by depositary banks, it is unrealistic to base the rights and duties of all banks in the collection chain on variations in the form of indorsements. It is anomalous to provide throughout the ABA Code that the prima facie status of collecting banks is that of agent or sub-agent but in Section 4 to provide that subsequent holders (sub-agents) shall have the right to rely on the presumption that the bank of deposit (the primary agent) is the owner of the item. It is unrealistic, particularly in this background, to base rights and duties on status of agent or owner. Thus Section 4-201 makes the pertinent provisions of Article 4 applicable to substantially all items handled by banks for presentment, payment or collection, recognizes the prima facie status of most banks as agents, and then seeks to state appropriate limits and some attributes to the general rules so expressed.

7. Subsection (b) protects the ownership rights with respect to an item indorsed "pay any bank or banker" or in similar terms of a customer initiating collection or of any bank acquiring a security interest under Section 4-210, in the event the item is subsequently

acquired under improper circumstances by a person who is not a bank and transferred by that person to another person, whether or not a bank. Upon return to the customer initiating collection of an item so indorsed, the indorsement may be cancelled (Section 3-207). A bank holding an item so indorsed may transfer the item out of banking channels by special indorsement; however, under Section 4-103(e), the bank would be liable to the owner of the item for any loss resulting therefrom if the transfer had been made in bad faith or with lack of ordinary care. If briefer and more simple forms of bank indorsements are developed under Section 4-206 (e.g., the use of bank transit numbers in lieu of present lengthy forms of bank indorsements), a depositary bank having the transit number "X100" could make subsection (b) operative by indorsements such as "Pay any bank—X100."

Regulation CC Section 229.35(c) states the effect of an indorsement on a check by a bank.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) is amended to delete the cross references to former Sections 4-211, 4-212 and 4-213. The reason for the deletion is to remove any implication that final settlement is determined only by these provisions. Sections 4-213(c) and (d) and 4-215(c) provide when final settlement occurs with respect to certain kinds of settlements, but these provisions are not intended to be exclusive. Since it is impossible to contemplate all the kinds of settlements that will be utilized, no attempt is made in Article 4 to provide when settlement is final in all cases. "Recoupment" is added to the second sentence to clarify the collecting bank's rights against the item or its proceeds. Terms like "valid" or "binding" have been deleted entirely from Article 4 as superfluous. "Or return" is added to the third sentence to make clear that the effect of the provision is not restricted to the forward collection activities of banks but also extends to their acts in returning items. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

Bank as holder in due course.

Where depositary bank gave customer provisional credit on check deposited with bank and permitted customer to withdraw portion of credit before bank had discovered that drawers had stopped payment, bank was a holder in due course as to amount of provisional credit withdrawn and, in absence of applicable defenses, could recover from drawers. D.C. Code §§ 28:3-305(2), 28:4-201, 28:4-208, 28:4-209. Falls Church Bank v. Wesley Heights Realty, Inc., 256 A.2d 915, 1969 D.C. App. LEXIS 312 (App. 1969).

§ 28:4-202. Responsibility for collection or return; when action timely.

(a) A collecting bank must exercise ordinary care in:

(1) Presenting an item or sending it for presentment;

(2) Sending notice of dishonor or nonpayment, or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;

(3) Settling for an item when the bank receives final settlement; and

(4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) of this section by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to subsection (a)(1) of this section, a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit.

(Dec. 30, 1963, 77 Stat. 698, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-202.

1973 Ed., § 28:4-202.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states the basic responsibilities of a collecting bank. Of course, under Section 1-203 a collecting bank is subject to the standard requirement of good faith. By subsection (a) it must also use ordinary care in the exercise of its basic collection tasks. By Section 4-103(a) neither requirement may be disclaimed.

2. If the bank makes presentment itself, subsection (a)(1) requires ordinary care with respect both to the time and manner of presentment. (Sections 3-501 and 4-212.) If it forwards the item to be presented the subsection requires ordinary care with respect to routing (Section 4-204), and also in the selection of intermediary banks or other agents.

3. Subsection (a) describes types of basic action with respect to which a collecting bank must use ordinary care. Subsection (b) deals with the time for taking action. It first prescribes the general standard for timely action, namely, for items received on Monday, proper action (such as forwarding or presenting) on Monday or Tuesday is timely. Although under current "production line" operations banks customarily move items along on regular schedules substantially briefer than two days, the subsection states an outside time within which a bank may know it has taken timely action. To provide flexibility from this standard norm, the subsection further states that action within a reasonably longer time may be timely but the bank has the burden of proof. In the case of time items, action after the midnight deadline, but sufficiently in advance of maturity for proper presentation, is a clear example of a "reasonably longer time" that is timely. The standard of requiring action not later than Tuesday in the case of Monday items is also subject to possibilities of variation under the general provisions of Section 4-103, or under the special provisions regarding time of receipt of items (Section 4-108), and regarding delays (Section 4-109). This subsection (b) deals only with collecting banks. The time limits applicable to payor banks appear in Sections 4-301 and 4-302.

4. At common law the so-called New York collection rule subjected the initial collecting bank to liability for the actions of subsequent banks in the collection chain; the so-called Massachusetts rule was that each bank, subject to the duty of selecting proper intermediaries, was liable only for its own negligence. Subsection (c) adopts the Massachusetts rule. But since this is stated to be subject to subsection (a)(1) a collecting bank remains responsible for using ordinary care in selecting properly qualified intermediary banks and agents and in giving proper instructions to them. Regulation CC Section 229.36(d) states the liability of a bank during the forward collection of checks.

Reason for 1990 Change [D.C. Law 10-249]

The term "timely" is substituted for "seasonable" throughout the section. The bracketed material in paragraph (2) of subsection (a) is deleted because the provision to which it refers in former Section 4-212 is deleted. Paragraph (d) of former subsection (1) is deleted because Article 4 has no requirement of protest. Subsection (b) is a restatement of former subsection (2). The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-203. Effect of instructions.

Subject to Article 3 concerning conversion of instruments (section 28:3-420) and restrictive indorsements (section 28:3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor.

(Dec. 30, 1963, 77 Stat. 699, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-203.

1973 Ed., § 28:4-203.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

This section adopts a "chain of command" theory which renders it unnecessary for an intermediary or collecting bank to determine whether its transferor is "authorized" to give the instructions. Equally the bank is not put on notice of any "revocation of authority" or "lack of authority" by notice received from any other person. The desirability of speed in the collection process and the fact that, by reason of advances made, the transferor may have the paramount interest in the item requires the rule.

The section is made subject to the provisions of Article 3 concerning conversion of instruments (Section 3-420) and restrictive indorsements (Section 3-206). Of course instructions from or an agreement with its transferor does not relieve a collecting bank of its general obligation to exercise good faith and ordinary care. See Section 4-103(a). If in any particular case a bank has exercised good faith and ordinary care and is relieved of responsibility by reason of instructions of or an agreement with its transferor, the owner of the item may still have a remedy for loss against the transferor (another bank) if such transferor has given wrongful instructions.

The rules of the section are applied only to collecting banks. Payor banks always have the problem of making proper payment of an item; whether such payment is proper should be based upon all of the rules of Articles 3 and 4 and all of the facts of any particular case, and should not be dependent exclusively upon instructions from or an agreement with a person presenting the item.

Reason for 1990 Change [D.C. Law 10-249]

Article 4 no longer has provisions on restrictive indorsements; hence, the reference to "this Article" is deleted. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-204. Methods of sending and presenting; sending directly to payor bank.

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

(1) An item directly to the payor bank;

(2) An item to a nonbank payor if authorized by its transferor; and

(3) An item other than documentary drafts to a nonbank payor, if authorized by Federal Reserve regulation or operating circular, clearing-house rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

(Dec. 30, 1963, 77 Stat. 699, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-204.

1973 Ed., § 28:4-204.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) prescribes the general standards applicable to proper sending or forwarding of items. Because of the many types of methods available and the desirability of preserving flexibility any attempt to prescribe limited or precise methods is avoided.

2. Subsection (b)(1) codifies the practice of direct mail, express, messenger or like presentment to payor banks. The practice is now country-wide and is justified by the need for speed, the general responsibility of banks, Federal Deposit Insurance protection and other reasons.

3. Full approval of the practice of direct sending is limited to cases in which a bank is a payor. Since nonbank drawees or payors may be of unknown responsibility, substantial risks may be attached to placing in their hands the instruments calling for payments from them. This is obviously so in the case of documentary drafts. However, in some cities practices have long existed under clearing-house procedures to forward certain types of items to certain nonbank payors. Examples include insurance loss drafts drawn by field agents on home offices. For the purpose of leaving the door open to legitimate practices of this kind, subsection (b)(3) affirmatively approves direct sending of any item other than documentary drafts to any nonbank payor, if authorized by Federal Reserve regulation or operating circular, clearing-house rule or the like.

On the other hand subsection (b)(2) approves sending any item directly to a nonbank payor if authorized by a collecting bank's transferor. This permits special instructions or agreements out of the norm and is consistent with the "chain of command" theory of Section 4-203. However, if a transferor other than the owner of the item, e.g., a prior collecting bank, authorizes a direct sending to a nonbank payor, such transferor assumes responsibility for the propriety or impropriety of such authorization.

4. Section 3-501(b) provides where presentment may be made. This provision is expressly subject to Article 4. Section 4-204(c) specifically approves presentment by a presenting bank at any place requested by the payor bank or other payor. The time when a check is received by a payor bank for presentment is governed by Regulation CC Section 229.36(b).

Reason for 1990 Change [D.C. Law 10-249]

Subsection (c) is amended to allow nonbank payors to request a place of payment. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of section 28:3-302, it is a holder in due course; and

(2) The depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account.

(Dec. 30, 1963, 77 Stat. 699, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-205.

1973 Ed., § 28:4-205.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-201(b) provides that negotiation of an instrument payable to order requires indorsement by the holder. The rule of former Section 4-205(1) was that the depositary bank may supply a missing indorsement of its customer unless the item contains the words "payee's indorsement required" or the like. The cases have differed on the status of the depos-

itary bank as a holder if it fails to supply its customer's indorsement. Marine Midland Bank, N.A. v. Price, Miller, Evans & Flowers, 446 N.Y.S.2d 797 (N.Y.App.Div.4th Dept. 1981), rev'd, 455 N.Y.S.2d 565 (N.Y.1982). It is common practice for depositary banks to receive unindorsed checks under so-called "lock-box" agreements from customers who receive a high volume of checks. No function would be served by requiring a depositary bank to run these items through a machine that would supply the customer's indorsement except to afford the drawer and the subsequent banks evidence that the proceeds of the item reached the customer's account. Paragraph (1) provides that the depositary bank becomes a holder when it takes the item for deposit if the depositor is a holder. Whether it supplies the customer's indorsement is immaterial. Paragraph (2) satisfies the need for a receipt of funds by the depositary bank by imposing on that bank a warranty that it paid the customer or deposited the item to the customer's account. This warranty runs not only to collecting banks and to the payor bank or nonbank drawee but also to the drawer, affording protection to these parties that the depositary bank received the item and applied it to the benefit of the holder.

§ 28:4-206. Transfer between banks.

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.

(Dec. 30, 1963, 77 Stat. 699, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-206.

1973 Ed., § 28:4-206.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is designed to permit the simplest possible form of transfer from one bank to another, once an item gets in the bank collection chain, provided only identity of the transferor bank is preserved. This is important for tracing purposes and if recourse is necessary. However, since the responsibilities of the various banks appear in the Article it becomes unnecessary to have liability or responsibility depend on more formal indorsements. Simplicity in the form of transfer is conducive to speed. If the transfer is between banks, this section takes the place of the more formal requirements of Section 3-201.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-207. Transfer warranties.

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

(1) The warrantor is a person entitled to enforce the item;

(2) All signatures on the item are authentic and authorized;

(3) The item has not been altered;

(4) The item is not subject to a defense or claim in recoupment (section 28:3-305(a)) of any party that can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) With respect to any remotely created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in sections 28:3-115 and 28:3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) of this section are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

(Dec. 30, 1963, 77 Stat. 699, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(d), 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:4-207.

1973 Ed., § 28:4-207.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 added (a)(6); and made related changes.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Except for subsection (b), this section conforms to Section 3-416 and extends its coverage to items. The substance of this section is discussed in the Comment to Section 3-416. Subsection (b) provides that customers or collecting banks that transfer items, whether by indorsement or not, undertake to pay the item if the item is dishonored. This obligation cannot be disclaimed by a "without recourse" indorsement or otherwise. With respect to checks, Regulation CC Section 229.34 states the warranties made by paying and returning banks.

§ 28:4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous

transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and

(4) With respect to any remotely created consumer item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under section 28:3-404 or 28:3-405 or the drawer is precluded under section 28:3-406 or 28:4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

(Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(e), 60 DCR 2634.)

Section references. — This section is referenced in § 28:4-302 and § 28:4-406.

Prior Codifications. — 1981 Ed., § 28:4-208.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 added (a)(4); and made related changes.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — See note to § 28:4-207.

UNIFORM COMMERCIAL CODE COMMENT

This section conforms to Section 3-417 and extends its coverage to items. The substance of this section is discussed in the Comment to Section 3-417. "Draft" is defined in Section 4-104 as including an item that is an order to pay so as to make clear that the term "draft" in Article 4 may include items that are not instruments within Section 3-104.

CASE NOTES

ANALYSIS

Bank as holder in due course.
Notification within reasonable time.

Bank as holder in due course.

Where bank, by debiting entire amount of dishonored check for $149,266.44 against payee's account on receipt of notice of dishonor, found that payee was then overdrawn by $721.48, and bank entered this figure on payee's balance statement as a deficit for that day in payee's account, and where had not payee's account been previously credited by bank with a $2,823.33 check deposited subsequent to original receipt of dishonored check the overdraft at crucial time would have amounted to $3,544.81, bank was a holder in due course for $721.48, not $3,544.81, since bank elected to apply the $2,823.33 check to the deficit. D.C. Code §§ 28:4-208, 28:4-208(2), 28:4-209. Security Bank v. Whiting Turner Contracting Co., 277 A.2d 106, 1971 D.C. App. LEXIS 309 (1971).

Where depositary bank gave customer provisional credit on check deposited with bank and permitted customer to withdraw portion of credit before bank had discovered that drawers had stopped payment, bank was a holder in due course as to amount of provisional credit withdrawn and, in absence of applicable defenses, could recover from drawers. D.C. Code §§ 28:3-305(2), 28:4-201, 28:4-208, 28:4-209. Falls Church Bank v. Wesley Heights Realty, Inc., 256 A.2d 915, 1969 D.C. App. LEXIS 312 (App. 1969).

Notification within reasonable time.

Under D.C. Code 1981, § 28:4-207(4), providing for discharge of liable person unless claim for breach of presentment warranty of good title is made within reasonable time after person claiming learns of the breach, whether notification is made within a reasonable time depends upon the particular facts of each case. Fidelity Bank v. United Nat'l Bank, 630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

Drawee bank, which did not notify presenting bank of forged signature of payee until 46 days after drawee bank had paid the cashier's check in question, failed to notify presenting bank of breach of presentment warranty of good title within a "reasonable time," as required by D.C. Code 1981, § 28:4-207(4), resulting in discharge of presenting bank, where drawee bank failed to establish reasonable internal controls regarding check which would have indicated that payee's signature was forged. Fidelity Bank v. United Nat'l Bank, 630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

§ 28:4-209. Encoding and retention warranties.

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depositary bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply

with the agreement. If a customer of a depositary bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

(Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-209.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Encoding and retention warranties are included in Article 4 because they are unique to the bank collection process. These warranties are breached only by the person doing the encoding or retaining the item and not by subsequent banks handling the item. Encoding and check retention may be done by customers who are payees of a large volume of checks; hence, this section imposes warranties on customers as well as banks. If a customer encodes or retains, the depositary bank is also liable for any breach of this warranty.

2. A misencoding of the amount on the MICR line is not an alteration under Section 3-407(a) which defines alteration as changing the contract of the parties. If a drawer wrote a check for $2,500 and the depositary bank encoded $25,000 on the MICR line, the payor bank could debit the drawer's account for only $2,500. This subsection would allow the payor bank to hold the depositary bank liable for the amount paid out over $2,500 without first pursuing the person who received payment. Intervening collecting banks would not be liable to the payor bank for the depositary bank's error. If a drawer wrote a check for $25,000 and the depositary bank encoded $2,500, the payor bank becomes liable for the full amount of the check. The payor bank's rights against the depositary bank depend on whether the payor bank has suffered a loss. Since the payor bank can debit the drawer's account for $25,000, the payor bank has a loss only to the extent that the drawer's account is less than the full amount of the check. There is no requirement that the payor bank pursue collection against the drawer beyond the amount in the drawer's account as a condition to the payor bank's action against the depositary bank for breach of warranty. See Georgia Railroad Bank & Trust Co. v. First National Bank & Trust, 229 S.E.2d 482 (Ga.App.1976), aff'd, 235 S.E.2d 1 (Ga.1977), and First National Bank of Boston v. Fidelity Bank, National Association, 724 F.Supp. 1168 (E.D.Pa.1989).

3. A person retaining items under an electronic presentment agreement (Section 4-110) warrants that it has complied with the terms of the agreement regarding its possession of the item and its sending a proper presentment notice. If the keeper is a customer, its depositary bank also makes this warranty.

§ 28:4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest

remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

(1) No security agreement is necessary to make the security interest enforceable (section 28:9-203(b)(e)(A));

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

(Dec. 30, 1963, 77 Stat. 700, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Oct. 26, 2000, D.C. Law 13-201, § 201(e), 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 6(f), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-109, § 28:9-203, § 28:9-309, and § 28:9-322.

Prior Codifications. — 1981 Ed., § 28:4-210.

1973 Ed., § 28:4-208.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

The 2013 amendment by D.C. Law 19-299 inserted "possession or control of the" preceding "accompanying documents" in the introductory paragraph of (c).

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 13-201. — Law 13-201, the "Uniform Commercial Code Secured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

Legislative history of Law 19-299. — See note to § 28:4-207.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states a rational rule for the interest of a bank in an item. The customer of the depositary bank is normally the owner of the item and the several collecting banks are agents of the customer (Section 4-201). A collecting agent may properly make advances on the security of paper held for collection, and acquires at common law a possessory lien for these advances. Subsection (a) applies an analogous principle to a bank in the collection chain which extends credit on items in the course of collection. The bank has a security interest to the extent stated in this section. To the extent of its security interest it is a holder for value (Sections 3-303, 4-211) and a holder in due course if it satisfies the other requirements for that status (Section 3-302). Subsection (a) does not derogate from the banker's general common law lien or right of setoff against indebtedness owing in deposit accounts. See Section 1-103. Rather subsection (a) specifically implements and extends the principle as a part of the bank collection process.

2. Subsection (b) spreads the security interest of the bank over all items in a single deposit or received under a single agreement and a single giving of credit. It also adopts the "first-in, first-out" rule.

3. Collection statistics establish that the vast majority of items handled for collection are in fact collected. The first sentence of subsection (c) reflects the fact that in the normal case the bank's security interest is self-liquidating. The remainder of the subsection correlates the security interest with the provisions of Article 9, particularly for use in the cases of noncollection in which the security interest may be important.

Reason for 1990 Change [D.C. Law 10-249]

The addition of "collecting" in subsection (a)

is a clarification. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

Analysis

In general.
Notification within reasonable time.
Priority of claims.

In general.

Presenting bank paid cashier's check in good faith and in accordance with reasonable banking standards so as to preclude drawee bank, under D.C. Code 1981, § 28:3-406, from asserting unauthorized signature of payee against presenting bank, where presenting bank followed its standard practice in permitting putative payee to open an account, made good-faith efforts to obtain information from drawee bank about putative payee before releasing funds to him, and encountered lack of cooperation from drawee bank despite fact that drawee bank's representative was told that $74,000 check was involved. Fidelity Bank v. United Nat'l Bank, 630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

Where depositary bank gave customer provisional credit on check deposited with bank and permitted customer to withdraw portion of credit before bank had discovered that drawers had stopped payment, bank was a holder in due course as to amount of provisional credit withdrawn and, in absence of applicable defenses, could recover from drawers. D.C. Code §§ 28:3-305(2), 28:4-201, 28:4-208, 28:4-209. Falls Church Bank v. Wesley Heights Realty, Inc., 256 A.2d 915, 1969 D.C. App. LEXIS 312 (App. 1969).

Notification within reasonable time.

Under D.C. Code 1981, § 28:4-207(4), providing for discharge of liable person unless claim for breach of presentment warranty of good title is made within reasonable time after person claiming learns of the breach, whether notification is made within a reasonable time depends upon the particular facts of each case. Fidelity Bank v. United Nat'l Bank, 630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

Drawee bank, which did not notify presenting bank of forged signature of payee until 46 days after drawee bank had paid the cashier's check in question, failed to notify presenting bank of breach of presentment warranty of good title within a "reasonable time," as required by D.C. Code 1981, § 28:4-207(4), resulting in discharge of presenting bank, where drawee bank failed to establish reasonable internal controls regarding check which would have indicated that payee's signature was forged. Fidelity Bank v. United Nat'l Bank, 630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

Priority of claims.

Where husband entered into separation and property settlement with wife in May, 1971, departed for foreign country in April, 1972, and entered into consent order in February, 1973, which acknowledged arrearages and directed that he pay wife certain sum per month, injunction and temporary restraining order obtained by wife in October, 1972, barring withdrawal of husband's retirement funds from first bank, was sufficient to give wife priority over claim to husband's funds of second bank which had paid husband's checks on September 28, September 29, and October 2, 1972, and which obtained lien on the funds in first bank on October 11, 1972, since wife's claim included future support and alimony installments not yet accrued and owing. D.C. Code §§ 16-911, 16-912, 16-916(d). Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

Where wife who was separated from her husband obtained a temporary restraining order on October 2, 1972, barring withdrawal of any of husband's retirement funds in account at first bank, claim of second bank, which had made payments to third party pursuant to checks signed by husband that had been presented to second bank on September 28, September 29, and October 2, 1972, was inferior to wife's where such claim did not become a lien on the funds until delivery of second bank's attachment before judgment to United States marshal on October 11, 1972, and second bank was not entitled to payment until attachment first served was paid. D.C. Code §§ 16-501, 16-507. Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

Where wife had obtained a temporary restraining order on October 2, 1972, barring withdrawal of any of husband's retirement funds from husband's account at first bank before defendant second bank presented checks signed by husband to first bank, wife had a prior claim to funds in account of first bank insofar as temporary restraining order was a valid attachment of those funds, even though defendant bank cashed husband's checks on September 28, September 29, and October 2, 1972, without having notice of wife's claim to the funds. D.C. Code § 28:4-303. Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

§ 28:4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of section 28:3-302 on what constitutes a holder in due course.

(Dec. 30, 1963, 77 Stat. 700, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:5-102.

Prior Codifications. — 1981 Ed., § 28:4-211.

1973 Ed., § 28:4-209.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

The section completes the thought of the previous section and makes clear that a security interest in an item is "value" for the purpose of determining the holder's status as a holder in due course. The provision is in accord with the prior law (N.I.L. Section 27) and with Article 3 (Section 3-303). The section does not prescribe a security interest under Section 4-210 as a test of "value" generally because the meaning of "value" under other Articles is adequately defined in Section 1-201.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-212. Presentment by notice of item not payable by, through, or at bank; liability of drawer or indorser.

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a record providing notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under section 28:3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under section 28:3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

(Dec. 30, 1963, 77 Stat. 701, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(g), 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:4-212.

1973 Ed., § 28:4-210.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "record providing notice" for "written notice" in (a).

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — See note to § 28:4-207.

UNIFORM COMMERCIAL CODE COMMENT

1. This section codifies a practice extensively followed in presentation of trade acceptances and documentary and other drafts drawn on nonbank payors. It imposes a duty on the payor to respond to the notice of the item if the item is not to be considered dishonored. Notice of such a dishonor charges drawers and indorsers. Presentment under this section is good presentment under Article 3. See Section 3-501.

2. A drawee not receiving notice is not, of course, liable to the drawer for wrongful dishonor.

3. A bank so presenting an instrument must be sufficiently close to the drawee to be able to exhibit the instrument on the day it is requested to do so or the next business day at the latest.

Reason for 1990 Change [D.C. Law 10-249]

The term "secondary party" is no longer used in Articles 3 and 4. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-213. Medium and time of settlement by bank.

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by Federal Reserve regulations or circulars, clearing-house rules, and the like, or agreement. In the absence of such prescription:

(1) The medium of settlement is cash or credit to an account in a Federal Reserve bank of or specified by the person to receive settlement; and

(2) The time of settlement, is:

(A) With respect to tender of settlement by cash, a cashier's check, or teller's check, when the cash or check is sent or delivered;

(B) With respect to tender of settlement by credit in an account in a Federal Reserve Bank, when the credit is made;

(C) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(D) With respect to tender of settlement by a funds transfer, when payment is made pursuant to section 28:4A-406(a) to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) of this section or the time of settlement is not fixed by subsection (a) of this section, no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) Presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement, settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

(Dec. 30, 1963, 77 Stat. 701, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-213.

1973 Ed., § 28:4-211.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) sets forth the medium of settlement that the person receiving settlement must accept. In nearly all cases the medium of settlement will be determined by agreement or by Federal Reserve regulations and circulars, clearing-house rules, and the like. In the absence of regulations, rules or agreement, the person receiving settlement may demand cash or credit in a Federal Reserve bank. If the person receiving settlement does not have an account in a Federal Reserve bank, it may specify the account of another bank in a Federal Reserve bank. In the unusual case in which there is no agreement on the medium of settlement and the bank making settlement tenders settlement other than cash or Federal Reserve bank credit, no settlement has occurred under subsection (b) unless the person receiving settlement accepts the settlement tendered. For example, if a payor bank, without agreement, tenders a teller's check, the bank receiving the settlement may reject the check and return it to the payor bank or it may accept the check as settlement.

2. In several provisions of Article 4 the time that a settlement occurs is relevant. Subsection (a) sets out a general rule that the time of settlement, like the means of settlement, may be prescribed by agreement. In the absence of agreement, the time of settlement for tender of the common agreed media of settlement is that set out in subsection (a)(2). The time of settlement by cash, cashier's or teller's check or authority to charge an account is the time the cash, check or authority is sent, unless presentment is over the counter in which case settlement occurs upon delivery to the presenter. If there is no agreement on the time of settlement and the tender of settlement is not made by one of the media set out in subsection (a), under subsection (b) the time of settlement is the time the settlement is accepted by the person receiving settlement.

3. Subsections (c) and (d) are special provisions for settlement by remittance drafts and authority to charge an account in the bank receiving settlement. The relationship between final settlement and final payment under Section 4-215 is addressed in subsection (b) of Section 4-215. With respect to settlement by cashier's checks or teller's checks, other than in response to over-the-counter presentment, the bank receiving settlement can keep the risk that the check will not be paid on the bank tendering the check in settlement by acting to initiate collection of the check within the midnight deadline of the bank receiving settlement. If the bank fails to initiate settlement before its midnight deadline, final settlement occurs at the midnight deadline, and the bank receiving settlement assumes the risk that the check will not be paid. If there is no agreement that permits the bank tendering settlement to tender a cashier's or teller's check, subsection (b) allows the bank receiving the check to reject it, and, if it does, no settlement occurs. However, if the bank accepts the check, settlement occurs and the time of final settlement is governed by subsection (c).

With respect to settlement by tender of authority to charge the account of the bank making settlement in the bank receiving settlement, subsection (d) provides that final settlement does not take place until the account charged has available funds to cover the amount of the item. If there is no agreement that permits the bank tendering settlement to tender an authority to charge an account as settlement, subsection (b) allows the bank receiving the tender to reject it. However, if the bank accepts the authority, settlement occurs and the time of final settlement is governed by subsection (d).

Reason for 1990 Change [D.C. Law 10-249]

New section. See the Official Comment. Former Section 4-211 applied only to settlements by remittance instruments and authorities to charge which could be received in settlement by a collecting bank without the collecting bank's being responsible if the remittance wasn't paid. The new section is much broader in stating general rules for all types of settlements with respect to the time settlement is made and the medium which the person receiving settlement must accept. Subsections (c) and (d) apply to the issues treated in former Section 4-211.

CASE NOTES

Analysis

Jurisdiction.
Priority of claims.
Provisional credit.

Jurisdiction.

Temporary restraining order obtained by wife on October 2, 1972, barring any withdrawal of husband's retirement funds in account at first bank, was a sufficient seizure of the funds to give the court in rem jurisdiction so as to permit determination of who was entitled to the funds, in case where second bank made a claim against the funds, husband had entered into separation and property agreement with wife in May, 1971 providing for alimony and child support, husband resigned his government position and departed for a foreign country in April 1972, apparently intending to seek a permanent residence there, and husband made no further alimony or support payments after July, 1972. Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

Priority of claims.

Where husband entered into separation and property settlement with wife in May, 1971, departed for foreign country in April, 1972, and entered into consent order in February, 1973, which acknowledged arrearages and directed that he pay wife certain sum per month, injunction and temporary restraining order obtained by wife in October, 1972, barring withdrawal of husband's retirement funds from first bank, was sufficient to give wife priority over claim to husband's funds of second bank which had paid husband's checks on September 28, September 29, and October 2, 1972, and which obtained lien on the funds in first bank on October 11, 1972, since wife's claim included future support and alimony installments not yet accrued and owing. D.C. Code §§ 16-911, 16-912, 16-916(d). Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

Provisional credit.

Where depositary bank gave customer provisional credit on check deposited with bank and permitted customer to withdraw portion of credit before bank had discovered that drawers had stopped payment, bank was a holder in due course as to amount of provisional credit withdrawn and, in absence of applicable defenses, could recover from drawers. D.C. Code §§ 28:3-305(2), 28:4-201, 28:4-208, 28:4-209. Falls Church Bank v. Wesley Heights Realty, Inc., 256 A.2d 915, 1969 D.C. App. LEXIS 312 (App. 1969).

§ 28:4-214. Right of charge-back or refund; liability of collecting bank; return of item.

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depositary bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (section 28:4-301).

(d) The right to charge back is not affected by:

(1) Previous use of a credit given for the item; or

(2) Failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

(Dec. 30, 1963, 77 Stat. 702, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-214.

1973 Ed., § 28:4-212.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Under current bank practice, in a major portion of cases banks make provisional settlement for items when they are first received and then await subsequent determination of whether the item will be finally paid. This is the principal characteristic of what are referred to in banking parlance as "cash items." Statistically, this practice of settling provisionally first and then awaiting final payment is justified because the vast majority of such cash items are finally paid, with the result that in this great preponderance of cases it becomes unnecessary for the banks making the provisional settlements to make any further entries. In due course the provisional settlements become final simply with the lapse of time. However, in those cases in which the item being collected is not finally paid or if for various reasons the bank making the provisional settlement does not itself receive final payment, provision is made in subsection (a) for the reversal of the provisional settlements, charge-back of provisional credits and the right to obtain refund.

2. Various causes of a bank's not receiving final payment, with the resulting right of charge-back or refund, are stated or suggested in subsection (a). These include dishonor of the original item; dishonor of a remittance instrument given for it; reversal of a provisional credit for the item; suspension of payments by another bank. The causes stated are illustrative; the right of charge-back or refund is stated to exist whether the failure to receive final payment in ordinary course arises through one of them "or otherwise."

3. The right of charge-back or refund exists if a collecting bank has made a provisional settlement for an item with its customer but terminates if and when a settlement received by the bank for the item is or becomes final. If the bank fails to receive such a final settlement the right of charge-back or refund must be exercised promptly after the bank learns the facts. The right exists (if so promptly exercised) whether or not the bank is able to return the item. The second sentence of subsection (a) adopts the view of Appliance Buyers Credit Corp. v. Prospect National Bank, 708 F.2d 290 (7th Cir.1983), that if the midnight deadline for returning an item or giving notice is not met, a collecting bank loses its rights only to the extent of damages for any loss resulting from the delay.

4. Subsection (b) states when an item is returned by a collecting bank. Regulation CC, Section 229.31 preempts this subsection with respect to checks by allowing direct return to the depositary bank. Because a returned check may follow a different path than in forward collection, settlement given for the check is final and not provisional except as between the depositary bank and its customer. Regulation CC Section 229.36(d). See also Regulations CC Sections 229.31(c) and 229.32(b). Thus owing to the federal preemption, this subsection applies only to noncheck items.

5. The rule of subsection (d) relating to charge-back (as distinguished from claim for refund) applies irrespective of the cause of the nonpayment, and of the person ultimately liable for nonpayment. Thus charge-back is permitted even if nonpayment results from the depositary bank's own negligence. Any other rule would result in litigation based upon a

claim for wrongful dishonor of other checks of the customer, with potential damages far in excess of the amount of the item. Any other rule would require a bank to determine difficult questions of fact. The customer's protection is found in the general obligation of good faith (Sections 1-203 and 4-103). If bad faith is established the customer's recovery "includes other damages, if any, suffered by the party as a proximate consequence" (Section 4-103(e); see also Section 4-402).

6. It is clear that the charge-back does not relieve the bank from any liability for failure to exercise ordinary care in handling the item. The measure of damages for such failure is stated in Section 4-103(e).

7. Subsection (f) states a rule fixing the time for determining the rate of exchange if there is a charge-back or refund of a credit given in dollars for an item payable in a foreign currency. Compare Section 3-107. Fixing such a rule is desirable to avoid disputes. If in any case the parties wish to fix a different time for determining the rate of exchange, they may do so by agreement.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) is amended by the addition of the second sentence which adopts the view of Appliance Buyers Credit Corp. v. Prospect National Bank, 708 F.2d 290 (7th Cir.1983), that if the midnight deadline for returning an item or giving notice is not met, a collecting bank loses its rights only to the extent of damages for any loss resulting from the delay. The cross references to former Sections 4-211 and 4-213 are deleted. The reason for the deletion is to remove any implication that final settlement is determined by only these provisions. See Reasons for 1990 Change for Section 4-201.

Former subsection (2) is replaced by subsection (b). Former subsection (2) broadly allowed for direct return of all types of unpaid items. The purpose of the amendment is to limit the right of direct return with respect to noncheck items. This purpose is accomplished by subsection (b) when read against the background of Regulation CC Section 229.31 which allows for the direct return of checks but does not apply to noncheck items. Since Regulation CC preempts subsection (b) with respect to checks, the result is that the limitation on direct return found in subsection (b) applies only to noncheck items.

Subsection (f) is amended to conform to the terminology ("bank-offered spot rate") used in Section 3-107.

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

In general.

Pursuant to the Uniform Commercial Code, payor bank was permitted to "charge back" to customer's account funds that had been improperly advanced on counterfeit money order that had been deposited. De Arellano v. Citibank, 135 WLR 1709 (Super. Ct. 2007).

§ 28:4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash;

(2) Settled for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement; or

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing-house rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between

the presenting and successive prior collecting banks seriatim, they become final upon final payment of the items by the payor bank.

(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) If the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time; or

(2) If the bank is both the depositary bank and the payor bank, and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.

(f) Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

(Dec. 30, 1963, 77 Stat. 703, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-418.

Prior Codifications. — 1981 Ed., § 28:4-215.

1973 Ed., § 28:4-213.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. By the definition and use of the term "settle" (Section 4-104(a)(11)) this Article recognizes that various debits or credits, remittances, settlements or payments given for an item may be either provisional or final, that settlements sometimes are provisional and sometimes are final and sometimes are provisional for awhile but later become final. Subsection (a) defines when settlement for an item constitutes final payment.

Final payment of an item is important for a number of reasons. It is one of several factors determining the relative priorities between items and notices, stop-payment orders, legal process and setoffs (Section 4-303). It is the "end of the line" in the collection process and the "turn around" point commencing the return flow of proceeds. It is the point at which many provisional settlements become final. See Section 4-215(c). Final payment of an item by the payor bank fixes preferential rights under Section 4-216.

2. If an item being collected moves through several states, e.g., is deposited for collection in California, moves through two or three California banks to the Federal Reserve Bank of San Francisco, to the Federal Reserve Bank of Boston, to a payor bank in Maine, the collection process involves the eastward journey of the item from California to Maine and the westward journey of the proceeds from Maine to California. Subsection (a) recognizes that final payment does not take place, in this hypothetical case, on the journey of the item eastward. It also adopts the view that neither does final payment occur on the journey westward because what in fact is journeying westward are proceeds of the item.

3. Traditionally and under various decisions payment in cash of an item by a payor bank has been considered final payment. Subsection (a)(1) recognizes and provides that payment of an item in cash by a payor bank is final payment.

4. Section 4-104(a)(11) defines "settle" as meaning "to pay in cash, by clearing-house

settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final." Subsection (a)(2) of Section 4-215 provides that an item is finally paid by a payor bank when the bank has "settled for the item without having a right to revoke the settlement under statute, clearing-house rule or agreement." Former subsection (1)(b) is modified by subsection (a)(2) to make clear that a payor bank cannot make settlement provisional by unilaterally reserving a right to revoke the settlement. The right must come from a statute (e.g., Section 4-301), clearing-house rule or other agreement. Subsection (a)(2) provides in effect that if the payor bank finally settles for an item this constitutes final payment of the item. The subsection operates if nothing has occurred and no situation exists making the settlement provisional. If under statute, clearing-house rule or agreement, a right of revocation of the settlement exists, the settlement is provisional. Conversely, if there is an absence of a right to revoke under statute, clearing-house rule or agreement, the settlement is final and such final settlement constitutes final payment of the item.

A primary example of a statutory right on the part of the payor bank to revoke a settlement is the right to revoke conferred by Section 4-301. The underlying theory and reason for deferred posting statutes (Section 4-301) is to require a settlement on the date of receipt of an item but to keep that settlement provisional with the right to revoke prior to the midnight deadline. In any case in which Section 4-301 is applicable, any settlement by the payor bank is provisional solely by virtue of the statute, subsection (a)(2) of Section 4-215 does not operate, and such provisional settlement does not constitute final payment of the item.

With respect to checks, Regulation CC Section 229.36(d) provides that settlement between banks for the forward collection of checks is final. The relationship of this provision to Article 4 is discussed in the Commentary to that section.

A second important example of a right to revoke a settlement is that arising under clearing-house rules. It is very common for clearing-house rules to provide that items exchanged and settled for in a clearing (e.g., before 10:00 a.m. on Monday) may be returned and the settlements revoked up to but not later than 2:00 p.m. on the same day (Monday) or under deferred posting at some hour on the next business day (e.g., 2:00 p.m. Tuesday). Under this type of rule the Monday morning settlement is provisional and being provisional does not constitute a final payment of the item.

An example of an agreement allowing the payor bank to revoke a settlement is a case in which the payor bank is also the depositary bank and has signed a receipt or duplicate deposit ticket or has made an entry in a passbook acknowledging receipt, for credit to the account of A, of a check drawn on it by B. If the receipt, deposit ticket, passbook or other agreement with A is to the effect that any credit so entered is provisional and may be revoked pending the time required by the payor bank to process the item to determine if it is in good form and there are funds to cover it, the agreement keeps the receipt or credit provisional and avoids its being either final settlement or final payment.

The most important application of subsection (a)(2) is that in which presentment of an item has been made over the counter for immediate payment. In this case Section 4-301(a) does not apply to make the settlement provisional, and final payment has occurred unless a rule or agreement provides otherwise.

5. Former Section 4-213(1)(c) provided that final payment occurred when the payor bank completed the "process of posting." The term was defined in former Section 4-109. In the present Article, Section 4-109 has been deleted and the process-of-posting test has been abandoned in Section 4-215(a) for determining when final payment is made. Difficulties in determining when the events described in former Section 4-109 take place make the process-of-posting test unsuitable for a system of automated check collection or electronic presentment.

6. The last sentence of former Section 4-213(1) is deleted as an unnecessary source of confusion. Initially the view that payor bank may be accountable for, that is, liable for the amount of, an item that it has already paid seems incongruous. This is particularly true in the light of the language formerly found in Section 4-302 stating that the payor bank can defend against liability for accountability by showing that it has already settled for the item. But, at least with respect to former Section 4-213(1)(c), such a provision was needed because under the process-of-posting test a payor bank may have paid an item without settling for it. Now that Article 4 has abandoned the process-of-posting test, the sentence is no longer needed. If the payor bank has neither paid the item nor returned it within its midnight deadline, the payor bank is accountable under Section 4-302.

7. Subsection (a)(3) covers the situation in which the payor bank makes a provisional settlement for an item, and this settlement becomes final at a later time by reason of the failure of the payor bank to revoke it in the time and manner permitted by statute, clearing-house rule or agreement. An example of this type of situation is the clearing-house settlement referred to in Comment 4. In the illustration there given if the time limit for the return of items received in the Monday morning clearing is 2:00 p.m. on Tuesday and the provisional

settlement has not been revoked at that time in a manner permitted by the clearing-house rules, the provisional settlement made on Monday morning becomes final at 2:00 p.m. on Tuesday. Subsection (a)(3) provides specifically that in this situation the item is finally paid at 2:00 p.m. Tuesday. If on the other hand a payor bank receives an item in the mail on Monday and makes some provisional settlement for the item on Monday, it has until midnight on Tuesday to return the item or give notice and revoke any settlement under Section 4-301. In this situation subsection (a)(3) of Section 4-215 provides that if the provisional settlement made on Monday is not revoked before midnight on Tuesday as permitted by Section 4-301, the item is finally paid at midnight on Tuesday. With respect to checks, Regulation CC Section 229.30(c) allows an extension of the midnight deadline under certain circumstances. If a bank does not expeditiously return a check liability may accrue under Regulation CC Section 229.38. For the relationship of that liability to responsibility under this Article, see Regulation CC Sections 229.30 and 229.38.

8. Subsection (b) relates final settlement to final payment under Section 4-215. For example, if a payor bank makes provisional settlement for an item by sending a cashier's or teller's check and that settlement fails to become final under Section 4-213(c), subsection (b) provides that final payment has not occurred. If the item is not paid, the drawer remains liable, and under Section 4-302(a) the payor bank is accountable unless it has returned the item before its midnight deadline. In this regard, subsection (b) is an exception to subsection (a)(3). Even if the payor bank has not returned an item by its midnight deadline there is still no final payment if provisional settlement had been made and settlement failed to become final. However, if presentment of the item was over the counter for immediate payment, final payment has occurred under Section 4-215(a)(2). Subsection (b) does not apply because the settlement was not provisional. Section 4-301(a). In this case the presenting person, often the payee of the item, has the right to demand cash or the cash equivalent of federal reserve credit. If the presenting person accepts another medium of settlement such as a cashier's or teller's check, the presenting person takes the risk that the payor bank may fail to pay a cashier's check because of insolvency or that the drawee of a teller's check may dishonor it.

9. Subsection (c) states the country-wide usage that when the item is finally paid by the payor bank under subsection (a) this final payment automatically without further action "firms up" other provisional settlements made for it. However, the subsection makes clear that this "firming up" occurs only if the settlement between the presenting and payor banks was made either through a clearing house or by debits and credits in accounts between them. It does not take place if the payor bank remits for the item by sending some form of remittance instrument. Further, the "firming up" continues only to the extent that provisional debits and credits are entered seriatim in accounts between banks which are successive to the presenting bank. The automatic "firming up" is broken at any time that any collecting bank remits for the item by sending a remittance draft, because final payment to the remittee then usually depends upon final payment of the remittance draft.

10. Subsection (d) states the general rule that if a collecting bank receives settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item. One means of accounting is to remit to its customer the amount it has received on the item. If previously it gave to its customer a provisional credit for the item in an account its receipt of final settlement for the item "firms up" this provisional credit and makes it final. When this credit given by it so becomes final, in the usual case its agency status terminates and it becomes a debtor to its customer for the amount of the item. See Section 4-201(a). If the accounting is by a remittance instrument or authorization to charge further time will usually be required to complete its accounting (Section 4-213).

11. Subsection (e) states when certain credits given by a bank to its customer become available for withdrawal as of right. Subsection (e)(1) deals with the situation in which a bank has given a credit (usually provisional) for an item to its customer and in turn has received a provisional settlement for the item from an intermediary or payor bank to which it has forwarded the item. In this situation before the provisional credit entered by the collecting bank in the account of its customer becomes available for withdrawal as of right, it is not only necessary that the provisional settlement received by the bank for the item becomes final but also that the collecting bank has a reasonable time to receive return of the item and the item has not been received within that time. How much time is "reasonable" for these purposes will of course depend on the distance the item has to travel and the number of banks through which it must pass (having in mind not only travel time by regular lines of transmission but also the successive midnight deadlines of the several banks) and other pertinent facts. Also, if the provisional settlement received is some form of a remittance instrument or authorization to charge, the "reasonable" time depends on the identity and location of the payor of the remittance instrument, the means for clearing such instrument, and other pertinent

facts. With respect to checks Regulation CC Sections 229.10-229.13 or similar applicable state law (Section 229.20) control. This is also time for the situation described in Comment 12.

12. Subsection (e)(2) deals with the situation of a bank that is both a depositary bank and a payor bank. The subsection recognizes that if A and B are both customers of a depositary-payor bank and A deposits B's check on the depositary-payor in A's account on Monday, time must be allowed to permit the check under the deferred posting rules of Section 4-301 to reach the bookkeeper for B's account at some time on Tuesday, and, if there are insufficient funds in B's account, to reverse or charge back the provisional credit in A's account. Consequently this provisional credit in A's account does not become available for withdrawal as of right until the opening of business on Wednesday. If it is determined on Tuesday that there are insufficient funds in B's account to pay the check, the credit to A's account can be reversed on Tuesday. On the other hand if the item is in fact paid on Tuesday, the rule of subsection (e)(2) is desirable to avoid uncertainty and possible disputes between the bank and its customer as to exactly what hour within the day the credit is available.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a)(2) is amended to provide that a payor bank cannot make settlement provisional by unilaterally reserving a right to revoke the settlement. The right to revoke must come from a statute (e.g., Section 4-301), clearing-house rule or other agreement.

Former subsection (1)(c) is deleted for the reason stated in the Reason for 1990 Change for former Section 4-109. Subsection (a)(3) is amended to remove the final sentence as an unnecessary source of confusion. Initially the view that payor bank may be accountable for, that is, liable for the amount of, an item that it has already paid seems incongruous. This is particularly true in the light of the language formerly found in former Section 4-302 stating that the payor bank can defend against liability for accountability by showing that it has already settled for the item. But, at least with respect to former Section 4-213(1)(c), such a provision was needed because under the process-of-posting test a payor bank may have paid an item without settling for it. Now that Article 4 has abandoned the process-of-posting test, the sentence is no longer needed. If the payor bank has neither paid the item not returned it within its midnight deadline, the payor bank is accountable under Section 4-302.

Subsection (b) was added to clarify the relationship of final settlement to final payment under Section 4-215. For example, if a payor bank makes provisional settlement for an item by sending a cashier's or teller's check and that settlement fails to become final under Section 4-213(c), subsection (b) provides that final payment has not occurred. Under Section 4-302(a) the payor bank is accountable unless it has returned the item before its midnight deadline. In this regard, subsection (b) is an exception to subsection (a)(3). Even if the payor bank has not returned an item by its midnight deadline there is still no final payment if provisional settlement had been made and settlement failed to become final. However, if presentment of the item was over the counter for immediate payment, final payment has occurred under Section 4-215(a)(2). Subsection (b) does not apply because the settlement was not provisional. Section 4-301(a). In this case the presenting person, often the payee of the item, has the right to demand cash or the cash equivalent of federal reserve credit. If the presenting person accepts another medium of settlement such as a cashier's or teller's check, the presenting person takes the risk that the payor bank may fail to pay a cashier's check because of insolvency or that the drawee of a teller's check may dishonor it.

Subsection (d) is amended to delete the cross references to former Sections 4-211 and 4-213. The reason for the deletion is to remove any implication that final settlement is determined by only those provisions. See Reasons for 1990 Change for Section 4-201.

The preamble to subsection (e), as well as subsection (f), is amended to recognize that Regulation CC Sections 229.10-229.13 and the laws of several states (Regulation CC Section 229.20) prescribe times for availability of a depositor's funds. Subsections (e) and (f) are expressly made subject to these funds availability laws. Paragraph (1) of subsection (e) is amended to delete the test that a customer may withdraw funds after the bank has had a reasonable time to "learn that the settlement is final." The depositary bank may never affirmatively learn that a settlement is final. The substituted test is that the bank may delay making funds available to a customer until it has had a reasonable time to receive return of the item and the item has not been returned. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-216. Insolvency and preference.

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must

be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(c) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank.

(Dec. 30, 1963, 77 Stat. 703, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-216.

1973 Ed., § 28:4-214.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The underlying purpose of the provisions of this section is not to confer upon banks, holders of items or anyone else preferential positions in the event of bank failures over general depositors or any other creditors of the failed banks. The purpose is to fix as definitely as possible the cut-off point of time for the completion or cessation of the collection process in the case of items that happen to be in the process at the time a particular bank suspends payments. It must be remembered that in bank collections as a whole and in the handling of items by an individual bank, items go through a whole series of processes. It must also be remembered that at any particular point of time a particular bank (at least one of any size) is functioning as a depositary bank for some items, as an intermediary bank for others, as a presenting bank for still others and as a payor bank for still others, and that when it suspends payments it will have close to its normal load of items working through its various processes. For the convenience of receivers, owners of items, banks, and in fact substantially everyone concerned, it is recognized that at the particular moment of time that a bank suspends payment, a certain portion of the items being handled by it have progressed far enough in the bank collection process that it is preferable to permit them to continue the remaining distance, rather than to send them back and reverse the many entries that have been made or the steps that have been taken with respect to them. Therefore, having this background and these purposes in mind, the section states what items must be turned backward at the moment suspension intervenes and what items have progressed far enough that the collection process with respect to them continues, with the resulting necessary statement of rights of various parties flowing from this prescription of the cut-off time.

2. The rules stated are similar to those stated in the American Bankers Association Bank Collection Code, but with the abandonment of any theory of trust. On the other hand, some law previous to this Act may be relevant. See Note, Uniform Commercial Code: Stopping Payment of an Item Deposited with an Insolvent Depositary Bank, 40 Okla.L.Rev. 689 (1987). Although for practical purposes Federal Deposit Insurance affects materially the result of bank failures on holders of items and banks, no attempt is made to vary the rules of the section by reason of such insurance.

3. It is recognized that in view of Jennings v. United States Fidelity & Guaranty Co., 294 U.S. 216, 55 S.Ct. 394, 79 L.Ed. 869, 99 A.L.R.

1248 (1935), amendment of the National Bank Act would be necessary to have this section apply to national banks. But there is no reason why it should not apply to others. See Section 1-108.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (c) is amended to delete the cross references to former Sections 4-211 and 4-213. The reason for the deletion is to remove any implication that final settlement is determined by only those provisions. See Reasons for 1990 Change for Section 4-201. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

Part 3. Collection of Items: Payor Banks.

§ 28:4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it

(1) Returns the item; or

(2) Returns an image of the item, if the party to which the return is made has entered into an agreement to accept an image as a return of the item and the image is returned in accordance with that agreement; or

(3) Sends a record providing notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a) of this section.

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when, for purposes of dishonor, it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) As to an item presented through a clearing house, when it is delivered to the presenting or last collecting bank or to the clearing house or is sent or delivered in accordance with clearing-house rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

(Dec. 30, 1963, 77 Stat. 704, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(h), 60 DCR 2634.)

Section references. — This section is referenced in § 28:3-502 and § 28:4-214.

Prior Codifications. — 1981 Ed., § 28:4-301.

1973 Ed., § 28:4-301.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 rewrote (a)(2); and added (a)(3).

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. The term "deferred posting" appears in the caption of Section 4-301. This refers to the practice permitted by statute in most of the states before the UCC under which a payor bank receives items on one day but does not post the items to the customer's account until the next day. Items dishonored were then returned after the posting on the day after receipt. Under Section 4-301 the concept of "deferred posting" merely allows a payor bank that has settled for an item on the day of receipt to return a dishonored item on the next day before its midnight deadline, without regard to when the item was actually posted. With respect to checks Regulation CC Section 229.30(c) extends the midnight deadline under the UCC under certain circumstances. See the Commentary to Regulation CC Section 229.38(d) on the relationship between the UCC and Regulation CC on settlement.

2. The function of this section is to provide the circumstances under which a payor bank that has made timely settlement for an item may return the item and revoke the settlement so that it may recover any settlement made. These circumstances are: (1) the item must be a demand item other than a documentary draft; (2) the item must be presented otherwise than for immediate payment over the counter; and (3) the payor bank must return the item (or give notice if the item is unavailable for return) before its midnight deadline and before it has paid the item. With respect to checks, see Regulation CC Section 229.31(f) on notice in lieu of return and Regulation CC Section 229.33 as to the different requirement of notice of nonpayment. An instance of when an item may be unavailable for return arises under a collecting bank check retention plan under which presentment is made by a presentment notice and the item is retained by the collecting bank. Section 4-215(a)(2) provides that final payment occurs if the payor bank has settled for an item without a right to revoke the settlement under statute, clearing-house rule or agreement. In any case in which Section 4-301(a) is applicable, the payor bank has a right to revoke the settlement by statute; therefore, Section 4-215(a)(2) is inoperable, and the settlement is provisional. Hence, if the settlement is not over the counter and the payor bank settles in a manner that does not constitute final payment, the payor bank can revoke the settlement by returning the item before its midnight deadline.

3. The relationship of Section 4-301(a) to final settlement and final payment under Section 4-215 is illustrated by the following case. Depositary Bank sends by mail an item to Payor Bank with instructions to settle by remitting a teller's check drawn on a bank in the city where Depositary Bank is located. Payor Bank sends the teller's check on the day the item was presented. Having made timely settlement, under the deferred posting provisions of Section 4-301(a), Payor Bank may revoke that settlement by returning the item before its midnight deadline. If it fails to return the item before its midnight deadline, it has finally paid the item if the bank on which the teller's check was drawn honors the check. But if the teller's check is dishonored there has been no final settlement under Section 4-213(c) and no final payment under Section 4-215(b). Since the Payor Bank has neither paid the item nor made timely return, it is accountable for the item under Section 4-302(a).

4. The time limits for action imposed by subsection (a) are adopted by subsection (b) for cases in which the payor bank is also the depositary bank, but in this case the requirement of a settlement on the day of receipt is omitted.

5. Subsection (c) fixes a base point from which to measure the time within which notice of dishonor must be given. See Section 3-503.

6. Subsection (d) leaves banks free to agree upon the manner of returning items but establishes a precise time when an item is "returned." For definition of "sent" as used in paragraphs (1) and (2) see Section 1-201(38). Obviously the subsection assumes that the item has not been "finally paid" under Section 4-215(a). If it has been, this provision has no operation.

7. The fact that an item has been paid under proposed Section 4-215 does not preclude the payor bank from asserting rights of restitution or revocation under Section 3-418. National Savings and Trust Co. v. Park Corp., 722 F.2d 1303 (6th Cir. 1983), cert. denied, 466 U.S. 939 (1984), is the correct interpretation of the present law on this issue.

Reason for 1990 Change [D.C. Law 10-249]

The term "authorized settlement" is deleted in subsection (a) because Section 4-213 makes the term superfluous. That section prescribes the medium of settlement that a bank must accept. References to settlement throughout

Article 4 assume that settlement was made by tender of the proper medium; hence, the word "settles" in subsection (a) means an authorized settlement. Substitution of "settlement" for "payment" in subsection (a) is consistent with the usage throughout Article 4 in distinguishing the act of settlement from the issue of whether the settlement constitutes final payment. The cross reference to former Section 4-213 is deleted. The reason for the deletion is to remove any implication that final settlement is determined only by that provision. See Reason for 1990 Change for Section 4-201. The reference to protest is deleted in paragraph (2) of subsection (a) because Article 4 no longer deals with protest. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

In general.
Pursuant to the Uniform Commercial Code, payor bank was permitted to "charge back" to customer's account funds that had been improperly advanced on counterfeit money order that had been deposited. De Arellano v. Citibank, 135 WLR 1709 (Super. Ct. 2007).

§ 28:4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) Any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) of this section is subject to defenses based on breach of a presentment warranty (section 28:4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

(Dec. 30, 1963, 77 Stat. 704, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-312, § 28:3-502, and § 28:4-303.

Prior Codifications. — 1981 Ed., § 28:4-302.
1973 Ed., § 28:4-302.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a)(1) continues the former law distinguishing between cases in which the payor bank is not also the depositary bank and those in which the payor bank is also the depositary bank ("on us" items). For "on us" items the payor bank is accountable if it retains the item beyond its midnight deadline without settling for it. If the payor bank is not the depositary bank it is accountable if it retains the item beyond midnight of the banking day of receipt without settling for it. It may avoid accountability either by settling for the item on the day of receipt and returning the item before its midnight deadline under Section 4-301 or by

returning the item on the day of receipt. This rule is consistent with the deferred posting practice authorized by Section 4-301 which allows the payor bank to make provisional settlement for an item on the day of receipt and to revoke that settlement by returning the item on the next day. With respect to checks, Regulation CC Section 229.36(d) provides that settlements between banks for forward collection of checks are final when made. See the Commentary on that provision for its effect on the UCC.

2. If the settlement given by the payor bank does not become final, there has been no payment under Section 4-215(b), and the payor bank giving the failed settlement is accountable under subsection (a)(1) of Section 4-302. For instance, the payor bank makes provisional settlement by sending a teller's check that is dishonored. In such a case settlement is not final under Section 4-213(c) and no payment occurs under Section 4-215(b). Payor bank is accountable on the item. The general principle is that unless settlement provides the presenting bank with usable funds, settlement has failed and the payor bank is accountable for the amount of the item.

3. Subsection (b) is an elaboration of the deleted introductory language of former Section 4-302: "In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of Section 4-207), settlement effected or the like...." A payor bank can defend an action against it based on accountability by showing that the item contained a forged indorsement or a fraudulent alteration. Subsection (b) drops the ambiguous "or the like" language and provides that the payor bank may also raise the defense of fraud. Decisions that hold an accountable bank's liability to be "absolute" are rejected. A payor bank that makes a late return of an item should not be liable to a defrauder operating a check kiting scheme. In Bank of Leumi Trust Co. v. Bally's Park Place Inc., 528 F.Supp. 349 (S.D.N.Y. 1981), and American National Bank v. Foodbasket, 497 P.2d 546 (Wyo. 1972), banks that were accountable under Section 4-302 for missing their midnight deadline were successful in defending against parties who initiated collection knowing that the check would not be paid. The "settlement effected" language is deleted as unnecessary. If a payor bank is accountable for an item it is liable to pay it. If it has made final payment for an item, it is no longer accountable for the item.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (b) is added to clarify the deleted introductory language of former Section 4-302: "In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of Section 4-207), settlement effected or the like ...." A payor bank can defend an action against it based on accountability by showing that the item contained a forged indorsement or a fraudulent alteration. Section 4-208. Proposed subsection (b) drops the ambiguous "or the like" language and provides that the payor bank may also raise the defense of fraud. Decisions that hold an accountable bank's liability to be "absolute" are rejected. A payor bank that makes a late return of an item should not be liable to a defrauder operating a check kiting scheme. In Bank Leumi Trust Co. v. Balley's Park Place Inc., 528 F.Supp. 349 (S.D.N.Y.1981), and American National Bank v. Foodbasket, 497 P.2d 546 (Wyo.1972), banks that were accountable under Section 4-302 for missing their midnight deadline were successful in defending against parties who initiated collection knowing that the check would not be paid. The "settlement effected" language is deleted as unnecessary. If a payor bank is accountable for an item it is liable to pay it. If it has made final payment for an item, it is no longer accountable for the item. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

§ 28:4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

(1) The bank accepts or certifies the item;

(2) The bank pays the item in cash;

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearing-house rule, or agreement;

(4) The bank becomes accountable for the amount of the item under section 28:4-302 dealing with the payor bank's responsibility for late return of items; or

(5) With respect to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a) of this section, items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

(Dec. 30, 1963, 77 Stat. 705, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:4-401 and § 28:4-403.

Prior Codifications. — 1981 Ed., § 28:4-303.

1973 Ed., § 28:4-303.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. While a payor bank is processing an item presented for payment, it may receive knowledge or a legal notice affecting the item, such as knowledge or a notice that the drawer has filed a petition in bankruptcy or made an assignment for the benefit of creditors; may receive an order of the drawer stopping payment on the item; may have served on it an attachment of the account of the drawer; or the bank itself may exercise a right of setoff against the drawer's account. Each of these events affects the account of the drawer and may eliminate or freeze all or part of whatever balance is available to pay the item. Subsection (a) states the rule for determining the relative priorities between these various legal events and the item.

2. The rule is that if any one of several things has been done to the item or if it has reached any one of several stages in its processing at the time the knowledge, notice, stop-payment order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised, the knowledge, notice, stop-payment order, legal process or setoff comes too late, the item has priority and a charge to the customer's account may be made and is effective. With respect to the effect of the customer's bankruptcy, the bank's rights are governed by Bankruptcy Code Section 542(c) which codifies the result of Bank of Marin v. England, 385 U.S. 99 (1966). Section 4-405 applies to the death or incompetence of the customer.

3. Once a payor bank has accepted or certified an item or has paid the item in cash, the event has occurred that determines priorities between the item and the various legal events usually described as the "four legals." Paragraphs (1) and (2) of subsection (a) so provide. If a payor bank settles for an item presented over the counter for immediate payment by a cashier's check or teller's check which the presenting person agrees to accept, paragraph (3) of subsection (a) would control and the event determining priority has occurred. Because presentment was over the counter, Section 4-301(a) does not apply to give the payor bank the statutory right to revoke the settlement. Thus the requirements of paragraph (3) have been met unless a clearing-house rule or agreement of the parties provides otherwise.

4. In the usual case settlement for checks is by entries in bank accounts. Since the process-of-posting test has been abandoned as inappropriate for automated check collection, the determining event for priorities is a given hour on the day after the item is received. (Paragraph (5) of subsection (a).) The hour may be fixed by the bank no earlier than one hour after the opening on the next banking day after the bank received the check and no later than the close of that banking day. If an item is received after the payor bank's regular Section 4-108 cutoff hour, it is treated as received the next banking day. If a bank receives an item after its regular cutoff hour on Monday and an attachment is levied at noon on Tuesday, the attachment is prior to the item if the bank had not before that

hour taken the action described in paragraphs (1), (2), and (3) of subsection (a). The Commentary to Regulation CC Section 229.36(d) explains that even though settlement by a paying bank for a check is final for Regulation CC purposes, the paying bank's right to return the check before its midnight deadline under the UCC is not affected.

5. Another event conferring priority for an item and a charge to the customer's account based upon the item is stated by the language "become accountable for the amount of the item under Section 4-302 dealing with the payor bank's responsibility for late return of items." Expiration of the deadline under Section 4-302 with resulting accountability by the payor bank for the amount of the item, establishes priority of the item over notices, stop-payment orders, legal process or setoff.

6. In the case of knowledge, notice, stop-payment orders and legal process the effective time for determining whether they were received too late to affect the payment of an item and a charge to the customer's account by reason of such payment, is receipt plus a reasonable time for the bank to act on any of these communications. Usually a relatively short time is required to communicate to the accounting department advice of one of these events but certainly some time is necessary. Compare Sections 1-201(27) and 4-403. In the case of setoff the effective time is when the setoff is actually made.

7. As between one item and another no priority rule is stated. This is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. Further, the drawer has drawn all the checks, the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another; and the holders have no direct right against the payor bank in any event, unless of course, the bank has accepted, certified or finally paid a particular item, or has become liable for it under Section 4-302. Under subsection (b) the bank has the right to pay items for which it is itself liable ahead of those for which it is not.

Reason for 1990 Change [D.C. Law 10-249]

The preamble of subsection (a) is restated in order to improve comprehension. Paragraphs (1)-(4) of subsection (a) are restated to accommodate the addition of paragraph (5) which is stated in terms of the reaching of a cutoff hour rather than the doing of an act. Subsection (a)(3) is amended to conform to Section 4-215(a)(2) which provides that a payor bank cannot make settlement provisional by unilaterally reserving a right to revoke the settlement. The right to revoke must come from a statute (e.g. Section 4-301), a clearing-house rule or other agreement. Former subsection (1)(d) is deleted for the reason stated in the Reason for 1990 Change for former Section 4-109. The reference to former Section 4-213 is deleted from subsection (a)(4) because the reference to accountability in former Section 4-213 is deleted from what is now Section 4-215.

Subsection (a)(5) is added to allow payor banks, under time pressure to return checks to meet Regulation CC deadlines, to fix a cutoff hour earlier than the close of the next banking day after the banking day on which the checks are received. Banks must have time after receiving an attachment or effecting a setoff to return a check if the attachment or setoff renders the customer's account insufficient to pay the check. Since banks are now returning checks earlier during the next banking day after the banking day of receipt owing to Regulation CC, they need a cutoff hour earlier than the close of the banking day after that of receipt because they may be returning their checks before the close of that banking day.

Subsection (b) is amended to delete "convenient to the bank" as being superfluous. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

ANALYSIS

Issuance and payment of cashier's checks.
Priority of claims.
Setoff.

Issuance and payment of cashier's checks.

Bank could not dishonor its cashier's check because of fraud or lack of consideration, where payee on check was an innocent party, and bank received knowledge that its check had been issued due to fraud and for no consideration only after it had accepted the check through issuance. D.C. Code 1981, §§ 28:3-305, 28:4-303. Da Silva v. Sanders, 600 F. Supp. 1008, 1984 U.S. Dist. LEXIS 21880 (1984).

Priority of claims.

Where wife had obtained a temporary restraining order on October 2, 1972, barring withdrawal of any of husband's retirement funds from husband's account at first bank before defendant second bank presented checks signed by husband to first bank, wife had a prior claim to funds in account of first bank insofar as temporary restraining order was a valid attachment of those funds, even though

defendant bank cashed husband's checks on September 28, September 29, and October 2, 1972, without having notice of wife's claim to the funds. D.C. Code § 28:4-303. Trigo v. Riggs Nat'l Bank, 338 A.2d 445, 1975 D.C. App. LEXIS 381 (1975).

Setoff.

Bank's failure to exercise right of set off against account for overdrafts on another account by depositor prior to entry of default judgment in garnishment action against bank would not allow relief from default since to vacate default judgment would be to suggest that banks can attack a garnishment at any later time if they discover accounting errors or pure oversight of possible set off rights where judgment was based on bank response to interrogatory indicating it held funds in one of debtor's accounts. D.C. Code 1981, § 28:4-303. Baltimore & Associates, Inc. v. Municipal Escrow & Title Co., 625 F. Supp. 1271, 1985 U.S. Dist. LEXIS 12525 (1985).

Part 4. Relationship Between Payor Bank and Its Customers.

§ 28:4-401. When bank may charge customer's account.

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in section 28:4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in section 28:4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under section 28:4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

(Dec. 30, 1963, 77 Stat. 705, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-113.

Prior Codifications. — 1981 Ed., § 28:4-401.

1973 Ed., § 28:4-401.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. An item is properly payable from a customer's account if the customer has authorized the payment and the payment does not violate any agreement that may exist between the bank and its customer. For an example of a payment held to violate an agreement with a customer, see Torrance National Bank v. Enesco Federal Credit Union, 285 P.2d 737 (Cal.App.1955). An item drawn for more than the amount of a customer's account may be properly payable. Thus under subsection (a) a bank may charge the customer's account for an item even though payment results in an overdraft. An item containing a forged drawer's signature or forged indorsement is not properly payable. Concern has arisen whether a bank may require a customer to execute a stop-payment order when the customer notifies the bank of the loss of an unindorsed or specially indorsed check. Since such a check cannot be properly payable from the customer's account, it is inappropriate for a bank to require stop-payment order in such a case.

2. Subsection (b) adopts the view of case authority holding that if there is more than one customer who can draw on an account, the nonsigning customer is not liable for an overdraft unless that person benefits from the proceeds of the item.

3. Subsection (c) is added because the automated check collection system cannot accommodate postdated checks. A check is usually paid upon presentment without respect to the date of the check. Under the former law, if a payor bank paid a postdated check before its stated date, it could not charge the customer's account because the check was not "properly payable." Hence, the bank might have been liable for wrongfully dishonoring subsequent checks of the drawer that would have been paid had the postdated check not been prematurely paid. Under subsection (c) a customer wishing to postdate a check must notify the payor bank of its postdating in time to allow the bank to act on the customer's notice before the bank has to commit itself to pay the check. If the bank fails to act on the customer's timely notice, it may be liable for damages for the resulting loss which may include damages for dishonor of subsequent items. This Act does not regulate fees that banks charge their customers for a notice of postdating or other services covered by the Act, but under principles of law such as unconscionability or good faith and fair dealing, courts have reviewed fees and the bank's exercise of a discretion to set fees. Perdue v. Crocker National Bank, 38 Cal.3d 913 (1985) (unconscionability); Best v. United Bank of Oregon, 739 P.2d 554, 562-566 (1987) (good faith and fair dealing). In addition, Section 1-203 provides that every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

4. Section 3-407(c) states that a payor bank or drawee which pays a fraudulently altered instrument in good faith and without notice of the alteration may enforce rights with respect to the instrument according to its original terms or, in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed. Section 4-401(d) follows the rule stated in Section 3-407(c) by applying it to an altered item and allows the bank to enforce rights with respect to the altered item by charging the customer's account.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) is amended by the addition of the second sentence which provides a more general definition of "properly payable" than the narrow definition that was contained in former Section 4-104(1)(i). An item is properly payable from a customer's account if the customer has authorized the payment and the payment does not violate the customer-bank agreement concerning the account. An item drawn for more than the balance of the customer's account may be properly payable.

Subsection (b) is added to adopt the view of case authority holding that if there is more than one customer who can draw on an account, the nonsigning customer is not liable for an overdraft unless that person benefits from the proceeds of the item.

Subsection (c) is added because the automated check collection system cannot accommodate postdated checks. A check is usually paid upon presentment without respect to the date of the check. Under the former law, if a payor bank paid a postdated check before its stated date, it could not charge the customer's account because the check was not "properly payable." Hence,. the bank might have been liable for wrongfully dishonoring subsequent checks of the drawer that would have been paid had the postdated check not been prematurely paid. Under subsection (c) a customer wishing to postdate a check must notify the payor bank of its postdating in time to allow the bank to act on the customer's notice before the bank has to commit itself to pay the check. If the bank fails to act on the customer's timely notice, it may be liable for damages for the resulting loss which may include damages for dishonor of subsequent items.

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

ANALYSIS

Counterfeit money.
Overdrafts.

Counterfeit money.
Pursuant to the Uniform Commercial Code, payor bank was permitted to "charge back" to customer's account funds that had been improperly advanced on counterfeit money order that had been deposited. De Arellano v. Citibank, 135 WLR 1709 (Super. Ct. 2007).

Overdrafts.
Bank's payment of customer's overdrafts gave rise to duty on customer's part to repay that amount; moreover, course of conduct between parties suggested that an implicit overdraft/loan arrangement had been reached. D.C. Code 1981, § 28:4-401(1). Sayan v. Riggs Nat'l Bank, 544 A.2d 267, 1988 D.C. App. LEXIS 111 (1988).

§ 28:4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.

(a) Except as otherwise provided in this article, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

(Dec. 30, 1963, 77 Stat. 705, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:4-401 and § 28:4-403.

Prior Codifications. — 1981 Ed., § 28:4-402.

1973 Ed., § 28:4-402.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states positively what has been assumed under the original Article: that if a bank fails to honor a properly payable item it may be liable to its customer for wrongful

dishonor. Under subsection (b) the payor bank's wrongful dishonor of an item gives rise to a statutory cause of action. Damages may include consequential damages. Confusion has resulted from the attempts of courts to reconcile the first and second sentences of former Section 4-402. The second sentence implied that the bank was liable for some form of damages other than those proximately caused by the dishonor if the dishonor was other than by mistake. But nothing in the section described what these noncompensatory damages might be. Some courts have held that in distinguishing between mistaken dishonors and nonmistaken dishonors, the so-called "trader" rule has been retained that allowed a "merchant or trader" to recover substantial damages for wrongful dishonor without proof of damages actually suffered. Comment 3 to former Section 4-402 indicated that this was not the intent of the drafters. White & Summers, Uniform Commercial Code, Section 18-4 (1988), states: "The negative implication is that when wrongful dishonors occur not 'through mistake' but willfully, the court may impose damages greater than 'actual damages'..... Certainly the reference to 'mistake' in the second sentence of 4-402 invites a court to adopt the relevant pre-Code distinction." Subsection (b) by deleting the reference to mistake in the second sentence precludes any inference that Section 4-402 retains the "trader" rule. Whether a bank is liable for noncompensatory damages, such as punitive damages, must be decided by Section 1-103 and Section 1-106 ("by other rule of law").

2. Wrongful dishonor is different from "failure to exercise ordinary care in handling an item," and the measure of damages is that stated in this section, not that stated in Section 4-103(e). By the same token, if a dishonor comes within this section, the measure of damages of this section applies and not another measure of damages. If the wrongful refusal of the beneficiary's bank to make funds available from a funds transfer causes the beneficiary's check to be dishonored, no specific guidance is given as to whether recovery is under this section or Article 4A. In each case this issue must be viewed in its factual context, and it was thought unwise to seek to establish certainty at the cost of fairness.

3. The second and third sentences of the subsection (b) reject decisions holding that as a matter of law the dishonor of a check is not the "proximate cause" of the arrest and prosecution of the customer and leave to determination in each case as a question of fact whether the dishonor is or may be the "proximate cause."

4. Banks commonly determine whether there are sufficient funds in an account to pay an item after the close of banking hours on the day of presentment when they post debit and credit items to the account. The determination is made on the basis of credits available for withdrawal as of right or made available for withdrawal by the bank as an accommodation to its customer. When it is determined that payment of the item would overdraw the account, the item may be returned at any time before the bank's midnight deadline the following day. Before the item is returned new credits that are withdrawable as of right may have been added to the account. Subsection (c) eliminates uncertainty under Article 4 as to whether the failure to make a second determination before the item is returned on the day following presentment is a wrongful dishonor if new credits were added to the account on that day that would have covered the amount of the check.

5. Section 4-402 has been construed to preclude an action for wrongful dishonor by a plaintiff other than the bank's customer. Loucks v. Albuquerque National Bank, 418 P.2d 191 (N.Mex. 1966). Some courts have allowed a plaintiff other than the customer to sue when the customer is a business entity that is one and the same with the individual or individuals operating it. Murdaugh Volkswagen, Inc. v. First National Bank, 801 F.2d 719 (4th Cir. 1986) and Karsh v. American City Bank, 113 Cal.App.3d 419, 169 Cal.Rptr. 851 (1980). However, where the wrongful dishonor impugns the reputation of an operator of the business, the issue is not merely, as the court in Koger v. East First National Bank, 443 So.2d 141 (Fla.App. 1983), put it, one of a literal versus a liberal interpretation of Section 4-402. Rather the issue is whether the statutory cause of action in Section 4-402 displaces, in accordance with Section 1-103, any cause of action that existed at common law in a person who is not the customer whose reputation was damaged. See Marcum v. Security Trust and Savings Co., 221 Ala. 419, 129 So. 74 (1930). While Section 4-402 should not be interpreted to displace the latter cause of action, the section itself gives no cause of action to other than a "customer," however that definition is construed, and thus confers no cause of action on the holder of a dishonored item. First American National Bank v. Commerce Union Bank, 692 S.W.2d 642 (Tenn.App. 1985).

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) is added for the purpose of stating positively what has been assumed under the original Article: that if a bank fails to honor a properly payable item it may be liable to its customer for wrongful dishonor. Subsection (b) is amended for clarification. Under this subsection the payor bank's wrongful dishonor of an item gives rise to a statutory cause of action. Damages may include consequential damages. Confusion has resulted from the attempts of courts to reconcile the first and second sentences of former Section 4-402. The second sentence implied that the bank was

liable for some form of damages other than those proximately caused by the dishonor if the dishonor was other than by mistake. But nothing in the section described what these noncompensatory damages might be. Some courts have held that in distinguishing between mistaken dishonors and nonmistaken dishonors, the so-called "trader" rule has been retained that allowed a "merchant or trader" to recover substantial damages for wrongful dishonor without proof of damages actually suffered. Comment 3 to former Section 4-402 indicated that this was not the intent of the drafters. White & Summers, Uniform Commercial Code, Section 18-4 (1988), states: "The negative implication is that when wrongful dishonors occur not 'through mistake' but willfully, the court may impose damages greater than 'actual damages' .... Certainly the reference to 'mistake' in the second sentence of 4-402 invites a court to adopt the relevant pre-Code distinction." Subsection (b) by deleting the reference to mistake in the second sentence precludes any inference that Section 4-402 retains the "trader" rule. Whether a bank is liable for noncompensatory damages, such as punitive damages, must be decided by Section 1-103 and Section 1-106 ("by other rule of law").

Subsection (c) is added for clarification. Banks commonly determine whether there are sufficient funds in an account to pay an item after the close of banking hours on the day of presentment when they post debit and credit items to the account. The determination is made on the basis of credits available for withdrawal as of right or made available for withdrawal by the bank as an accommodation to its customer. When it is determined that payment of the item would overdraw the account, the item may be returned at any time before the bank's midnight deadline the following day. Before the item is returned new credits that are withdrawable as of right may have been added to the account. Subsection (c) eliminates uncertainty under Article 4 as to whether the failure to make a second determination before the item is returned on the day following presentment is a wrongful dishonor if new credits were added to the account on that day that would have covered the amount of the check.

§ 28:4-403. Customer's right to stop payment; burden of proof of loss.

(a) A customer, or any person authorized to draw on the account if there is more than one person, may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in section 28:4-303. If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for 6 months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in a record within that period. A stop-payment order may be renewed for additional 6-month periods by a record given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under section 28:4-402.

(Dec. 30, 1963, 77 Stat. 705, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467; Apr. 27, 2013, D.C. Law 19-299, § 6(i), 60 DCR 2634.)

Section references. — This section is referenced in § 28:3-418 and § 28:4-401.

Prior Codifications. — 1981 Ed., § 28:4-403.

1973 Ed., § 28:4-403.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299, in (b), substituted "in a record" for "in writing" in the first sentence and substituted "by a record" for "by a writing" in the second sentence.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. The position taken by this section is that stopping payment or closing an account is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop or close should be borne by the banks as a cost of the business of banking.

2. Subsection (a) follows the decisions holding that a payee or indorsee has no right to stop payment. This is consistent with the provision governing payment or satisfaction. See Section 3-602. The sole exception to this rule is found in Section 4-405 on payment after notice of death, by which any person claiming an interest in the account can stop payment.

3. Payment is commonly stopped only on checks; but the right to stop payment is not limited to checks, and extends to any item payable by any bank. If the maker of a note payable at a bank is in a position analogous to that of a drawer (Section 4-106) the maker may stop payment of the note. By analogy the rule extends to drawees other than banks.

4. A cashier's check or teller's check purchased by a customer whose account is debited in payment for the check is not a check drawn on the customer's account within the meaning of subsection (a); hence, a customer purchasing a cashier's check or teller's check has no right to stop payment of such a check under subsection (a). If a bank issuing a cashier's check or teller's check refuses to pay the check as an accommodation to its customer or for other reasons, its liability on the check is governed by Section 3-411. There is no right to stop payment after certification of a check or other acceptance of a draft, and this is true no matter who procures the certification. See Sections 3-411 and 4-303. The acceptance is the drawee's own engagement to pay, and it is not required to impair its credit by refusing payment for the convenience of the drawer.

5. Subsection (a) makes clear that if there is more than one person authorized to draw on a customer's account any one of them can stop payment of any check drawn on the account or can order the account closed. Moreover, if there is a customer, such as a corporation, that requires its checks to bear the signatures of more than one person, any of these persons may stop payment on a check. In describing the item, the customer, in the absence of a contrary agreement, must meet the standard of what information allows the bank under the technology then existing to identify the item with reasonable certainty.

6. Under subsection (b), a stop-payment order is effective after the order, whether written or oral, is received by the bank and the bank has a reasonable opportunity to act on it. If the order is written it remains in effect for six months from that time. If the order is oral it lapses after 14 days unless there is written confirmation. If there is written confirmation within the 14-day period, the six-month period dates from the giving of the oral order. A stop-payment order may be renewed any number of times by written notice given during a six-month period while a stop order is in effect. A new stop-payment order may be given after a six-month period expires, but such a notice takes effect from the date given. When a stop-payment order expires it is as though the order had never been given, and the payor bank may pay the item in good faith under Section 4-404 even though a stop-payment order had once been given.

7. A payment in violation of an effective direction to stop payment is an improper payment, even though it is made by mistake or inadvertence. Any agreement to the contrary is invalid under Section 4-103(a) if in paying the item over the stop-payment order the bank has failed to exercise ordinary care. An agreement to the contrary which is imposed upon a customer as part of a standard form contract would have to be evaluated in the light of the general obligation of good faith. Sections 1-203 and 4-104(c). The drawee is, however, entitled to subrogation to prevent unjust enrichment (Section 4-407); retains common law defenses, e.g., that by conduct in recognizing the payment the customer has ratified the bank's action in paying over a stop-payment order (Section 1-103); and retains common law rights, e.g., to recover money paid under a mistake under Section 3-418. It has sometimes been said that pay-

ment cannot be stopped against a holder in due course, but the statement is inaccurate. The payment can be stopped but the drawer remains liable on the instrument to the holder in due course (Sections 3-305, 3-414) and the drawee, if it pays, becomes subrogated to the rights of the holder in due course against the drawer. Section 4-407. The relationship between Sections 4-403 and 4-407 is discussed in the comments to Section 4-407. Any defenses available against a holder in due course remain available to the drawer, but other defenses are cut off to the same extent as if the holder were bringing the action.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a) removes any ambiguity that may have been present under former subsection (1) by making clear that if there is more than one person authorized to draw on a customer's account any one of them can stop payment of any check drawn on the account or can order the account closed. Moreover, if there is a customer, such as a corporation, that requires its checks to bear the signatures of more than one person, any of these persons may stop payment on a check. In describing the item, the customer, in the absence of a contrary agreement, must meet the standard of what information allows the bank under the technology then existing to identify the item with reasonable certainty. An order to close an account is assimilated to an order to stop payment in this section and in Section 4-407.

Subsection (b) restates and clarifies former subsection (2). Subsection (c) is amended by the addition of the last sentence to provide expressly for what was only assumed under the former section: that a customer's damages for payment contrary to a stop-payment order may include damages for wrongful dishonor of subsequent items. The word "binding" is deleted as superfluous.

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

ANALYSIS

Burden of proof.
Loss.

Burden of proof.

Drawer had the burden of establishing that he in fact suffered a loss to recover for drawee's mistaken payment of checks drawn on cash management account, upon which stop payment orders were placed, and which were issued to casinos in order to pay drawer's gambling debts. D.C. Code 1981, § 28:4-403(a, c). Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 2000 D.C. App. LEXIS 21 (2000).

Loss.

Even if checks drawn from cash management account would not be directly enforceable in District of Columbia, drawer did not suffer an actual loss that would be actionable against drawee for its mistakenly paying checks, upon which stop payment orders were placed, to casino to pay for drawer's legal gambling in New Jersey, where casino and drawee, as subrogee of casino, could bring action to recover on the checks in either Maryland, where drawer resided, or New Jersey. D.C. Code 1981, §§ 16-1701(a), 28:3-308(b), 28:4-403(a, c), 28:4-407, 28:4-414(b). Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 2000 D.C. App. LEXIS 21 (2000).

§ 28:4-404. Bank not obliged to pay check more than 6 months old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than 6 months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

(Dec. 30, 1963, 77 Stat. 706, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-404.

1973 Ed., § 28:4-404.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-

101.

UNIFORM COMMERCIAL CODE COMMENT

This section incorporates a type of statute that had been adopted in 26 jurisdictions before the Code. The time limit is set at six months because banking and commercial practice regards a check outstanding for longer than that period as stale, and a bank will normally not pay such a check without consulting the depositor. It is therefore not required to do so, but is given the option to pay because it may be in a position to know, as in the case of dividend checks, that the drawer wants payment made.

Certified checks are excluded from the section because they are the primary obligation of the certifying bank (Sections 3-409 and 3-413). The obligation runs directly to the holder of the check. The customer's account was presumably charged when the check was certified.

§ 28:4-405. Death or incompetence of customer.

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for 10 days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

(Dec. 30, 1963, 77 Stat. 706, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-405.

1973 Ed., § 28:4-405.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) follows existing decisions holding that a drawee (payor) bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. The justice and necessity of the rule are obvious. A check is an order to pay which the bank must obey under penalty of possible liability for dishonor. Further, with the tremendous volume of items handled any rule that required banks to verify the continued life and competency of drawers would be completely unworkable.

One or both of these same reasons apply to other phases of the bank collection and payment process and the rule is made wide enough to apply to these other phases. It applies to all kinds of "items"; to "customers" who own items as well as "customers" who draw or make them; to the function of collecting items as well as the function of accepting or paying them; to the carrying out of instructions to account for proceeds even though these may involve transfers to third parties; to depositary and intermediary banks as well as payor banks; and to incompetency existing at the time of the issuance of an item or the commencement of the collection or payment process as well as to incompetency occurring thereafter. Further, the requirement of actual knowledge makes inapplicable the rule of some cases that an adjudication of incompetency is constructive notice to all the world because obviously it is as impossible for banks to keep posted on such adjudications (in the absence of actual knowledge) as it is to keep posted as to death of immediate or remote customers.

2. Subsection (b) provides a limited period

after death during which a bank may continue to pay checks (as distinguished from other items) even though it has notice. The purpose of the provision, as of the existing statutes, is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that these checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank.

This section does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

3. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is "colorable." But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-406. Customer's duty to discover and report unauthorized signature or alteration.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of 7 years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a) of this section, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c) of this section, the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable

period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) of this section applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) of this section and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) of this section does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (subsection (a) of this section) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 28:4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

(Dec. 30, 1963, 77 Stat. 706, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-417 and § 28:4-208.

Prior Codifications. — 1981 Ed., § 28:4-406.

1973 Ed., § 28:4-406.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Under subsection (a), if a bank that has paid a check or other item for the account of a customer makes available to the customer a statement of account showing payment of the item, the bank must either return the item to the customer or provide a description of the item sufficient to allow the customer to identify it. Under subsection (c), the customer has a duty to exercise reasonable promptness in examining the statement or the returned item to discover any unauthorized signature of the customer or any alteration and to promptly notify the bank if the customer should reasonably have discovered the unauthorized signature or alteration.

The duty stated in subsection (c) becomes operative only if the "bank sends or makes available a statement of account or items pursuant to subsection (a)." A bank is not under a duty to send a statement of account or the paid items to the customer; but, if it does not do so, the customer does not have any duties under subsection (c).

Under subsection (a), a statement of account must provide information "sufficient to allow the customer reasonably to identify the items paid." If the bank supplies its customer with an image of the paid item, it complies with this standard. But a safe harbor rule is provided. The bank complies with the standard of providing "sufficient information" if "the item is described by item number, amount, and date of payment." This means that the customer's duties under subsection (c) are triggered if the bank sends a statement of account complying with the safe harbor rule without returning the paid items. A bank does not have to return the paid items unless it has agreed with the customer to do so. Whether there is such an agreement depends upon the particular circumstances. See Section 1-201(3). If the bank elects to provide the minimum information that is "sufficient" under subsection (a) and, as a consequence, the customer could not "reasonably have discovered the unauthorized payment," there is no preclusion under subsection (d). If the customer made a record of the issued checks on the check stub or carbonized copies furnished by the bank in the checkbook, the customer should usually be able to verify the paid items shown on the statement of account and discover any unauthorized or altered

checks. But there could be exceptional circumstances. For example, if a check is altered by changing the name of the payee, the customer could not normally detect the fraud unless the customer is given the paid check or the statement of account discloses the name of the payee of the altered check. If the customer could not "reasonably have discovered the unauthorized payment" under subsection (c) there would not be a preclusion under subsection (d).

The safe harbor provided by subsection (a) serves to permit a bank, based on the state of existing technology, to trigger the customer's duties under subsection (c) by providing a "statement of account showing payment of items" without having to return the paid items, in any case in which the bank has not agreed with the customer to return the paid items. The safe harbor does not, however, preclude a customer under subsection (d) from asserting its unauthorized signature or an alteration against a bank in those circumstances in which under subsection (c) the customer should not "reasonably have discovered the unauthorized payment." Whether the customer has failed to comply with its duties under subsection (c) is determined on a case-by-case basis.

The provision in subsection (a) that a statement of account contains "sufficient information if the item is described by item number, amount, and date of payment" is based upon the existing state of technology. This information was chosen because it can be obtained by the bank's computer from the check's MICR line without examination of the items involved. The other two items of information that the customer would normally want to know—the name of the payee and the date of the item—cannot currently be obtained from the MICR line. The safe harbor rule is important in determining the feasibility of payor or collecting bank check retention plans. A customer who keeps a record of checks written, e.g., on the check stubs or carbonized copies of the checks supplied by the bank in the checkbook, will usually have sufficient information to identify the items on the basis of item number, amount, and date of payment. But customers who do not utilize these record-keeping methods may not. The policy decision is that accommodating customers who do not keep adequate records is not as desirable as accommodating customers who keep more careful records. This policy results in less cost to the check collection system and thus to all customers of the system. It is expected that technological advances such as image processing may make it possible for banks to give customers more information in the future in a manner that is fully compatible with automation or truncation systems. At that time the Permanent Editorial Board may wish to make recommendations for an amendment revising the safe harbor requirements in the light of those advances.

2. Subsection (d) states the consequences of a failure by the customer to perform its duty under subsection (c) to report an alteration or the customer's unauthorized signature. Subsection (d)(1) applies to the unauthorized payment of the item to which the duty to report under subsection (c) applies. If the bank proves that the customer "should reasonably have discovered the unauthorized payment" (See Comment 1) and did not notify the bank, the customer is precluded from asserting against the bank the alteration or the customer's unauthorized signature if the bank proves that it suffered a loss as a result of the failure of the customer to perform its subsection (c) duty. Subsection (d)(2) applies to cases in which the customer fails to report an unauthorized signature or alteration with respect to an item in breach of the subsection (c) duty (See Comment 1) and the bank subsequently pays other items of the customer with respect to which there is an alteration or unauthorized signature of the customer and the same wrongdoer is involved. If the payment of the subsequent items occurred after the customer has had a reasonable time (not exceeding 30 days) to report with respect to the first item and before the bank received notice of the unauthorized signature or alteration of the first item, the customer is precluded from asserting the alteration or unauthorized signature with respect to the subsequent items.

If the customer is precluded in a single or multiple item unauthorized payment situation under subsection (d), but the customer proves that the bank failed to exercise ordinary care in paying the item or items and that the failure substantially contributed to the loss, subsection (e) provides a comparative negligence test for allocating loss between the customer and the bank. Subsection (e) also states that, if the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.

Subsection (d)(2) changes former subsection (2)(b) by adopting a 30-day period in place of a 14-day period. Although the 14-day period may have been sufficient when the original version of Article 4 was drafted in the 1950s, given the much greater volume of checks at the time of the revision, a longer period was viewed as more appropriate. The rule of subsection (d)(2) follows pre-Code case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank traceable to the customer's failure to exercise reasonable care (See Comment 1) in examining the statement and notifying the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the require-

ments of subsection (c) is the opportunity presented to the wrongdoer to repeat the misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine the statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items. Hence, the rule of subsection (d)(2) is prescribed, and to avoid dispute a specific time limit, 30 days, is designated for cases to which the subsection applies. These considerations are not present if there are no losses resulting from the payment of additional items. In these circumstances, a reasonable period for the customer to comply with its duties under subsection (c) would depend on the circumstances (Section 1-204(2)) and the subsection (d)(2) time limit should not be imported by analogy into subsection (c).

3. Subsection (b) applies if the items are not returned to the customer. Check retention plans may include a simple payor bank check retention plan or the kind of check retention plan that would be authorized by a truncation agreement in which a collecting bank or the payee may retain the items. Even after agreeing to a check retention plan, a customer may need to see one or more checks for litigation or other purposes. The customer's request for the check may always be made to the payor bank. Under subsection (b) retaining banks may destroy items but must maintain the capacity to furnish legible copies for seven years. A legible copy may include an image of an item. This Act does not define the length of the reasonable period of time for a bank to provide the check or copy of the check. What is reasonable depends on the capacity of the bank and the needs of the customer. This Act does not specify sanctions for failure to retain or furnish the items or legible copies; this is left to other laws regulating banks. See Comment 3 to Section 4-101. Moreover, this Act does not regulate fees that banks charge their customers for furnishing items or copies or other services covered by the Act, but under principles of law such as unconscionability or good faith and fair dealing, courts have reviewed fees and the bank's exercise of a discretion to set fees. Perdue v. Crocker National Bank, 38 Cal.3d 913 (1985) (unconscionability); Best v. United Bank of Oregon, 739 P.2d 554, 562-566 (1987) (good faith and fair dealing). In addition, Section 1-203 provides that every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

4. Subsection (e) replaces former subsection (3) and poses a modified comparative negligence test for determining liability. See the discussion on this point in the Comments to Sections 3-404, 3-405, and 3-406. The term "good faith" is defined in Section 3-103(a)(4) as including "observance of reasonable commercial standards of fair dealing." The connotation of this standard is fairness and not absence of negligence.

The term "ordinary care" used in subsection (e) is defined in Section 3-103(a)(7), made applicable to Article 4 by Section 4-104(c), to provide that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area. The case law is divided on this issue. The definition of "ordinary care" in Section 3-103 rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law. The effect of the definition of "ordinary care" on Section 4-406 is only to provide that in the small percentage of cases in which a customer's failure to examine its statement or returned items has led to loss under subsection (d) a bank should not have to share that loss solely because it has adopted an automated collection or payment procedure in order to deal with the great volume of items at a lower cost to all customers.

5. Several changes are made in former Section 4-406(5). First, former subsection (5) is deleted and its substance is made applicable only to the one-year notice preclusion in former subsection (4) (subsection (f)). Thus if a drawer has not notified the payor bank of an unauthorized check or material alteration within the one-year period, the payor bank may not choose to recredit the drawer's account and pass the loss to the collecting banks on the theory of breach of warranty. Second, the reference in former subsection (4) to unauthorized indorsements is deleted. Section 4-406 imposes no duties on the drawer to look for unauthorized indorsements. Section 4-111 sets out a statute of limitations allowing a customer a three-year period to seek a credit to an account improperly charged by payment of an item bearing an unauthorized indorsement. Third, subsection (c) is added to Section 4-208 to assure that if a depositary bank is sued for breach of a presentment warranty, it can defend by showing that the drawer is precluded by Section 3-406 or Section 4-406(c) and (d). Revisions approved by the Permanent Editorial Board for the Uniform Commercial Code, March 16, 1991.

Reason for 1990 Change [D.C. Law 10-249]

Subsection (a), (b) and (c) restate and enlarge on former subsection (1). Subsection (a) recognizes that the parties may agree that the payor, a collecting bank or other person may retain the items drawn on the customer's account. In these cases the payor bank must provide sufficient information in a statement of account to allow the customer to reasonably identify the items paid. A safe harbor rule is stated that provides that the payor bank has satisfied its obligation if the item is described by item number, amount and the date of payment. This

information is selected because it can be captured by the payor bank by automation without manual processing of the item.

Subsection (b) allows the bank retaining the item to destroy the item so long as it maintains the capacity to furnish legible copies for seven years. During this period the customer is entitled to demand from its payor bank the item or a copy of it. If the item is being retained by a collecting bank or other person, the payor bank must obtain the item or copy from that bank for its customer.

Subsection (c) continues the rule of former subsection (1) of requiring the customer to exercise reasonable promptness in examining the statement or items for an unauthorized signature of the customer or an alteration and to notify the bank promptly.

Subsection (d)(2) restates the conditions of the customer's preclusion and extends the 14-day period under former subsection (2) to a 30-day period. Although the 14-day period may have been sufficient when the original version of Article 4 was drafted, given the huge increase in the volume of checks, a longer period is viewed as more appropriate today.

Subsection (e) replaces former subsection (3) and poses a modified comparative negligence test for determining liability. See the discussion on this point in the Official Comments to Sections 3-404, 3-405 and 3-406. The term "good faith" is defined in Section 3-103(a)(4) as including "observance of reasonable commercial standards of fair dealing." The connotation of this standard is fairness and not absence of negligence. The term "ordinary care" used in subsection (e) is defined in Section 3-103(a)(7) to provide that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area. The case law is divided on this issue. The definition of "ordinary care" in Section 3-103 rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law.

Subsection (f) amends former subsection (4) to delete the reference to a three-year period to discover an unauthorized indorsement. Section 4-406 imposes no duty on a customer to discover a forged indorsement. Section 4-111 sets out a statute of limitations allowing a customer a three-year period to seek a credit to an account improperly charged by payment of an item bearing an unauthorized indorsement. The final sentence added to subsection (f) incorporates the substance of former subsection (5).

The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

ANALYSIS

Defenses.

Even if a statute of repose was a statute of limitations defense that was required to be pled in an answer to avoid waiver, bank sufficiently raised the defense in action against it by a union arising from union employees' use of union's bank account in an embezzlement scheme; bank's answer stated as an affirmative defense that union failed to reasonably take advantage of preventative and corrective opportunities to avoid harm, bank raised the statute of repose in response to interrogatory seeking factual details in support of this affirmative defense, and the parties argued the applicability of the statute in their respective motion for and opposition to summary judgment. AFT v. Bullock, 605 F.Supp.2d 251, 2009 U.S. Dist. LEXIS 45791 (2009), appeal dismissed by 2009 U.S. App. LEXIS 29360 (D.C. Cir. Nov. 27, 2009).

District of Columbia statute of repose for claims against banks, requiring bank customers to discover and report unauthorized signatures or alterations to the bank and establishing a notice requirement before customers could bring any claim against the bank, did not impose a prior pre-condition of good faith, and thus bank could assert statute of repose defense regardless of whether it acted in good faith. AFT v. Bullock, 605 F.Supp.2d 251, 2009 U.S. Dist. LEXIS 45791 (2009), appeal dismissed by 2009 U.S. App. LEXIS 29360 (D.C. Cir. Nov. 27, 2009).

Bank was not equitably estopped from raising a statute of repose defense in action by union against the bank stemming from union employees' use of union's bank account in an embezzlement scheme, as there was no evidence bank engaged in fraud or that the employees' fraudulent conduct could be imputed to bank. AFT v. Bullock, 605 F.Supp.2d 251, 2009 U.S. Dist. LEXIS 45791 (2009), appeal dismissed by 2009 U.S. App. LEXIS 29360 (D.C. Cir. Nov. 27, 2009).

Liability of bank to depositor, payee, or owner.

The law holds banks to a strict accountability, and a customer is not precluded from recovering simply because he has been lax in conduct of his business affairs. Callaway v. Hamilton

Nat. Bank of Wash., 195 F.2d 556, 1952 U.S. App. LEXIS 2985 (C.A.D.C. 1952).

In action by union against bank arising from union employees' use of union's bank account in an embezzlement scheme, District of Columbia statute of repose for claims against banks, precluding bank customers from asserting against the bank an unauthorized signature or alteration if the customer did not discover and report it within one year of receiving statement, was applicable to union's claims for aiding and abetting conversion and breach of fiduciary duty in addition to union's claim for negligence, despite union's contention that statute only dealt with the negation of a duty by bank; statute established an absolute notice requirement for customers as a prerequisite to bringing any claim against bank. AFT v. Bullock, 605 F.Supp.2d 251, 2009 U.S. Dist. LEXIS 45791 (2009), appeal dismissed by 2009 U.S. App. LEXIS 29360 (D.C. Cir. Nov. 27, 2009).

Trial court's finding that drawee bank failed to comply with commercially reasonable procedures when it failed to detect forgeries on drawer's checks was not clearly erroneous, and thus, bank was liable to drawer; forged signature was not spelled the same as authorized signature on signature card. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406, 28:4-406(3). American Sec. Bank, N.A. v. American Motorists Ins. Co., 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Drawee bank was liable for handling forged checks, even if drawer was negligent in failing to earlier examine its bank statements and to report forgeries to bank, given drawee bank's lack of ordinary care in handling forged checks. D.C. Code 1981, §§ 28:3-406, 28:4-406, 28:4-406(3). American Sec. Bank, N.A. v. American Motorists Ins. Co., 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Law holds banks to strict accountability and customer is not precluded from recovering simply because he has been lax in conduct of his business affairs. Joffe v. Riggs Nat. Bank, 179 A.2d 390, 1962 D.C. App. LEXIS 274 (Cr.App. 1962).

Where properly signed check was stolen, "Cash" was typed in as payee and check was regularly negotiated, drawee bank was not liable to depositor for payment of check. Concordia Lutheran Evangelical Church v. U.S. Cas. Co., 115 A.2d 307, 1955 D.C. App. LEXIS 186 (Cr.App. 1955).

Limitation of actions.

Purpose of Uniform Commercial Code provision allowing maximum one-year limitation, regardless of negligence of bank's customer, for customer to assert claims against bank for payment of items bearing unauthorized signatures or material alterations is to compel customer to notify bank of wrongful payment of item within reasonable time, and customer's duty to discover and notify is limited to notice that item has been improperly paid; provision does not compel customer to declare at that time his intention to avail himself of legal remedies against the bank. D.C. Code § 28:4-406(4). G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 1975 U.S. App. LEXIS 11740 (C.A.D.C. 1975).

Where bank not only authorized diversion of funds from joint venture account but also received the benefits thereof, bank would not be heard to complain that it lacked notice of such disbursement, and bank was not protected by Uniform Commercial Code section providing maximum one-year limitation, regardless of negligence of bank or customer, for customer to assert claims against bank for disbursements made upon unauthorized signature or alteration. D.C. Code § 28:4-406(4). G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 1975 U.S. App. LEXIS 11740 (C.A.D.C. 1975).

The one-year Uniform Commercial Code (U.C.C.) statute of repose for asserting an unauthorized signature or alteration claim against a bank was not tolled by bank customer's incapacitation or subsequent death. Peters v. Riggs Nat'l Bank, N.A., 942 A.2d 1163, 2008 D.C. App. LEXIS 85 (2008).

Bank could shorten the one-year Uniform Commercial Code (U.C.C.) statute of repose period for reporting unauthorized checks or withdrawals to 60-days through contract with bank customer. Peters v. Riggs Nat'l Bank, N.A., 942 A.2d 1163, 2008 D.C. App. LEXIS 85 (2008).

Negligence by depositor.

The scope of the defense under District of Columbia Uniform Commercial Code (U.C.C.) section relating to negligent contribution to alteration or unauthorized signature is coextensive with the scope of the substantive wrong of conversion of an instrument by paying it on a forged endorsement, and thus the former section provides a defense to conversion claims under the latter section, including cases where payee's endorsement is missing. D.C. Code 1981, §§ 28:3-406, 28:3-419(1)(c), (2); U.C.C. §§ 3-406, 3-419, 3-419(1)(c). Kuwait Airways Corp. v. American Sec. Bank, N.A., 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Drawer's negligence that contributes to forgery negates drawee bank's liability, but only if drawee bank meets its burden of proving by a preponderance of the evidence that it complied with reasonable commercial standards when it cashed check. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406. American Sec. Bank, N.A. v. American Motorists Ins. Co., 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Depositor was negligent as a matter of law in failing to inquire of bank as to her lack of receipt of monthly statements and cancelled checks, especially after bank informed depositor that bank's record showed she had no money in her account, and this negligence substantially contributed to the making of an unauthorized signature and depositor was precluded from asserting lack of bank's authority to pay allegedly forged checks. D.C. Code § 28:3-406. Myrick v. National Sav. & Trust Co., 268 A.2d 526, 1970 D.C. App. LEXIS 322 (App. 1970).

Mere negligence of customer in conduct of his business affairs would not preclude recovery from bank for paying proceeds of checks to his employee who forged his name thereon, but to preclude recovery it was necessary for bank to show that customer's negligence directly and proximately affected conduct of bank in cashing checks bearing forged endorsements. Joffe v. Riggs Nat. Bank, 179 A.2d 390, 1962 D.C. App. LEXIS 274 (Cr.App. 1962).

In suit for repayment of loss resulting in cashing checks of defendant bearing endorsements forged by its employee, liability could not be imposed upon defendant under the statute on the ground that it was negligence for it not to examine all endorsements on its cancelled checks for forgery or suspicious endorsements. D.C. Code 1951, § 28-124. B. F. Saul Co. v. Rich Wine & Liquor Co., 120 A.2d 208, 1956 D.C. App. LEXIS 177 (Cr.App. 1956).

Unless there are suspicious circumstances known to the drawer generally, he is under no duty to examine checks for forged endorsements on their return from the bank since he cannot be expected to know the signatures of his payees. D.C. Code 1951, § 28-124. B. F. Saul Co. v. Rich Wine & Liquor Co., 120 A.2d 208, 1956 D.C. App. LEXIS 177 (Cr.App. 1956).

Summary judgment.

Fact issues existed as to whether union local was adversely dominated by individual employees who engaged in scheme to embezzle union funds, as to whether local's officials could have discovered scheme earlier, and as to whether bank at which local maintained checking account used in scheme failed to exercise ordinary care, precluding summary judgment in union's action against bank seeking recredit of account. AFT v. Bullock, 539 F.Supp.2d 161, 2008 U.S. Dist. LEXIS 20019 (2008), vacated by 605 F. Supp. 2d 251, 2009 U.S. Dist. LEXIS 45791, 68 U.C.C. Rep. Serv. 2d (CBC) 424 (D.D.C. 2009).

Unauthorized signature.

Where drawing on joint venture account with bank required signature of one of two contractors and signature of one of two other joint venturers, and bank paid upon the signatures of the contractors alone, neither signature was an "unauthorized signature" within Uniform Commercial Code section providing that customer's negligence in examining bank statement and notifying bank may preclude him from recovering from bank for payment of items bearing unauthorized signatures or material alterations. D.C. Code §§ 28:4-104(1)(e, g), 28:4-406, 28:4-406(1, 4), 41-311. G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 1975 U.S. App. LEXIS 11740 (C.A.D.C. 1975).

In action by union against bank arising from union employees' use of the union's bank account in an embezzlement scheme, District of Columbia statute of repose for claims against banks, precluding bank customers from asserting against the bank an unauthorized signature or alteration if the customer did not discover and report it within one year of receiving statement, was applicable to union's claims relating to "red flag" checks signed by employees, even though employees were authorized to sign checks for the union's official business; employees were not authorized to sign checks for their own use and as part of the embezzlement scheme. AFT v. Bullock, 605 F.Supp.2d 251, 2009 U.S. Dist. LEXIS 45791 (2009), appeal dismissed by 2009 U.S. App. LEXIS 29360 (D.C. Cir. Nov. 27, 2009).

§ 28:4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

(1) Of any holder in due course on the item against the drawer or maker;

(2) Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(3) Of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

(Dec. 30, 1963, 77 Stat. 707, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Section references. — This section is referenced in § 28:3-418.

Prior Codifications. — 1981 Ed., § 28:4-407.

1973 Ed., § 28:4-407.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 4-403 states that a stop-payment order or an order to close an account is binding on a bank. If a bank pays an item over such an order it is prima facie liable, but under subsection (c) of Section 4-403 the burden of establishing the fact and amount of loss from such payment is on the customer. A defense frequently interposed by a bank in an action against it for wrongful payment over a stop-payment order is that the drawer or maker suffered no loss because it would have been liable to a holder in due course in any event. On this argument some cases have held that payment cannot be stopped against a holder in due course. Payment can be stopped, but if it is, the drawer or maker is liable and the sound rule is that the bank is subrogated to the rights of the holder in due course. The preamble and paragraph (1) of this section state this rule.

2. Paragraph (2) also subrogates the bank to the rights of the payee or other holder against the drawer or maker either on the item or under the transaction out of which it arose. It may well be that the payee is not a holder in due course but still has good rights against the drawer. These may be on the check but also may not be as, for example, where the drawer buys goods from the payee and the goods are partially defective so that the payee is not entitled to the full price, but the goods are still worth a portion of the contract price. If the drawer retains the goods it is obligated to pay a part of the agreed price. If the bank has paid the check it should be subrogated to this claim of the payee against the drawer.

3. Paragraph (3) subrogates the bank to the rights of the drawer or maker against the payee or other holder with respect to the transaction out of which the item arose. If, for example, the payee was a fraudulent salesman inducing the drawer to issue a check for defective securities, and the bank pays the check over a stop-payment order but reimburses the drawer for such payment, the bank should have a basis for getting the money back from the fraudulent salesman.

4. The limitations of the preamble prevent the bank itself from getting any double recovery or benefits out of its subrogation rights conferred by the section.

5. The spelling out of the affirmative rights of the bank in this section does not destroy other existing rights (Section 1-103).

Among others these may include the defense of a payor bank that by conduct in recognizing the payment a customer has ratified the bank's action in paying in disregard of a stop-payment order or right to recover money paid under a mistake.

Reason for 1990 Change [D,C. Law 10-249]

An order to close an account is assimilated to an order to stop payment in this section and in Section 4-403. The other modifications are made to conform with current legislative drafting practices, with no intent to change substance.

CASE NOTES

In general.

In assessing whether drawer suffered a loss as a result of drawee's mistaken payment of checks drawn on cash management account, upon which stop orders were placed, and which were issued to casinos to pay drawer's gambling debts, drawee had to be treated as the subrogee of any rights of the casino payees against drawer. D.C. Code 1981, §§ 28:4-407, 28:4-414(b). Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 2000 D.C. App. LEXIS 21 (2000).

Even if checks drawn from cash management account would not be directly enforceable in District of Columbia, drawer did not suffer an actual loss that would be actionable against drawee for its mistakenly paying checks, upon which stop payment orders were placed, to casino to pay for drawer's legal gambling in New Jersey, where casino and drawee, as sub-

rogee of casino, could bring action to recover on the checks in either Maryland, where drawer resided, or New Jersey. D.C. Code 1981, §§ 16-1701(a), 28:3-308(b), 28:4-403(a, c), 28:4-407, 28:4-414(b). Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301, 2000 D.C. App. LEXIS 21 (2000).

Part 5. Collection of Documentary Drafts.

§ 28:4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

(Dec. 30, 1963, 77 Stat. 707, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-501.

1973 Ed., § 28:4-501.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

This section states the duty of a bank handling a documentary draft for a customer. "Documentary draft" is defined in Section 4-104. The duty stated exists even if the bank has bought the draft. This is because to the customer the draft normally represents an underlying commercial transaction, and if that is not going through as planned the customer should know it promptly.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-502. Presentment of "on arrival" drafts.

If a draft or the relevant instructions require presentment "on arrival", "when goods arrive", or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or it learns of the arrival of the goods.

(Dec. 30, 1963, 77 Stat. 707, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-502.

1973 Ed., § 28:4-502.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

The section is designed to establish a definite rule for "on arrival" drafts. The term includesnot only drafts drawn payable "on arrival" but also drafts forwarded with instructions to present "on arrival." The term refers to the arrival of the relevant goods. Unless a bank has actual knowledge of the arrival of the goods, as for example, when it is the "notify" party on the bill of lading, the section only requires the exercise of such judgment in estimating time as a bank may be expected to have. Commonly the buyer-drawee will want the goods and will therefore call for the documents and take up the draft when they do arrive.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.

Unless otherwise instructed and except as provided in Article 5, a bank presenting a documentary draft:

(1) Must deliver the documents to the drawee on acceptance of the draft if it is payable more than 3 days after presentment; otherwise, only on payment; and

(2) Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee's services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions. However, the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses.

(Dec. 30, 1963, 77 Stat. 707, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-503.

1973 Ed., § 28:4-503.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section states the rules governing, in the absence of instructions, the duty of the presenting bank in case either of honor or of dishonor of a documentary draft. The section should be read in connection with Section 2-514 on when documents are deliverable on acceptance, when on payment.

2. If the draft is drawn under a letter of credit, Article 5 controls. See Sections 5-109 through 5-114.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

§ 28:4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a) of this section, the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

(Dec. 30, 1963, 77 Stat. 708, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(e), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:4-504.

1973 Ed., § 28:4-504.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:4-101.

UNIFORM COMMERCIAL CODE COMMENT

The section gives the presenting bank, after dishonor, a privilege to deal with the goods in any commercially reasonable manner pending instructions from its transferor and, if still unable to communicate with its principal after a reasonable time, a right to realize its expenditures as if foreclosing on an unpaid seller's lien (Section 2-706). The provision includes situations in which storage of goods or other action becomes commercially necessary pending receipt of any requested instructions, even if the requested instructions are later received.

The "reasonable manner" referred to means one reasonable in the light of business factors and the judgment of a business man.

Reason for 1990 Change [D.C. Law 10-249]

Modified to conform with current drafting practices; no intent to change substance.

Article 4A. Funds Transfers.

Part 1. Subject Matter and Definitions.

§ 28:4A-101. Short title.

This article may be cited as "Uniform Commercial Code — Funds Transfers."

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-101.

Legislative history of Law 9-95. — Law 9-95, the "District of Columbia Uniform Commercial Code—Funds Transfers Act of 1992," was introduced in Council and assigned Bill No. 9-32, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on January 7, 1992, and February 4, 1992, respectively. Signed by the Mayor on March 2, 1992, it was assigned Act No. 9-165 and transmitted to both Houses of Congress for its review. D.C. Law 9-95 became effective on April 30, 1992.

§ 28:4A-102. Subject matter.

Except as otherwise provided in § 28:4A-108, this article applies to funds transfers defined in § 28:4A-104.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-102.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

Article 4A governs a specialized method of payment referred to in the Article as a funds transfer but also commonly referred to in the commercial community as a wholesale wire transfer. A funds transfer is made by means of one or more payment orders. The scope of Article 4A is determined by the definitions of "payment order" and "funds transfer" found in Section 4A-103 and Section 4A-104.

The funds transfer governed by Article 4A is in large part a product of recent and developing technological changes. Before this Article was drafted there was no comprehensive body of law—statutory or judicial—that defined the juridical nature of a funds transfer or the rights and obligations flowing from payment orders. Judicial authority with respect to funds transfers is sparse, undeveloped and not uniform. Judges have had to resolve disputes by referring to general principles of common law or equity, or they have sought guidance in statutes such as Article 4 which are applicable to other payment methods. But attempts to define rights and obligations in funds transfers by general principles or by analogy to rights and obligations in negotiable instrument law or the law of check collection have not been satisfactory.

In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.

Funds transfers involve competing interests—those of the banks that provide funds transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.

§ 28:4A-103. Payment order — definitions.

(a) In this article:

(1) "Beneficiary" means the person to be paid by the beneficiary's bank.

(2) "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(3) "Payment order" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(A) the instruction does not state a condition to payment to the beneficiary other than time of payment,

(B) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(C) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(4) "Receiving bank" means the bank to which the sender's instruction is addressed.

(5) "Sender" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(3) of this section is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-103.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is discussed in the Comment following Section 4A-104.

§ 28:4A-104. Funds transfer — definitions.

In this article:

(1) "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

(2) "Intermediary bank" means a receiving bank other than the originator's bank or the beneficiary's bank.

(3) "Originator" means the sender of the first payment order in a funds transfer.

(4) "Originator's bank" means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-102 and § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-104.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Article 4A governs a method of payment in which the person making payment (the "originator") directly transmits an instruction to a bank either to make payment to the person receiving payment (the "beneficiary") or to instruct some other bank to make payment to the beneficiary. The payment from the originator to the beneficiary occurs when the bank that is to pay the beneficiary becomes obligated to pay the beneficiary. There are two basic definitions: "Payment order" stated in Section 4A-103 and "Funds transfer" stated in Section 4A-104. These definitions, other related definitions, and the scope of Article 4A can best be understood in the context of specific fact situations. Consider the following cases:

Case #1. X, which has an account in Bank A, instructs that bank to pay $1,000,000 to Y's account in Bank A. Bank A carries out X's instruction by making a credit of $1,000,000 to Y's account and notifying Y that the credit is available for immediate withdrawal. The instruction by X to Bank A is a "payment order" which was issued when it was sent to Bank A. Section 4A-103(a)(1) and (c). X is the "sender" of the payment order and Bank A is the "receiving bank." Section 4A-103(a)(5) and (a)(4). Y is the "beneficiary" of the payment order and Bank A is the "beneficiary's bank." Section 4A-103(a)(2) and (a)(3). When Bank A notified Y of receipt of the payment order, Bank A "accepted" the payment order. Section 4A-209(b)(1). When Bank A accepted the order it incurred an obligation to Y to pay the amount of the order. Section 4A-404(a). When Bank A accepted X's order, X incurred an obligation to pay Bank A the amount of the order. Section 4A-402(b). Payment from X to Bank A would normally be made by a debit to X's account in Bank A. Section 4A-403(a)(3). At the time Bank A incurred the obligation to pay Y, payment of $1,000,000 by X to Y was also made. Section 4A-406(a). Bank A paid Y when it gave notice to Y of a withdrawable credit of $1,000,000 to Y's account. Section 4A-405(a). The overall transaction, which comprises the acts of X and Bank A, in which the payment by X to Y is accomplished is referred to as the "funds transfer." Section 4A-104(a). In this case only one payment order was involved in the funds transfer. A one-payment-order funds transfer is usually referred to as a "book transfer" because the payment is accomplished by the receiving bank's debiting the account of the sender and crediting the account of the beneficiary in the same bank. X, in addition to being the sender of the payment order to Bank A, is the "originator" of the funds transfer. Section 4A-104(c). Bank A is the "originator's bank" in the funds transfer as well as the beneficiary's bank. Section 4A-104(d).

Case #2. Assume the same facts as in Case #1 except that X instructs Bank A to pay $1,000,000 to Y's account in Bank B. With respect to this payment order, X is the sender, Y is the beneficiary, and Bank A is the receiving bank. Bank A carries out X's order by instructing Bank B to pay $1,000,000 to Y's account. This instruction is a payment order in which Bank A is the sender, Bank B is the receiving bank, and Y is the beneficiary. When Bank A issued its payment order to Bank B, Bank A "executed" X's order. Section 4A-301(a). In the funds transfer, X is the originator, Bank A is the originator's bank, and Bank B is the beneficiary's bank. When Bank A executed X's order, X incurred an obligation to pay Bank A the amount of the order. Section 4A-402(c). When Bank B accepts the payment order issued to it by Bank A, Bank B incurs an obligation to Y to pay the amount of the order (Section 4A-404(a)) and Bank A incurs an obligation to pay Bank B. Section 4A-402(b). Acceptance by Bank B also results in payment of $1,000,000 by X to Y. Section 4A-406(a). In this case two payment orders are involved in the funds transfer.

Case #3. Assume the same facts as in Case #2 except that Bank A does not execute X's payment order by issuing a payment order to Bank B. One bank will not normally act to carry out a funds transfer for another bank unless there is a preexisting arrangement between the banks for transmittal of payment orders and settlement of accounts. For example, if Bank B is a foreign bank with which Bank A has no relationship, Bank A can utilize a bank that is a correspondent of both Bank A and Bank B. Assume Bank A issues a payment order to Bank C to pay $1,000,000 to Y's account in Bank B. With respect to this order, Bank A is the sender, Bank C is the receiving bank, and Y is the beneficiary. Bank C will execute the payment order of Bank A by issuing a payment order to Bank B to pay $1,000,000 to Y's account in Bank B. With respect to Bank C's payment order, Bank C is the sender, Bank B is the receiving bank, and Y is the beneficiary. Payment of $1,000,000 by X to Y occurs when Bank B accepts the payment order issued to it by Bank C. In this case the funds transfer involves three payment orders. In the funds transfer, X is the originator, Bank A is the originator's bank, Bank B is the beneficiary's bank, and Bank C is an "intermediary bank." Section 4A-104(b). In some cases there may be

more than one intermediary bank, and in those cases each intermediary bank is treated like Bank C in Case #3.

As the three cases demonstrate, a payment under Article 4A involves an overall transaction, the funds transfer, in which the originator, X, is making payment to the beneficiary, Y, but the funds transfer may encompass a series of payment orders that are issued in order to effect the payment initiated by the originator's payment order.

In some cases the originator and the beneficiary may be the same person. This will occur, for example, when a corporation orders a bank to transfer funds from an account of the corporation in that bank to another account of the corporation in that bank or in some other bank. In some funds transfers the first bank to issue a payment order is a bank that is executing a payment order of a customer that is not a bank. In this case the customer is the originator. In other cases, the first bank to issue a payment order is not acting for a customer, but is making a payment for its own account. In that event the first bank to issue a payment order is the originator as well as the originator's bank.

2. "Payment order" is defined in Section 4A-103(a)(1) as an instruction to a bank to pay, or to cause another bank to pay, a fixed or determinable amount of money. The bank to which the instruction is addressed is known as the "receiving bank." Section 4A-103(a)(4). "Bank" is defined in Section 4A-105(a)(2). The effect of this definition is to limit Article 4A to payments made through the banking system. A transfer of funds made by an entity outside the banking system is excluded. A transfer of funds through an entity other than a bank is usually a consumer transaction involving relatively small amounts of money and a single contract carried out by transfers of cash or a cash equivalent such as a check. Typically, the transferor delivers cash or a check to the company making the transfer, which agrees to pay a like amount to a person designated by the transferor. Transactions covered by Article 4A typically involve very large amounts of money in which several transactions involving several banks may be necessary to carry out the payment. Payments are normally made by debits or credits to bank accounts. Originators and beneficiaries are almost always business organizations and the transfers are usually made to pay obligations. Moreover, these transactions are frequently done on the basis of very short-term credit granted by the receiving bank to the sender of the payment order. Wholesale wire transfers involve policy questions that are distinct from those involved in consumer-based transactions by nonbanks.

3. Further limitations on the scope of Article 4A are found in the three requirements found in subparagraphs (i), (ii), and (iii) of Section 4A-103(a)(1). Subparagraph (i) states that the instruction to pay is a payment order only if it "does not state a condition to payment to the beneficiary other than time of payment." An instruction to pay a beneficiary sometimes is subject to a requirement that the beneficiary perform some act such as delivery of documents. For example, a New York bank may have issued a letter of credit in favor of X, a California seller of goods to be shipped to the New York bank's customer in New York. The terms of the letter of credit provide for payment to X if documents are presented to prove shipment of the goods. Instead of providing for presentment of the documents to the New York bank, the letter of credit states that they may be presented to a California bank that acts as an agent for payment. The New York bank sends an instruction to the California bank to pay X upon presentation of the required documents. The instruction is not covered by Article 4A because payment to the beneficiary is conditional upon receipt of shipping documents. The function of banks in a funds transfer under Article 4A is comparable to the role of banks in the collection and payment of checks in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact. Conditions to payment by the California bank other than time of payment impose responsibilities on that bank that go beyond those in Article 4A funds transfers. Although the payment by the New York bank to X under the letter of credit is not covered by Article 4A, if X is paid by the California bank, payment of the obligation of the New York bank to reimburse the California bank could be made by an Article 4A funds transfer. In such a case there is a distinction between the payment by the New York bank to X under the letter of credit and the payment by the New York bank to the California bank. For example, if the New York bank pays its reimbursement obligation to the California bank by a Fedwire naming the California bank as beneficiary (see Comment 1 to Section 4A-107), payment is made to the California bank rather than to X. That payment is governed by Article 4A and it could be made either before or after payment by the California bank to X. The payment by the New York bank to X under the letter of credit is not governed by Article 4A and it occurs when the California bank, as agent of the New York bank, pays X. No payment order was involved in that transaction. In this example, if the New York bank had erroneously sent an instruction to the California bank unconditionally instructing payment to X, the instruction would have been an Article 4A payment order. If the payment order was accepted (Section 4A-209(b)) by the California bank, a payment by the New York bank to X would have resulted (Section 4A-406(a)). But Article 4a

would not prevent recovery of funds from X on the basis that X was not entitled to retain the funds under the law of mistake and restitution, letter of credit law or other applicable law.

4. Transfers of funds made through the banking system are commonly referred to as either "credit" transfers or "debit" transfers. In a credit transfer the instruction to pay is given by the person making payment. In a debit transfer the instruction to pay is given by the person receiving payment. The purpose of subparagraph (ii) of subsection (a)(1) of Section 4A-103 is to include credit transfers in Article 4A and to exclude debit transfers. All of the instructions to pay in the three cases described in Comment 1 fall within subparagraph (ii). Take Case #2 as an example. With respect to X's instruction given to Bank A, Bank A will be reimbursed by debiting X's account or otherwise receiving payment from X. With respect to Bank A's instruction to Bank B, Bank B will be reimbursed by receiving payment from Bank A. In a debit transfer, a creditor, pursuant to authority from the debtor, is enabled to draw on the debtor's bank account by issuing an instruction to pay to the debtor's bank. If the debtor's bank pays, it will be reimbursed by the debtor rather than by the person giving the instruction. For example, the holder of an insurance policy may pay premiums by authorizing the insurance company to order the policyholder's bank to pay the insurance company. The order to pay may be in the form of a draft covered by Article 3, or it might be an instruction to pay that is not an instrument under that Article. The bank receives reimbursement by debiting the policyholder's account. Or, a subsidiary corporation may make payments to its parent by authorizing the parent to order the subsidiary's bank to pay the parent from the subsidiary's account. These transactions are not covered by Article 4A because subparagraph (2) is not satisfied. Article 4A is limited to transactions in which the account to be debited by the receiving bank is that of the person in whose name the instruction is given.

If the beneficiary of a funds transfer is the originator of the transfer, the transfer is governed by Article 4A if it is a credit transfer in form. If it is in the form of a debit transfer it is not governed by Article 4A. For example, Corporation has accounts in Bank A and Bank B. Corporation instructs Bank A to pay to Corporation's account in Bank B. The funds transfer is governed by Article 4A. Sometimes, Corporation will authorize Bank B to draw on Corporation's account in Bank A for the purpose of transferring funds into Corporation's account in Bank B. If Corporation also makes an agreement with Bank A under which Bank A is authorized to follow instructions of Bank B, as agent of Corporation, to transfer funds from Customer's account in Bank A, the instruction of Bank B is a payment order of Customer and is governed by Article 4A. This kind of transaction is known in the wire-transfer business as a "drawdown transfer." If Corporation does not make such an agreement with Bank A and Bank B instructs Bank A to make the transfer, the order is in form a debit transfer and is not governed by Article 4A. These debit transfers are normally ACH transactions in which Bank A relies on Bank B's warranties pursuant to ACH rules, including the warranty that the transfer is authorized.

5. The principal effect of subparagraph (iii) of subsection (a) of Section 4A-103 is to exclude from Article 4A payments made by check or credit card. In those cases the instruction of the debtor to the bank on which the check is drawn or to which the credit card slip is to be presented is contained in the check or credit card slip signed by the debtor. The instruction is not transmitted by the debtor directly to the debtor's bank. Rather, the instruction is delivered or otherwise transmitted by the debtor to the creditor who then presents it to the bank either directly or through bank collection channels. These payments are governed by Articles 3 and 4 and federal law. There are, however, limited instances in which the paper on which a check is printed can be used as the means of transmitting a payment order that is covered by Article 4A. Assume that Originator instructs Originator's Bank to pay $10,000 to the account of Beneficiary in Beneficiary's Bank. Since the amount of Originator's payment order is small, if Originator's Bank and Beneficiary's Bank do not have an account relationship, Originator's Bank may execute Originator's order by issuing a teller's check payable to Beneficiary's Bank for $10,000 along with instructions to credit Beneficiary's account in that amount. The instruction to Beneficiary's Bank to credit Beneficiary's account is a payment order. The check is the means by which Originator's Bank pays its obligation as sender of the payment order. The instruction of Originator's Bank to Beneficiary's Bank might be given in a letter accompanying the check or it may be written on the check itself.

In either case the instruction to Beneficiary's Bank is a payment order but the check itself (which is an order to pay addressed to the drawee rather than to Beneficiary's Bank) is an instrument under Article 3 and is not a payment order. The check can be both the means by which Originator's Bank pays its obligation under s 4A-402(b) to Beneficiary's Bank and the means by which the instruction to Beneficiary's Bank is transmitted.

6. Most payments covered by Article 4A are commonly referred to as wire transfers and usually involve some kind of electronic transmission, but the applicability of Article 4A does not depend upon the means used to transmit

the instruction of the sender. Transmission may be by letter or other written communication, oral communication or electronic communication. An oral communication is normally given by telephone. Frequently the message is recorded by the receiving bank to provide evidence of the transaction, but apart from problems of proof there is no need to record the oral instruction. Transmission of an instruction may be a direct communication between the sender and the receiving bank or through an intermediary such as an agent of the sender, a communication system such as international cable, or a funds transfer system such as CHIPS, SWIFT or an automated clearing house.

§ 28:4A-105. Other definitions.

(a) In this article:

(1) "Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this article.

(3) "Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) "Funds-transfer system" means a wire transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) Repealed.

(7) "Prove" with respect to a fact means to meet the burden of establishing the fact under § 28:1-201(b)(8).

(b) Other definitions applying to this article and the sections in which they appear are:

"Acceptance".	§ 28:4A-209
"Beneficiary".	§ 28:4A-103
"Beneficiary's bank".	§ 28:4A-103
"Executed".	§ 28:4A-301
"Execution date".	§ 28:4A-301
"Funds transfer".	§ 28:4A-104
"Funds-transfer system rule".	§ 28:4A-501
"Intermediary bank".	§ 28:4A-104
"Originator".	§ 28:4A-104
"Originator's bank".	§ 28:4A-104
"Payment by beneficiary's bank to beneficiary".	§ 28:4A-405
"Payment by originator to beneficiary".	§ 28:4A-406

"Payment by sender to receiving bank".	§ 28:4A-403
"Payment date".	§ 28:4A-401
"Payment order".	§ 28:4A-103
"Receiving bank".	§ 28:4A-103
"Security procedure".	§ 28:4A-201
"Sender".	§ 28:4A-103

(c) The following definitions in Article 4 apply to this article:

"Clearing house".	§ 28:4-104
"Item".	§ 28:4-104
"Suspends payments".	§ 28:4-104

(d) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595; Apr. 27, 2013, D.C. Law 19-299, § 7(a), 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:4A-105.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 repealed (a)(6), which read: "'Good faith' means honesty in fact and the observance of reasonable commercial standards of fair dealing"; and substituted "under § 28:1-201(b)(8)" for "(§ 28:1-201(8))" in (a)(7).

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. The definition of "bank" in subsection (a)(2) includes some institutions that are not commercial banks. The definition reflects the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers. Since many funds transfers involve payment orders to or from foreign countries the definition also covers foreign banks. The definition also includes Federal Reserve Banks. Funds transfers carried out by Federal Reserve Banks are described in Comments 1 and 2 to Section 4A-107.

2. Funds transfer business is frequently transacted by banks outside of general banking hours. Thus, the definition of banking day in Section 4-104(1)(c) cannot be used to describe when a bank is open for funds transfer business. Subsection (a)(4) defines a new term, "funds transfer business day," which is applicable to Article 4A. The definition states, "is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders." In some cases it is possible to electronically transmit payment orders and other communications to a receiving bank at any time. If the receiving bank is not open for the processing of an order when it is received, the communication is stored in the receiving bank's computer for retrieval when the receiving bank is open for processing. The use of the conjunctive makes clear that the defined term is limited to the period during which all functions of the receiving bank can be performed, i.e., receipt, processing, and transmittal of payment orders, cancellations and amendments.

3. Subsection (a)(5) defines "funds transfer system." The term includes a system such as CHIPS which provides for transmission of a payment order as well as settlement of the obligation of the sender to pay the order. It also includes automated clearing houses, operated by a clearing house or other association of banks, which process and transmit payment orders of banks to other banks. In addition the term includes organizations that provide only transmission services such as SWIFT. The definition also includes the wire transfer network and automated clearing houses of Federal Reserve Banks. Systems of the Federal Reserve Banks, however, are treated differently from systems of other associations of banks. Funds transfer systems other than systems of the Federal Reserve Banks are treated in Article 4A as a means of communication of payment

orders between participating banks. Section 4A-206. The Comment to that section and the Comment to Section 4A-107 explain how Federal Reserve Banks function under Article 4A.

Funds transfer systems are also able to promulgate rules binding on participating banks that, under Section 4A-501, may supplement or in some cases may even override provisions of Article 4A.

4. Subsection (d) incorporates definitions stated in Article 1 as well as principles of construction and interpretation stated in that Article. Included is Section 1-103. The last paragraph of the Comment to Section 4A-102 is addressed to the issue of the extent to which general principles of law and equity should apply to situations covered by provisions of Article 4A.

§ 28:4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in § 28:1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this article.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595; Apr. 27, 2013, D.C. Law 19-299, § 7(b), 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:4A-106.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "§ 28:1-202" for "§ 28:1-201(27)" in the first sentence of (a).

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

Legislative history of Law 19-299. — See note to § 28:4A-105.

UNIFORM COMMERCIAL CODE COMMENT

The time that a payment order is received by a receiving bank usually defines the payment date or the execution date of a payment order. Section 4A-401 and Section 4A-301. The time of receipt of a payment order, or communication cancelling or amending a payment order is defined in subsection (a) by reference to the rules stated in Section 1-201(27). Thus, time of receipt is determined by the same rules that determine when a notice is received. Time of receipt, however, may be altered by a cut-off time.

§ 28:4A-107. Federal Reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this article to the extent of the inconsistency.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-107.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Funds transfers under Article 4A may be made, in whole or in part, by payment orders through a Federal Reserve Bank in what is usually referred to as a transfer by Fedwire. If Bank A, which has an account in Federal Reserve Bank X, wants to pay $1,000,000 to Bank B, which has an account in Federal Reserve Bank Y, Bank A can issue an instruction to Reserve Bank X requesting a debit of $1,000,000 to Bank A's Reserve account and an equal credit to Bank B's Reserve account. Reserve Bank X will debit Bank A's account and will credit the account of Reserve Bank Y. Reserve Bank X will issue an instruction to Reserve Bank Y requesting a debit of $1,000,000 to the account of Reserve Bank X and an equal credit to Bank B's account in Reserve Bank Y. Reserve Bank Y will make the requested debit and credit and will give Bank B an advice of credit. The definition of "bank" in Section 4A-105(a)(2) includes both Reserve Bank X and Reserve Bank Y. Bank A's instruction to Reserve Bank X to pay money to Bank B is a payment order under Section 4A-103(a)(1). Bank A is the sender and Reserve Bank X is the receiving bank. Bank B is the beneficiary of Bank A's order and of the funds transfer. Bank A is the originator of the funds transfer and is also the originator's bank. Section 4A-104(c) and (d). Reserve Bank X, an intermediary bank under Section 4A-104(b), executes Bank A's order by sending a payment order to Reserve Bank Y instructing that bank to credit the Federal Reserve account of Bank B. Reserve Bank Y is the beneficiary's bank.

Suppose the transfer of funds from Bank A to Bank B is part of a larger transaction in which Originator, a customer of Bank A, wants to pay Beneficiary, a customer of Bank B. Originator issues a payment order to Bank A to pay $1,000,000 to the account of Beneficiary in Bank B. Bank A may execute Originator's order by means of Fedwire which simultaneously transfers $1,000,000 from Bank A to Bank B and carries a message instructing Bank B to pay $1,000,000 to the account of Y. The Fedwire transfer is carried out as described in the previous paragraph, except that the beneficiary of the funds transfer is Beneficiary rather than Bank B. Reserve Bank X and Reserve Bank Y are intermediary banks. When Reserve Bank Y advises Bank B of the credit to its Federal Reserve account it will also instruct Bank B to pay to the account of Beneficiary. The instruction is a payment order to Bank B which is the beneficiary's bank. When Reserve Bank Y advises Bank B of the credit to its Federal Reserve account Bank B receives payment of the payment order issued to it by Reserve Bank Y. Section 4A-403(a)(1). The payment order is automatically accepted by Bank B at the time it receives the payment order of Reserve Bank Y. Section 4A-209(b)(2). At the time of acceptance by Bank B payment by Originator to Beneficiary also occurs. Thus, in a Fedwire transfer, payment to the beneficiary's bank, acceptance by the beneficiary's bank and payment by the originator to the beneficiary all occur simultaneously by operation of law at the time the payment order to the beneficiary's bank is received.

If Originator orders payment to the account of Beneficiary in Bank C rather than Bank B, the analysis is somewhat modified. Bank A may not have any relationship with Bank C and may not be able to make payment directly to Bank C. In that case, Bank A could send a Fedwire instructing Bank B to instruct Bank C to pay Beneficiary. The analysis is the same as the previous case except that Bank B is an intermediary bank and Bank C is the beneficiary's bank.

2. A funds transfer can also be made through a Federal Reserve Bank in an automated clearing house transaction. In a typical case, Originator instructs Originator's Bank to pay to the account of Beneficiary in Beneficiary's Bank. Originator's instruction to pay a particular beneficiary is transmitted to Originator's Bank along with many other instructions for pay-

ment to other beneficiaries by many different beneficiary's banks. All of these instructions are contained in a magnetic tape or other electronic device. Transmission of instructions to the various beneficiary's banks requires that Originator's instructions be processed and repackaged with instructions of other originators so that all instructions to a particular beneficiary's bank are transmitted together to that bank. The repackaging is done in processing centers usually referred to as automated clearing houses.

Automated clearing houses are operated either by Federal Reserve Banks or by other associations of banks. If Originator's Bank chooses to execute Originator's instructions by transmitting them to a Federal Reserve Bank for processing by the Federal Reserve Bank, the transmission to the Federal Reserve Bank results in the issuance of payment orders by Originator's Bank to the Federal Reserve Bank, which is an intermediary bank. Processing by the Federal Reserve Bank will result in the issuance of payment orders by the Federal Reserve Bank to Beneficiary's Bank as well as payment orders to other beneficiary's banks making payments to carry out Originator's instructions.

3. Although the terms of Article 4A apply to funds transfers involving Federal Reserve Banks, federal preemption would make ineffective any Article 4A provision that conflicts with federal law. The payments activities of the Federal Reserve Banks are governed by regulations of the Federal Reserve Board and by operating circulars issued by the Reserve Banks themselves. In some instances, the operating circulars are issued pursuant to a Federal Reserve Board regulation. In other cases, the Reserve Bank issues the operating circular under its own authority under the Federal Reserve Act, subject to review by the Federal Reserve Board. Section 4A-107 states that Federal Reserve Board regulations and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of Article 4A to the extent of the inconsistency. Federal Reserve Board regulations, being valid exercises of regulatory authority pursuant to a federal statute, take precedence over state law if there is an inconsistency.

Childs v. Federal Reserve Bank of Dallas, 719 F.2d 812 (5th Cir. 1983), reh. den. 724 F.2d 127 (5th Cir. 1984). Section 4A-107 treats operating circulars as having the same effect whether issued under the Reserve Bank's own authority or under a Federal Reserve Board regulation.

§ 28:4A-108. Relationship to Electronic Fund Transfers Act.

(a) Except as otherwise provided in subsection (b) of this section, this article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act, approved November 10, 1978 (92 Stat. 3728; 15 U.S.C. § 1693 et seq.).

(b) This article applies to a funds transfer that is a remittance transfer as defined in section 919(g)(2) of the Electronic Fund Transfer Act, approved July 21, 2010 (124 Stat. 2065; 15 U.S.C. § 1693o-1(g)(2)), unless the remittance transfer is an electronic fund transfer as defined in section 903(7) of the Electronic Fund Transfer Act, approved November 10, 1978 (92 Stat. 3728; 15 U.S.C. § 1693a(7)).

(c) In the event of an inconsistency between a provision of this article and the Electronic Fund Transfer Act, the Electronic Fund Transfer Act governs to the extent of the inconsistency.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595; Apr. 27, 2013, D.C. Law 19-299, § 7(c), 60 DCR 2634.)

Section references. — This section is referenced in § 28:4A-102.

Prior Codifications. — 1981 Ed., § 28:4A-108.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 rewrote the section, which read: "This article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. § 1693 et seq.) as amended from time to time."

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

Legislative history of Law 19-299. — See note to § 28:4A-105.

UNIFORM COMMERCIAL CODE COMMENT

The Electronic Fund Transfer Act of 1978 is a federal statute that covers a wide variety of electronic funds transfers involving consumers. The types of transfers covered by the federal statute are essentially different from the wholesale wire transfers that are the primary focus of Article 4A. Section 4A-108 excludes a funds transfer from Article 4A if any part of the transfer is covered by the federal law. Existing procedures designed to comply with federal law will not be affected by Article 4A. The effect of Section 4A-108 is to make Article 4A and EFTA mutually exclusive. For example, if a funds transfer is to a consumer account in the beneficiary's bank and the funds transfer is made in part by use of Fedwire and in part by means of an automated clearing house, EFTA applies to the ACH part of the transfer but not to the Fedwire part. Under Section 4A-108, Article 4A does not apply to any part of the transfer. However, in the absence of any law to govern the part of the funds transfer that is not subject to EFTA, a court might apply appropriate principles from Article 4A by analogy.

Part 2. Issue and Acceptance of Payment Order.

§ 28:4A-201. Security procedure.

"Security procedure" means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-201.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

A large percentage of payment orders and communications amending or cancelling payment orders are transmitted electronically and it is standard practice to use security procedures that are designed to assure the authenticity of the message. Security procedures can also be used to detect error in the content of messages or to detect payment orders that are transmitted by mistake as in the case of multiple transmission of the same payment order. Security procedures might also apply to communications that are transmitted by telephone or in writing. Section 4A-201 defines these security procedures. The definition of security procedure limits the term to a procedure "established by agreement of a customer and a receiving bank." The term does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders. The question of whether loss that may result from the transmission of a spurious or erroneous payment order will be borne by the receiving bank or the sender or purported sender is affected by whether a security procedure was or was not in effect and whether there was or was not compliance with the procedure. Security procedures are referred to in Sections 4A-202 and 4A-203, which deal with authorized and verified payment orders, and Section 4A-205, which deals with erroneous payment orders.

§ 28:4A-202. Authorized and verified payment orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "sender" in this article includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a) of this section, or it is effective as the order of the customer under subsection (b) of this section.

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in § 28:4A-203(a)(1), rights and obligations arising under this section or § 28:4A-203 may not be varied by agreement.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-203 and § 28:4A-204.

Prior Codifications. — 1981 Ed., § 28:4A-202.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is discussed in the Comment following Section 4A-203.

§ 28:4A-203. Unenforceability of certain verified payment orders.

(a) If an accepted payment order is not, under § 28:4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to § 28:4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-202 and § 28:4A-204.

Prior Codifications. — 1981 Ed., § 28:4A-203.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Some person will always be identified as the sender of a payment order. Acceptance of the order by the receiving bank is based on a belief by the bank that the order was authorized by the person identified as the sender. If the receiving bank is the beneficiary's bank acceptance means that the receiving bank is obliged to pay the beneficiary. If the receiving bank is not the beneficiary's bank, acceptance means that the receiving bank has executed the sender's order and is obliged to pay the bank that accepted the order issued in execution of the sender's order. In either case the receiving bank may suffer a loss unless it is entitled to enforce payment of the payment order that it accepted. If the person identified as the sender of the order refuses to pay on the ground that the order was not authorized by that person, what are the rights of the receiving bank? In the absence of a statute or agreement that specifically addresses the issue, the question usually will be resolved by the law of agency. In some cases, the law of agency works well. For example, suppose the receiving bank executes a payment order given by means of a letter apparently written by a corporation that is a customer of the bank and apparently signed by an officer of the corporation. If the receiving bank acts solely on the basis of the letter, the corporation is not bound as the sender of the payment order unless the signature was that of the officer and the officer was authorized to act for the corporation in the issuance of payment orders, or some other agency doctrine such as apparent authority or estoppel causes the corporation to be bound. Estoppel can be illustrated by the following example. Suppose P is aware that A, who is unauthorized to act for P, has fraudulently misrepresented to T that A is authorized to act for P. T believes A and is about to rely on the misrepresentation. If P does not notify T of the true facts although P could easily do so, P may be estopped from denying A's lack of authority. A similar result could follow if the

failure to notify T is the result of negligence rather than a deliberate decision. Restatement, Second, Agency s 8B. Other equitable principles such as subrogation or restitution might also allow a receiving bank to recover with respect to an unauthorized payment order that it accepted. In Gatoil (U.S.A.), Inc. v. Forest Hill State Bank, 1 U.C.C. Rep.Serv.2d 171 (D.Md.1986), a joint venturer not authorized to order payments from the account of the joint venture, ordered a funds transfer from the account. The transfer paid a bona fide debt of the joint venture. Although the transfer was unauthorized the court refused to require recredit of the account because the joint venture suffered no loss. The result can be rationalized on the basis of subrogation of the receiving bank to the right of the beneficiary of the funds transfer to receive the payment from the joint venture.

But in most cases these legal principles give the receiving bank very little protection in the case of an authorized payment order. Cases like those just discussed are not typical of the way that most payment orders are transmitted and accepted, and such cases are likely to become even less common. Given the large amount of the typical payment order, a prudent receiving bank will be unwilling to accept a payment order unless it has assurance that the order is what it purports to be. This assurance is normally provided by security procedures described in Section 4A-201.

In a very large percentage of cases covered by Article 4A, transmission of the payment order is made electronically. The receiving bank may be required to act on the basis of a message that appears on a computer screen. Common law concepts of authority of agent to bind principal are not helpful. There is no way of determining the identity or the authority of the person who caused the message to be sent. The receiving bank is not relying on the authority of any particular person to act for the purported sender. The case is not comparable to payment of a check by the drawee bank on the basis of a signature that is forged. Rather, the receiving bank relies on a security procedure pursuant to which the authenticity of the message can be "tested" by various devices which are designed to provide certainty that the message is that of the sender identified in the payment order. In the wire transfer business the concept of "authorized" is different from that found in agency law. In that business a payment order is treated as the order of the person in whose name it is issued if it is properly tested pursuant to a security procedure and the order passes the test.

Section 4A-202 reflects the reality of the wire transfer business. A person in whose name a payment order is issued is considered to be the sender of the order if the order is "authorized" as stated in subsection (a) or if the order is "verified" pursuant to a security procedure in compliance with subsection (b). If subsection (b) does not apply, the question of whether the customer is responsible for the order is determined by the law of agency. The issue is one of actual or apparent authority of the person who caused the order to be issued in the name of the customer. In some cases the law of agency might allow the customer to be bound by an unauthorized order if conduct of the customer can be used to find an estoppel against the customer to deny that the order was unauthorized. If the customer is bound by the order under any of these agency doctrines, subsection (a) treats the order as authorized and thus the customer is deemed to be the sender of the order. In most cases, however, subsection (b) will apply. In that event there is no need to make an agency law analysis to determine authority. Under Section 4A-202, the issue of liability of the purported sender of the payment order will be determined by agency law only if the receiving bank did not comply with subsection (b).

2. The scope of Section 4A-202 can be illustrated by the following cases. Case #1. A payment order purporting to be that of Customer is received by Receiving Bank but the order was fraudulently transmitted by a person who had no authority to act for Customer. Case #2. An authentic payment order was sent by Customer, but before the order was received by Receiving Bank the order was fraudulently altered by an unauthorized person to change the beneficiary. Case #3. An authentic payment order was received by Receiving Bank, but before the order was executed by Receiving Bank a person who had no authority to act for Customer fraudulently sent a communication purporting to amend the order by changing the beneficiary. In each case Receiving Bank acted on the fraudulent communication by accepting the payment order. These cases are all essentially similar and they are treated identically by Section 4A-202. In each case Receiving Bank acted on a communication that it thought was authorized by Customer when in fact the communication was fraudulent. No distinction is made between Case #1 in which Customer took no part at all in the transaction and Case #2 and Case #3 in which an authentic order was fraudulently altered or amended by an unauthorized person. If subsection (b) does not apply, each case is governed by subsection (a). If there are no additional facts on which an estoppel might be found, Customer is not responsible in Case #1 for the fraudulently issued payment order, in Case #2 for the fraudulent alteration or in Case #3 for the fraudulent amendment. Thus, in each case Customer is not liable to pay the order and Receiving Bank takes the loss. The only remedy of Receiving Bank is to seek

recovery from the person who received payment as beneficiary of the fraudulent order. If there was verification in compliance with subsection (b), Customer will take the loss unless Section 4A-203 applies.

3. Subsection (b) of Section 4A-202 is based on the assumption that losses due to fraudulent payment orders can best be avoided by the use of commercially reasonable security procedures, and that the use of such procedures should be encouraged. The subsection is designed to protect both the customer and the receiving bank. A receiving bank needs to be able to rely on objective criteria to determine whether it can safely act on a payment order. Employees of the bank can be trained to "test" a payment order according to the various steps specified in the security procedure. The bank is responsible for the acts of these employees. Subsection (b)(ii) requires the bank to prove that it accepted the payment order in good faith and "in compliance with the security procedure." If the fraud was not detected because the bank's employee did not perform the acts required by the security procedure, the bank has not complied. Subsection (b)(ii) also requires the bank to prove that it complied with any agreement or instruction that restricts acceptance of payment orders issued in the name of the customer. A customer may want to protect itself by imposing limitations on acceptance of payment orders by the bank. For example, the customer may prohibit the bank from accepting a payment order that is not payable from an authorized account, that exceeds the credit balance in specified accounts of the customer, or that exceeds some other amount. Another limitation may relate to the beneficiary. The customer may provide the bank with a list of authorized beneficiaries and prohibit acceptance of any payment order to a beneficiary not appearing on the list. Such limitations may be incorporated into the security procedure itself or they may be covered by a separate agreement or instruction. In either case, the bank must comply with the limitations if the conditions stated in subsection (b) are met. Normally limitations on acceptance would be incorporated into an agreement between the customer and the receiving bank, but in some cases the instruction might be unilaterally given by the customer. If standing instructions or an agreement state limitations on the ability of the receiving bank to act, provision must be made for later modification of the limitations. Normally this would be done by an agreement that specifies particular procedures to be followed. Thus, subsection (b) states that the receiving bank is not required to follow an instruction that violates a written agreement. The receiving bank is not bound by an instruction unless it has adequate notice of it. Subsections (25), (26) and (27) of Section 1-201 apply.

Subsection (b)(i) assures that the interests of the customer will be protected by providing an incentive to a bank to make available to the customer a security procedure that is commercially reasonable. If a commercially reasonable security procedure is not made available to the customer, subsection (b) does not apply. The result is that subsection (a) applies and the bank acts at its peril in accepting a payment order that may be unauthorized. Prudent banking practice may require that security procedures be utilized in virtually all cases except for those in which personal contact between the customer and the bank eliminates the possibility of an unauthorized order. The burden of making available commercially reasonable security procedures is imposed on receiving banks because they generally determine what security procedures can be used and are in the best position to evaluate the efficacy of procedures offered to customers to combat fraud. The burden on the customer is to supervise its employees to assure compliance with the security procedure and to safeguard confidential security information and access to transmitting facilities so that the security procedure cannot be breached.

4. The principal issue that is likely to arise in litigation involving subsection (b) is whether the security procedure in effect when a fraudulent payment order was accepted was commercially reasonable. The concept of what is commercially reasonable in a given case is flexible. Verification entails labor and equipment costs that can vary greatly depending upon the degree of security that is sought. A customer that transmits very large numbers of payment orders in very large amounts may desire and may reasonably expect to be provided with state-of-the-art procedures that provide maximum security. But the expense involved may make use of a state-of-the-art procedure infeasible for a customer that normally transmits payments orders infrequently or in relatively low amounts. Another variable is the type of receiving bank. It is reasonable to require large money center banks to make available state-of-the-art security procedures. On the other hand, the same requirement may not be reasonable for a small country bank. A receiving bank might have several security procedures that are designed to meet the varying needs of different customers. The type of payment order is another variable. For example, in a wholesale wire transfer, each payment order is normally transmitted electronically and individually. A testing procedure will be individually applied to each payment order. In funds transfers to be made by means of an automated clearing house many payment orders are incorporated into an electronic device such as a magnetic tape that is physically delivered. Testing of the individual payment

orders is not feasible. Thus, a different kind of security procedure must be adopted to take into account the different mode of transmission.

The issue of whether a particular security procedure is commercially reasonable is a question of law. Whether the receiving bank complied with the procedure is a question of fact. It is appropriate to make the finding concerning commercial reasonability a matter of law because security procedures are likely to be standardized in the banking industry and a question of law standard leads to more predictability concerning the level of security that a bank must offer to its customers. The purpose of subsection (b) is to encourage banks to institute reasonable safeguards against fraud but not to make them insurers against fraud. A security procedure is not commercially unreasonable simply because another procedure might have been better or because the judge deciding the question would have opted for a more stringent procedure. The standard is not whether the security procedure is the best available. Rather it is whether the procedure is reasonable for the particular customer and the particular bank, which is a lower standard. On the other hand, a security procedure that fails to meet prevailing standards of good banking practice applicable to the particular bank should not be held to be commercially reasonable. Subsection (c) states factors to be considered by the judge in making the determination of commercial reasonableness. Sometimes an informed customer refuses a security procedure that is commercially reasonable and suitable for that customer and insists on using a higher-risk procedure because it is more convenient or cheaper. In that case, under the last sentence of subsection (c), the customer has voluntarily assumed the risk of failure of the procedure and cannot shift the loss to the bank. But this result follows only if the customer expressly agrees in writing to assume that risk. It is implicit in the last sentence of subsection (c) that a bank that accedes to the wishes of its customer in this regard is not acting in bad faith by so doing so long as the customer is made aware of the risk. In all cases, however, a receiving bank cannot get the benefit of subsection (b) unless it has made available to the customer a security procedure that is commercially reasonable and suitable for use by that customer. In most cases, the mutual interest of bank and customer to protect against fraud should lead to agreement to a security procedure which is commercially reasonable.

5. The effect of Section 4A-202(b) is to place the risk of loss on the customer if an unauthorized payment order is accepted by the receiving bank after verification by the bank in compliance with a commercially reasonable security procedure. An exception to this result is provided by Section 4A-203(a)(2). The customer may avoid the loss resulting from such a payment order if the customer can prove that the fraud was not committed by a person described in that subsection. Breach of a commercially reasonable security procedure requires that the person committing the fraud have knowledge of how the procedure works and knowledge of codes, identifying devices, and the like. That person may also need access to transmitting facilities through an access device or other software in order to breach the security procedure. This confidential information must be obtained either from a source controlled by the customer or from a source controlled by the receiving bank. If the customer can prove that the person committing the fraud did not obtain the confidential information from an agent or former agent of the customer or from a source controlled by the customer, the loss is shifted to the bank. "Prove" is defined in Section 4A-105(a)(7). Because of bank regulation requirements, in this kind of case there will always be a criminal investigation as well as an internal investigation of the bank to determine the probable explanation for the breach of security. Because a funds transfer fraud usually will involve a very large amount of money, both the criminal investigation and the internal investigation are likely to be thorough. In some cases there may be an investigation by bank examiners as well. Frequently, these investigations will develop evidence of who is at fault and the cause of the loss. The customer will have access to evidence developed in these investigations and that evidence can be used by the customer in meeting its burden of proof.

6. The effect of Section 4A-202(b) may also be changed by an agreement meeting the requirements of Section 4A-203(a)(1). Some customers may be unwilling to take all or part of the risk of loss with respect to unauthorized payment orders even if all of the requirements of Section 4A-202(b) are met. By virtue of Section 4A-203(a)(1), a receiving bank may assume all of the risk of loss with respect to unauthorized payment orders or the customer and bank may agree that losses from unauthorized payment orders are to be divided as provided in the agreement.

7. In a large majority of cases the sender of a payment order is a bank. In many cases in which there is a bank sender, both the sender and the receiving bank will be members of a funds transfer system over which the payment order is transmitted. Since Section 4A-202(f) does not prohibit a funds transfer system rule from varying rights and obligations under Section 4A-202, a rule of the funds transfer system can determine how loss due to an unauthorized payment order from a participating bank to another participating bank is to be allocated. A funds transfer system rule, however, cannot change the rights of a customer that is not a

participating bank. s 4A-501(b). Section 4A-202(f) also prevents variation by agreement except to the extent stated.

§ 28:4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under § 28:4A-202, or (ii) not enforceable, in whole or in part, against the customer under § 28:4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) of this section may be fixed by agreement as stated in § 28:1-302(b), but the obligation of a receiving bank to refund payment as stated in subsection (a) of this section may not otherwise be varied by agreement.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595; Apr. 27, 2013, D.C. Law 19-299, § 7(c)[(d)], 60 DCR 2634.)

Section references. — This section is referenced in § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-204.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "§ 28:1-302(b)" for "§ 28:1-204(1)" in (b).

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. With respect to unauthorized payment orders, in a very large percentage of cases a commercially reasonable security procedure will be in effect. Section 4A-204 applies only to cases in which (i) no commercially reasonable security procedure is in effect, (ii) the bank did not comply with a commercially reasonable security procedure that was in effect, (iii) the sender can prove, pursuant to Section 4A-203(a)(2), that the culprit did not obtain confidential security information controlled by the customer, or (iv) the bank, pursuant to Section 4A-203(a)(1) agreed to take all or part of the loss resulting from an unauthorized payment order. In each of these cases the bank takes the risk of loss with respect to an unauthorized payment order because the bank is not entitled to payment from the customer with respect to

the order. The bank normally debits the customer's account or otherwise receives payment from the customer shortly after acceptance of the payment order. Subsection (a) of Section 4A-204 states that the bank must recredit the account or refund payment to the extent the bank is not entitled to enforce payment.

2. Section 4A-204 is designed to encourage a customer to promptly notify the receiving bank that it has accepted an unauthorized payment order. Since cases of unauthorized payment orders will almost always involve fraud, the bank's remedy is normally to recover from the beneficiary of the unauthorized order if the beneficiary was party to the fraud. This remedy may not be worth very much and it may not make any difference whether or not the bank promptly learns about the fraud. But in some cases prompt notification may make it easier for the bank to recover some part of its loss from the culprit. The customer will routinely be notified of the debit to its account with respect to an unauthorized order or will otherwise be notified of acceptance of the order. The customer has a duty to exercise ordinary care to determine that the order was unauthorized after it has received notification from the bank, and to advise the bank of the relevant facts within a reasonable time not exceeding 90 days after receipt of notification. Reasonable time is not defined and it may depend on the facts of the particular case. If a payment order for $1,000,000 is wholly unauthorized, the customer should normally discover it in far less than 90 days. If a $1,000,000 payment order was authorized but the name of the beneficiary was fraudulently changed, a much longer period may be necessary to discover the fraud. But in any event, if the customer delays more than 90 days the customer's duty has not been met. The only consequence of a failure of the customer to perform this duty is a loss of interest on the refund payable by the bank. A customer that acts promptly is entitled to interest from the time the customer's account was debited or the customer otherwise made payment. The rate of interest is stated in Section 4A-506. If the customer fails to perform the duty, no interest is recoverable for any part of the period before the bank learns that it accepted an unauthorized order. But the bank is not entitled to any recovery from the customer based on negligence for failure to inform the bank. Loss of interest is in the nature of a penalty on the customer designed to provide an incentive for the customer to police its account. There is no intention to impose a duty on the customer that might result in shifting loss from the unauthorized order to the customer.

§ 28:4A-205. Erroneous payment orders.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to § 28:4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3) of this subsection.

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a) of this section, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a) of this section, the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) of this section is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-205.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section concerns error in the content or in the transmission of payment orders. It deals with three kinds of error. Case #1. The order identifies a beneficiary not intended by the sender. For example, Sender intends to wire funds to a beneficiary identified only by an account number. The wrong account number is stated in the order. Case #2. The error is in the amount of the order. For example, Sender intends to wire $1,000 to Beneficiary. Through error, the payment order instructs payment of $1,000,000. Case #3. A payment order is sent to the receiving bank and then, by mistake, the same payment order is sent to the receiving bank again. In Case #3, the receiving bank may have no way of knowing whether the second order is a duplicate of the first or is another order. Similarly, in Case #1 and Case #2, the receiving bank may have no way of knowing that the error exists. In each case, if this section does not apply and the funds transfer is completed, Sender is obliged to pay the order. Section 4A-402. Sender's remedy, based on payment by mistake, is to recover from the beneficiary that received payment.

Sometimes, however, transmission of payment orders of the sender to the receiving bank is made pursuant to a security procedure designed to detect one or more of the errors described above. Since "security procedure" is defined by Section 4A-201 as "a procedure established by agreement of a customer and a receiving bank for the purpose of * * * detecting error * * *," Section 4A-205 does not apply if the receiving bank and the customer did not agree to the establishment of a procedure for detecting error.

A security procedure may be designed to detect an account number that is not one to which Sender normally makes payment. In that case, the security procedure may require a special verification that payment to the stated account number was intended. In the case of dollar amounts, the security procedure may require different codes for different dollar amounts. If a $1,000,000 payment order contains a code that is inappropriate for that amount, the error in amount should be detected. In the case of duplicate orders, the security procedure may require that each payment order be identified by a number or code that applies to no other order. If the number or code of each payment order received is registered in a computer base, the receiving bank can quickly identify a duplicate order. The three cases covered by this section are essentially similar. In each, if the error is not detected, some beneficiary will receive funds that the beneficiary was not intended to receive. If this section applies, the risk of loss with respect to the error of the sender is shifted to the bank which has the burden of recovering the funds from the beneficiary. The risk of loss is shifted to the bank only if the sender proves that the error would have been detected if there had been compliance with the procedure and that the sender (or an agent under Section 4A-206) complied. In the case of a duplicate order or a wrong beneficiary, the sender doesn't have to pay the order. In the case of an overpayment,

the sender does not have to pay the order to the extent of the overpayment. If subsection (a)(1) applies, the position of the receiving bank is comparable to that of a receiving bank that erroneously executes a payment order as stated in Section 4A-303. However, failure of the sender to timely report the error is covered by Section 4A-205(b) rather than by Section 4A-304 which applies only to erroneous execution under Section 4A-303. A receiving bank to which the risk of loss is shifted by subsection (a)(1) or (2) is entitled to recover the amount erroneously paid to the beneficiary to the extent allowed by the law of mistake and restitution. Rights of the receiving bank against the beneficiary are similar to those of a receiving bank that erroneously executes a payment order as stated in Section 4A-303. Those rights are discussed in Comment 2 to Section 4A-303.

2. A security procedure established for the purpose of detecting error is not effective unless both sender and receiving bank comply with the procedure. Thus, the bank undertakes a duty of complying with the procedure for the benefit of the sender. This duty is recognized in subsection (a)(1). The loss with respect to the sender's error is shifted to the bank if the bank fails to comply with the procedure and the sender (or an agent under section 4A-206) does comply. Although the customer may have been negligent in transmitting the erroneous payment order, the loss is put on the bank on a last-clear-chance theory. A similar analysis applies to subsection (b). If the loss with respect to an error is shifted to the receiving bank and the sender is notified by the bank that the erroneous payment order was accepted, the sender has a duty to exercise ordinary care to discover the error and notify the bank of the relevant facts within a reasonable time not exceeding 90 days. If the bank can prove that the sender failed in this duty it is entitled to compensation for the loss incurred as a result of the failure. Whether the bank is entitled to recover from the sender depends upon whether the failure to give timely notice would have made any difference. If the bank could not have recovered from the beneficiary that received payment under the erroneous payment order even if timely notice had been given, the sender's failure to notify did not cause any loss of the bank.

3. Section 4A-205 is subject to variation by agreement under Section 4A-501. Thus, if a receiving bank and its customer have agreed to a security procedure for detection of error, the liability of the receiving bank for failing to detect an error of the customer as provided in Section 4A-205 may be varied as provided in an agreement of the bank and the customer.

§ 28:4A-206. Transmission of payment order through funds-transfer or other communication system.

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the Federal Reserve Banks.

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-205.

Prior Codifications. — 1981 Ed., § 28:4A-206.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. A payment order may be issued to a receiving bank directly by delivery of a writing or electronic device or by an oral or electronic communication. If an agent of the sender is employed to transmit orders on behalf of the sender, the sender is bound by the order transmitted by the agent on the basis of agency law. Section 4A-206 is an application of that principle to cases in which a funds transfer or communication system acts as an intermediary in transmitting the sender's order to the receiving bank. The intermediary is deemed to be an agent of the sender for the purpose of transmitting payment orders and related messages for the sender. Section 4A-206 deals with error by the intermediary.

2. Transmission by an automated clearing house of an association of banks other than the Federal Reserve Banks is an example of a transaction covered by Section 4A-206. Suppose Originator orders Originator's Bank to cause a large number of payments to be made to many accounts in banks in various parts of the country. These payment orders are electronically transmitted to Originator's Bank and stored in an electronic device that is held by Originator's Bank. Or, transmission of the various payment orders is made by delivery to Originator's Bank of an electronic device containing the instruction to the bank. In either case the terms of the various payment orders by Originator are determined by the information contained in the electronic device. In order to execute the various orders, the information in the electronic device must be processed. For example, if some of the orders are for payments to accounts in Bank X and some to accounts in Bank Y, Originator's Bank will execute these orders of Originator by issuing a series of payment orders to Bank X covering all payments to accounts in that bank, and by issuing a series of payment orders to Bank Y covering all payments to accounts in that bank. The orders to Bank X may be transmitted together by means of an electronic device, and those to Bank Y may be included in another electronic device. Typically, this processing is done by an automated clearing house acting for a group of banks including Originator's Bank. The automated clearing house is a funds transfer system. Section 4A-105(a)(5). Originator's Bank delivers Originator's electronic device or transmits the information contained in the device to the funds transfer system for processing into payment orders of Originator's Bank to the appropriate beneficiary's banks. The processing may result in an erroneous payment order. Originator's Bank, by use of Originator's electronic device, may have given information to the funds transfer system instructing payment of $100,000 to an account in Bank X, but because of human error or an equipment malfunction the processing may have converted that instruction into an instruction to Bank X to make a payment of $1,000,000. Under Section 4A-206, Originator's Bank issued a payment order for $1,000,000 to Bank X when the erroneous information was sent to Bank X. Originator's Bank is responsible for the error of the automated clearing house. The liability of the funds transfer system that made the error is not governed by Article 4A. It is left to the law of contract, a funds transfer system rule, or other applicable law.

In the hypothetical case just discussed, if the automated clearing house is operated by a Federal Reserve Bank, the analysis is different. Section 4A-206 does not apply. Originator's Bank will execute Originator's payment orders by delivery or transmission of the electronic information to the Federal Reserve Bank for processing. The result is that Originator's Bank has issued payment orders to the Federal Reserve Bank which, in this case, is acting as an intermediary bank. When the Federal Reserve Bank has processed the information given to it by Originator's Bank it will issue payment orders to the various beneficiary's banks. If the processing results in an erroneous payment order, the Federal Reserve Bank has erroneously executed the payment order of Originator's Bank and the case is governed by Section 4A-303.

§ 28:4A-207. Misdescription of beneficiary.

(a) Subject to subsection (b) of this section, if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c) of this section, if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) of this section is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1) of this section, the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1) of this section, if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c) of this section, the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-207.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) deals with the problem of payment orders issued to the beneficiary's bank for payment to nonexistent or unidentifiable persons or accounts. Since it is not possible in that case for the funds transfer to be completed, subsection (a) states that the order cannot be accepted. Under Section 4A-402(c), a sender of a payment order is not obliged to pay its order unless the beneficiary's bank accepts a payment order instructing payment to the benefi-

ciary of that sender's order. Thus, if the beneficiary of a funds transfer is non-existent or unidentifiable, each sender in the funds transfer that has paid its payment order is entitled to get its money back.

2. Subsection (b), which takes precedence over subsection (a), deals with the problem of payment orders in which the description of the beneficiary does not allow identification of the beneficiary because the beneficiary is described by name and by an identifying number or an account number and the name and number refer to different persons. A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks. The standard format, however, may also allow the inclusion of the name of the beneficiary and other information which can be useful to the beneficiary's bank and the beneficiary but which plays no part in the process of payment. If the beneficiary's bank has both the account number and name of the beneficiary supplied by the originator of the funds transfer, it is possible for the beneficiary's bank to determine whether the name and number refer to the same person, but if a duty to make that determination is imposed on the beneficiary's bank the benefits of automated payment are lost. Manual handling of payment orders is both expensive and subject to human error. If payment orders can be handled on an automated basis there are substantial economies of operation and the possibility of clerical error is reduced. Subsection (b) allows banks to utilize automated processing by allowing banks to act on the basis of the number without regard to the name if the bank does not know that the name and number refer to different persons. "Know" is defined in Section 1-201(25) to mean actual knowledge, and Section 1-201(27) states rules for determining when an organization has knowledge of information received by the organization. The time of payment is the pertinent time at which knowledge or lack of knowledge must be determined.

Although the clear trend is for beneficiary's banks to process payment orders by automated means, Section 4A-207 is not limited to cases in which processing is done by automated means. A bank that processes by semi-automated means or even manually may rely on number as stated in Section 4A-207.

In cases covered by subsection (b) the erroneous identification would in virtually all cases be the identifying or bank account number. In the typical case the error is made by the originator of the funds transfer. The originator should know the name of the person who is to receive payment and can further identify that person by an address that would normally be known to the originator.

It is not unlikely, however, that the originator may not be sure whether the identifying or account number refers to the person the originator intends to pay. Subsection (b)(1) deals with the typical case in which the beneficiary's bank pays on the basis of the account number and is not aware at the time of payment that the named beneficiary is not the holder of the account which was paid. In some cases the false number will be the result of error by the originator. In other cases fraud is involved. For example, Doe is the holder of shares in Mutual Fund. Thief, impersonating Doe, requests redemption of the shares and directs Mutual Fund to wire the redemption proceeds to Doe's account #12345 in Beneficiary's Bank. Mutual Fund originates a funds transfer by issuing a payment order to Originator's Bank to make the payment to Doe's account #12345 in Beneficiary's Bank. Originator's Bank executes the order by issuing a conforming payment order to Beneficiary's Bank which makes payment to account #12345. That account is the account of Roe rather than Doe. Roe might be a person acting in concert with Thief or Roe might be an innocent third party. Assume that Roe is a gem merchant that agreed to sell gems to Thief who agreed to wire the purchase price to Roe's account in Beneficiary's Bank. Roe believed that the credit to Roe's account was a transfer of funds from Thief and released the gems to Thief in good faith in reliance on the payment. The case law is unclear on the responsibility of a beneficiary's bank in carrying out a payment order in which the identification of the beneficiary by name and number is conflicting. See Securities Fund Services, Inc. v. American National Bank, 542 F.Supp. 323 (N.D.Ill.1982) and Bradford Trust Co. v. Texas American Bank, 790 F.2d 407 (5th Cir.1986). Section 4A-207 resolves the issue.

If Beneficiary's Bank did not know about the conflict between the name and number, subsection (b)(1) applies. Beneficiary's Bank has no duty to determine whether there is a conflict and it may rely on the number as the proper identification of the beneficiary of the order. When it accepts the order, it is entitled to payment from Originator's Bank. Section 4A-402(b). On the other hand, if Beneficiary's Bank knew about the conflict between the name and number and nevertheless paid Roe, subsection (b)(2) applies. Under that provision, acceptance of the payment order of Originator's Bank did

not occur because there is no beneficiary of that order. Since acceptance did not occur Originator's Bank is not obliged to pay Beneficiary's Bank. Section 4A-402(b). Similarly, Mutual Fund is excused from its obligation to pay Originator's Bank. Section 4A-402(c). Thus, Beneficiary's Bank takes the loss. Its only cause of action is against Thief. Roe is not obliged to return the payment to the beneficiary's bank because Roe received the payment in good faith and for value. Article 4A makes irrelevant the issue of whether Mutual Fund was or was not negligent in issuing its payment order.

3. Normally, subsection (b)(1) will apply to the hypothetical case discussed in Comment 2. Beneficiary's Bank will pay on the basis of the number without knowledge of the conflict. In that case subsection (c) places the loss on either Mutual Fund or Originator's Bank. It is not unfair to assign the loss to Mutual Fund because it is the person who dealt with the impostor and it supplied the wrong account number. It could have avoided the loss if it had not used an account number that it was not sure was that of Doe. Mutual Fund, however, may not have been aware of the risk involved in giving both name and number. Subsection (c) is designed to protect the originator, Mutual Fund, in this case. Under that subsection, the originator is responsible for the inconsistent description of the beneficiary if it had notice that the order might be paid by the beneficiary's bank on the basis of the number. If the originator is a bank, the originator always has that responsibility. The rationale is that any bank should know how payment orders are processed and paid. If the originator is not a bank, the originator's bank must prove that its customer, the originator, had notice. Notice can be proved by any admissible evidence, but the bank can always prove notice by providing the customer with a written statement of the required information and obtaining the customer's signature to the statement. That statement will then apply to any payment order accepted by the bank thereafter. The information need not be supplied more than once.

In the hypothetical case if Originator's Bank made the disclosure stated in the last sentence of subsection (c)(2), Mutual Fund must pay Originator's Bank. Under subsection (d)(1), Mutual Fund has an action to recover from Roe if recovery from Roe is permitted by the law governing mistake and restitution. Under the assumed facts Roe should be entitled to keep the money as a person who took it in good faith and for value since it was taken as payment for the gems. In that case, Mutual Fund's only remedy is against Thief. If Roe was not acting in good faith, Roe has to return the money to Mutual Fund. If Originator's Bank does not prove that Mutual Fund had notice as stated in subsection (c)(2), Mutual Fund is not required to pay Originator's Bank. Thus, the risk of loss falls on Originator's Bank whose remedy is against Roe or Thief as stated above. Subsection (d)(2).

§ 28:4A-208. Misdescription of intermediary bank or beneficiary's bank.

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1) of this section, as though the sender were a bank. Proof of notice may be made by an admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in § 28:4A-302(a)(1).

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-208.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section addresses an issue similar to that addressed by Section 4A-207. Because of automation in the processing of payment orders, a payment order may identify the beneficiary's bank or an intermediary bank by an identifying number. The bank identified by number might or might not also be identified by name. The following two cases illustrate Section 4A-208(a) and (b):

Case #1. Originator's payment order to Originator's Bank identifies the beneficiary's bank as Bank A and instructs payment to Account #12345 in that bank. Originator's Bank executes Originator's order by issuing a payment order to Intermediary Bank. In the payment order of Originator's Bank the beneficiary's bank is identified as Bank A but is also identified by number, #67890. The identifying number refers to Bank B rather than Bank A. If processing by Intermediary Bank of the payment order of Originator's Bank is done by automated means, Intermediary Bank, in executing the order, will rely on the identifying number and will issue a payment order to Bank B rather than Bank A. If there is an Account #12345 in Bank B, the payment order of Intermediary Bank would normally be accepted and payment would be made to a person not intended by Originator. In this case, Section 4A-208(b)(1) puts the risk of loss on Originator's Bank. Intermediary Bank may rely on the number #67890 as the proper identification of the beneficiary's bank. Intermediary Bank has properly executed the payment order of Originator's Bank. By using the wrong number to describe the beneficiary's bank, Originator's Bank has improperly executed Originator's payment order because the payment order of Originator's Bank provides for payment to the wrong beneficiary, the holder of Account #12345 in Bank B rather than the holder of Account #12345 in Bank A. Section 4A-302(a)(1) and Section 4A-303(c). Originator's Bank is not entitled to payment from Originator but is required to pay Intermediary Bank. Section 4A-303(c) and Section 4A-402(c). Intermediary Bank is also entitled to compensation for any loss and expenses resulting from the error by Originator's Bank.

If there is no Account #12345 in Bank B, the result is that there is no beneficiary of the payment order issued by Originator's Bank and

the funds transfer will not be completed. Originator's Bank is not entitled to payment from Originator and Intermediary Bank is not entitled to payment from Originator's Bank. Section 4A-402(c). Since Originator's Bank improperly executed Originator's payment order it may be liable for damages under Section 4A-305. As stated above, Intermediary Bank is entitled to compensation for loss and expenses resulting from the error by Originator's Bank.

Case #2. Suppose the same payment order by Originator to Originator's Bank as in Case #1. In executing the payment order Originator's Bank issues a payment order to Intermediary Bank in which the beneficiary's bank is identified only by number, #67890.

That number does not refer to Bank A. Rather, it identifies a person that is not a bank. If processing by Intermediary Bank of the payment order of Originator's Bank is done by automated means, Intermediary Bank will rely on the number #67890 to identify the beneficiary's bank. Intermediary Bank has no duty to determine whether the number identifies a bank. The funds transfer cannot be completed in this case because no bank is identified as the beneficiary's bank. Subsection (a) puts the risk of loss on Originator's Bank. Originator's Bank is not entitled to payment from Originator. Section 4A-402(c). Originator's Bank has improperly executed Originator's payment order and may be liable for damages under Section 4A-305. Originator's Bank is obliged to compensate Intermediary Bank for loss and expenses resulting from the error by Originator's Bank.

Subsection (a) also applies if #67890 identifies a bank, but the bank is not Bank A. Intermediary Bank may rely on the number as the proper identification of the beneficiary's bank. If the bank to which Intermediary Bank sends its payment order accepts the order, Intermediary Bank is entitled to payment from Originator's Bank, but Originator's Bank is not entitled to payment from Originator. The analysis is similar to that in Case #1.

2. Subsection (b)(2) of Section 4A-208 addresses cases in which an erroneous identification of a beneficiary's bank or intermediary bank by name and number is made in a payment order of a sender that is not a bank. Suppose Originator issues a payment order to Originator's Bank that instructs that bank to use an intermediary bank identified as Bank A and by an identifying number, #67890. The identifying number refers to Bank B. Originator intended to identify Bank A as intermediary bank. If Originator's Bank relied on the number and issued a payment order to Bank B the rights of Originator's Bank depend upon whether the proof of notice stated in subsection (b)(2) is made by Originator's Bank. If proof is made, Originator's Bank's rights are governed by subsection (b)(1) of Section 4A-208. Originator's Bank is not liable for breach of Section 4A-302(a)(1) and is entitled to compensation from Originator for any loss and expenses resulting from Originator's error. If notice is not proved, Originator's Bank may not rely on the number in executing Originator's payment order. Since Originator's Bank does not get the benefit of subsection (b)(1) in that case, Originator's Bank improperly executed Originator's payment order and is in breach of the obligation stated in Section 4A-302(a)(1). If notice is not given, Originator's Bank can rely on the name if it is not aware of the conflict in name and number. Subsection (b)(3).

3. Although the principal purpose of Section 4A-208 is to accommodate automated processing of payment orders, Section 4A-208 applies regardless of whether processing is done by automation, semi-automated means or manually.

§ 28:4A-209. Acceptance of payment order.

(a) Subject to subsection (d) of this section, a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d) of this section, a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in § 28:4A-405(a) or § 28:4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to § 28:4A-403(a)(1) or § 28:4A-403(a)(2); or

(3) The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the

sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one hour after that time, or (ii) one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) of this section if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently cancelled pursuant to § 28:4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105, § 28:4A-212, and § 28:4A-302.

Prior Codifications. — 1981 Ed., § 28:4A-209.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section treats the sender's payment order as a request by the sender to the receiving bank to execute or pay the order and that request can be accepted or rejected by the receiving bank. Section 4A-209 defines when acceptance occurs. Section 4A-210 covers rejection. Acceptance of the payment order imposes an obligation on the receiving bank to the sender if the receiving bank is not the beneficiary's bank, or to the beneficiary if the receiving bank is the beneficiary's bank. These obligations are stated in Section 4A-302 and Section 4A-404.

2. Acceptance by a receiving bank other than the beneficiary's bank is defined in Section 4A-209(a). That subsection states the only way that a bank other than the beneficiary's bank can accept a payment order. A payment order to a bank other than the beneficiary's bank is, in effect, a request that the receiving bank execute the sender's order by issuing a payment order to the beneficiary's bank or to an intermediary bank. Normally, acceptance occurs at the time of execution, but there is an exception stated in subsection (d) and discussed in Comment 9. Execution occurs when the receiving bank "issues a payment order intended to carry out" the sender's order. Section 4A-301(a). In some cases the payment order issued by the receiving bank may not conform to the sender's order. For example, the receiving bank might make a mistake in the amount of its order, or the order might be issued to the wrong beneficiary's bank or for the benefit of the wrong beneficiary. In all of these cases there is acceptance of the sender's order by the bank when

the receiving bank issues its order intended to carry out the sender's order, even though the bank's payment order does not in fact carry out the instruction of the sender. Improper execution of the sender's order may lead to liability to the sender for damages or it may mean that the sender is not obliged to pay its payment order. These matters are covered in Section 4A-303, Section 4A-305, and Section 4A-402.

3. A receiving bank has no duty to accept a payment order unless the bank makes an agreement, either before or after issuance of the payment order, to accept it, or acceptance is required by a funds transfer system rule. If the bank makes such an agreement it incurs a contractual obligation based on the agreement and may be held liable for breach of contract if a failure to execute violates the agreement. In many cases a bank will enter into an agreement with its customer to govern the rights and obligations of the parties with respect to payment orders issued to the bank by the customer or, in cases in which the sender is also a bank, there may be a funds transfer system rule that governs the obligations of a receiving bank with respect to payment orders transmitted over the system. Such agreements or rules can specify the circumstances under which a receiving bank is obliged to execute a payment order and can define the extent of liability of the receiving bank for breach of the agreement or rule. Section 4A-305(d) states the liability for breach of an agreement to execute a payment order.

4. In the case of a payment order issued to the beneficiary's bank, acceptance is defined in Section 4A-209(b). The function of a beneficiary's bank that receives a payment order is different from that of a receiving bank that receives a payment order for execution. In the typical case, the beneficiary's bank simply receives payment from the sender of the order, credits the account of the beneficiary and notifies the beneficiary of the credit. Acceptance by the beneficiary's bank does not create any obligation to the sender. Acceptance by the beneficiary's bank means that the bank is liable to the beneficiary for the amount of the order. Section 4A-404(a). There are three ways in which the beneficiary's bank can accept a payment order which are described in the following comments.

5. Under Section 4A-209(b)(1), the beneficiary's bank can accept a payment order by paying the beneficiary. In the normal case of crediting an account of the beneficiary, payment occurs when the beneficiary is given notice of the right to withdraw the credit, the credit is applied to a debt of the beneficiary, or "funds with respect to the order" are otherwise made available to the beneficiary. Section 4A-405(a). The quoted phrase covers cases in which funds are made available to the beneficiary as a result of receipt of a payment order for the benefit of the beneficiary but the release of funds is not expressed as payment of the order. For example, the beneficiary's bank might express a release of funds equal to the amount of the order as a "loan" that will be automatically repaid when the beneficiary's bank receives payment by the sender of the order. If the release of funds is designated as a loan pursuant to a routine practice of the bank, the release is conditional payment of the order rather than a loan, particularly if normal incidents of a loan such as the signing of a loan agreement or note and the payment of interest are not present. Such a release of funds is payment to the beneficiary under Section 4A-405(a). Under Section 4A-405(c) the bank cannot recover the money from the beneficiary if the bank does not receive payment from the sender of the payment order that it accepted. Exceptions to this rule are stated in s 4A-405(d) and (e). The beneficiary's bank may also accept by notifying the beneficiary that the order has been received. "Notifies" is defined in Section 1-201(26). In some cases a beneficiary's bank will receive a payment order during the day but settlement of the sender's obligation to pay the order will not occur until the end of the day. If the beneficiary's bank wants to defer incurring liability to the beneficiary until the beneficiary's bank receives payment, it can do so. The beneficiary's bank incurs no liability to the beneficiary with respect to a payment order that it receives until it accepts the order. If the bank does not accept pursuant to subsection (b)(1), acceptance does not occur until the end of the day when the beneficiary's bank receives settlement. If the sender settles, the payment order will be accepted under subsection (b)(2) and the funds will be released to the beneficiary the next morning. If the sender doesn't settle, no acceptance occurs. In either case the beneficiary's bank suffers no loss.

6. In most cases the beneficiary's bank will receive a payment order from another bank. If the sender is a bank and the beneficiary's bank receives payment from the sender by final settlement through the Federal Reserve System or a funds transfer system (Section 4A-403(a)(1)) or, less commonly, through credit to an account of the beneficiary's bank with the sender or another bank (Section 4A-403(a)(2)), acceptance by the beneficiary's bank occurs at the time payment is made. Section 4A-209(b)(2). A minor exception to this rule is stated in Section 4A-209(c). Section 4A-209(b)(2) results in automatic acceptance of payment orders issued to a beneficiary's bank by means of Fedwire because the Federal Reserve account of the beneficiary's bank is credited and final payment is made to that bank when the payment order is received.

Subsection (b)(2) would also apply to cases in which the beneficiary's bank mistakenly pays a person who is not the beneficiary of the payment order issued to the beneficiary's bank. For

example, suppose the payment order provides for immediate payment to Account #12345. The beneficiary's bank erroneously credits Account #12346 and notifies the holder of that account of the credit. No acceptance occurs in this case under subsection (b)(1) because the beneficiary of the order has not been paid or notified. The holder of Account #12345 is the beneficiary of the order issued to the beneficiary's bank. But acceptance will normally occur if the beneficiary's bank takes no other action, because the bank will normally receive settlement with respect to the payment order. At that time the bank has accepted because the sender paid its payment order. The bank is liable to pay the holder of Account #12345. The bank has paid the holder of Account #12346 by mistake, and has a right to recover the payment if the credit is withdrawn, to the extent provided in the law governing mistake and restitution.

7. Subsection (b)(3) covers cases of inaction by the beneficiary's bank. It applies whether or not the sender is a bank and covers a case in which the sender and the beneficiary both have accounts with the receiving bank and payment will be made by debiting the account of the sender and crediting the account of the beneficiary. Subsection (b)(3) is similar to subsection (b)(2) in that it bases acceptance by the beneficiary's bank on payment by the sender. Payment by the sender is effected by a debit to the sender's account if the account balance is sufficient to cover the amount of the order. On the payment date (Section 4A-401) of the order the beneficiary's bank will normally credit the beneficiary's account and notify the beneficiary of receipt of the order if it is satisfied that the sender's account balance covers the order or is willing to give credit to the sender. In some cases, however, the bank may not be willing to give credit to the sender and it may not be possible for the bank to determine until the end of the day on the payment date whether there are sufficient good funds in the sender's account. There may be various transactions during the day involving funds going into and out of the account. Some of these transactions may occur late in the day or after the close of the banking day. To accommodate this situation, subsection (b)(3) provides that the status of the account is determined at the opening of the next funds transfer business day of the beneficiary's bank after the payment date of the order. If the sender's account balance is sufficient to cover the order, the beneficiary's bank has a source of payment and the result in almost all cases is that the bank accepts the order at that time if it did not previously accept under subsection (b)(1). In rare cases, a bank may want to avoid acceptance under subsection (b)(3) by rejecting the order as discussed in Comment 8.

8. Section 4A-209 is based on a general principle that a receiving bank is not obliged to accept a payment order unless it has agreed or is bound by a funds transfer system rule to do so. Thus, provision is made to allow the receiving bank to prevent acceptance of the order. This principle is consistently followed if the receiving bank is not the beneficiary's bank. If the receiving bank is not the beneficiary's bank, acceptance is in the control of the receiving bank because it occurs only if the order is executed. But in the case of the beneficiary's bank acceptance can occur by passive receipt of payment under subsection (b)(2) or (3). In the case of a payment made by Fedwire acceptance cannot be prevented. In other cases the beneficiary's bank can prevent acceptance by giving notice of rejection to the sender before payment occurs under Section 4A-403(a)(1) or (2). A minor exception to the ability of the beneficiary's bank to reject is stated in Section 4A-502(c)(3).

Under subsection (b)(3) acceptance occurs at the opening of the next funds transfer business day of the beneficiary's bank following the payment date unless the bank rejected the order before that time or it rejects within one hour after that time. In some cases the sender and the beneficiary's bank may not be in the same time zone or the beginning of the business day of the sender and the funds transfer business day of the beneficiary's bank may not coincide. For example, the sender may be located in California and the beneficiary's bank in New York. Since in most cases notice of rejection would be communicated electronically or by telephone, it might not be feasible for the bank to give notice before one hour after the opening of the funds transfer business day in New York because at that hour, the sender's business day may not have started in California. For that reason, there are alternative deadlines stated in subsection (b)(3). In the case stated, the bank acts in time if it gives notice within one hour after the opening of the business day of the sender. But if the notice of rejection is received by the sender after the payment date, the bank is obliged to pay interest to the sender if the sender's account does not bear interest. In that case the bank had the use of funds of the sender that the sender could reasonably assume would be used to pay the beneficiary. The rate of interest is stated in Section 4A-506. If the sender receives notice on the day after the payment date the sender is entitled to one day's interest. If receipt of notice is delayed for more than one day, the sender is entitled to interest for each additional day of delay.

9. Subsection (d) applies only to a payment order by the originator of a funds transfer to the originator's bank and it refers to the following situation. On April 1, Originator instructs Bank A to make a payment on April 15 to the

account of Beneficiary in Bank B. By mistake, on April 1, Bank A executes Originator's payment order by issuing a payment order to Bank B instructing immediate payment to Beneficiary. Bank B credited Beneficiary's account and immediately released the funds to Beneficiary. Under subsection (d) no acceptance by Bank A occurred on April 1 when Originator's payment order was executed because acceptance cannot occur before the execution date which in this case would be April 15 or shortly before that date. Section 4A-301(b). Under Section 4A-402(c), Originator is not obliged to pay Bank A until the order is accepted and that can't occur until the execution date. But Bank A is required to pay Bank B when Bank B accepted Bank A's order on April 1. Unless Originator and Beneficiary are the same person, in almost all cases Originator is paying a debt owed to Beneficiary and early payment does not injure Originator because Originator does not have to pay Bank A until the execution date. Section 4A-402(c). Bank A takes the interest loss. But suppose that on April 3, Originator concludes that no debt was owed to Beneficiary or that the debt was less than the amount of the payment order. Under Section 4A-211(b) Originator can cancel its payment order if Bank A has not accepted. If early execution of Originator's payment order is acceptance, Originator can suffer a loss because cancellation after acceptance is not possible without the consent of Bank A and Bank B. Section 4A-211(c). If Originator has to pay Bank A, Originator would be required to seek recovery of the money from Beneficiary. Subsection (d) prevents this result and puts the risk of loss on Bank A by providing that the early execution does not result in acceptance until the execution date. Since on April 3 Originator's order was not yet accepted, Originator can cancel it under Section 4A-211(b). The result is that Bank A is not entitled to payment from Originator but is obliged to pay Bank B. Bank A has paid Beneficiary by mistake. If Originator's payment order is cancelled, Bank A becomes the originator of an erroneous funds transfer to Beneficiary. Bank A has the burden of recovering payment from Beneficiary on the basis of a payment by mistake. If Beneficiary received the money in good faith in payment of a debt owed to Beneficiary by Originator, the law of mistake and restitution may allow Beneficiary to keep all or part of the money received. If Originator owed money to Beneficiary, Bank A has paid Originator's debt and, under the law of restitution, which applies pursuant to Section 1-103, Bank A is subrogated to Beneficiary's rights against Originator on the debt.

If Bank A is the Beneficiary's bank and Bank A credited Beneficiary's account and released the funds to Beneficiary on April 1, the analysis is similar. If Originator's order is cancelled, Bank A has paid Beneficiary by mistake. The right of Bank A to recover the payment from Beneficiary is similar to Bank A's rights in the preceding paragraph.

§ 28:4A-210. Rejection of payment order.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to § 28:4A-211(d) or the

day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-210.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. With respect to payment orders issued to a receiving bank other than the beneficiary's bank, notice of rejection is not necessary to prevent acceptance of the order. Acceptance can occur only if the receiving bank executes the order. Section 4A-209(a). But notice of rejection will routinely be given by such a bank in cases in which the bank cannot or is not willing to execute the order for some reason. There are many reasons why a bank doesn't execute an order. The payment order may not clearly instruct the receiving bank because of some ambiguity in the order or an internal inconsistency. In some cases, the receiving bank may not be able to carry out the instruction because of equipment failure, credit limitations on the receiving bank, or some other factor which makes proper execution of the order infeasible. In those cases notice of rejection is a means of informing the sender of the facts so that a corrected payment order can be transmitted or the sender can seek alternate means of completing the funds transfer. The other major reason for not executing an order is that the sender's account is insufficient to cover the order and the receiving bank is not willing to give credit to the sender. If the sender's account is sufficient to cover the order and the receiving bank chooses not to execute the order, notice of rejection is necessary to prevent liability to pay interest to the sender if the case falls within Section 4A-210(b) which is discussed in Comment 3.

2. A payment order to the beneficiary's bank can be accepted by inaction of the bank. Section 4A-209(b)(2) and (3). To prevent acceptance under those provisions it is necessary for the receiving bank to send notice of rejection before acceptance occurs. Subsection (a) of Section 4A-210 states the rule that rejection is accomplished by giving notice of rejection. This incorporates the definitions in Section 1-201(26). Rejection is effective when notice is given if it is given by a means that is reasonable in the circumstances. Otherwise it is effective when the notice is received. The question of when rejection is effective is important only in the relatively few cases under subsection (b)(2) and (3) in which a notice of rejection is necessary to prevent acceptance. The question of whether a particular means is reasonable depends on the facts in a particular case. In a very large percentage of cases the sender and the receiving bank will be in direct electronic contact with each other and in those cases a notice of rejection can be transmitted instantaneously. Since time is of the essence in a large proportion of funds transfers, some quick means of transmission would usually be required, but this is not always the case. The parties may specify by agreement the means by which communication between the parties is to be made.

3. Subsection (b) deals with cases in which a sender does not learn until after the execution date that the sender's order has not been executed. It applies only to cases in which the receiving bank was assured of payment because the sender's account was sufficient to cover the order. Normally, the receiving bank will accept the sender's order if it is assured of payment, but there may be some cases in which the bank chooses to reject. Unless the receiving bank had obligated itself by agreement to accept, the failure to accept is not wrongful. There is no duty of the receiving bank to accept the payment order unless it is obliged to accept by express agreement. Section 4A-212. But even if the bank has not acted wrongfully, the receiving bank had the use of the sender's money that the sender could reasonably assume was to be the source of payment of the funds transfer. Until the sender learns that the order was not accepted the sender is denied the use of that money. Subsection (b) obliges the receiving

bank to pay interest to the sender as restitution unless the sender receives notice of rejection on the execution date. The time of receipt of notice is determined pursuant to § 1-201(27). The rate of interest is stated in Section 4A-506. If the sender receives notice on the day after the execution date, the sender is entitled to one day's interest. If receipt of notice is delayed for more than one day, the sender is entitled to interest for each additional day of delay.

4. Subsection (d) treats acceptance and rejection as mutually exclusive. If a payment order has been accepted, rejection of that order becomes impossible. If a payment order has been rejected it cannot be accepted later by the receiving bank. Once notice of rejection has been given, the sender may have acted on the notice by making the payment through other channels. If the receiving bank wants to act on a payment order that it has rejected it has to obtain the consent of the sender. In that case the consent of the sender would amount to the giving of a second payment order that substitutes for the rejected first order. If the receiving bank suspends payments (Section 4-104(1)(k)), subsection (c) provides that unaccepted payment orders are deemed rejected at the time suspension of payments occurs. This prevents acceptance by passage of time under Section 4A-209(b)(3).

§ 28:4A-211. Cancellation and amendment of payment order.

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a) of this section, a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is cancelled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A cancelled payment order cannot be accepted. If an accepted payment order is cancelled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2) of this section.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-209, § 28:4A-210, § 28:4A-404, and § 28:4A-406.

Prior Codifications. — 1981 Ed., § 28:4A-211.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section deals with cancellation and amendment of payment orders. It states the conditions under which cancellation or amendment is both effective and rightful. There is no concept of wrongful cancellation or amendment of a payment order. If the conditions stated in this section are not met the attempted cancellation or amendment is not effective. If the stated conditions are met the cancellation or amendment is effective and rightful. The sender of a payment order may want to withdraw or change the order because the sender has had a change of mind about the transaction or because the payment order was erroneously issued or for any other reason. One common situation is that of multiple transmission of the same order. The sender that mistakenly transmits the same order twice wants to correct the mistake by cancelling the duplicate order. Or, a sender may have intended to order a payment of $1,000,000 but mistakenly issued an order to pay $10,000,000. In this case the sender might try to correct the mistake by cancelling the order and issuing another order in the proper amount. Or, the mistake could be corrected by amending the order to change it to the proper amount. Whether the error is corrected by amendment or cancellation and reissue the net result is the same. This result is stated in the last sentence of subsection (e).

2. Subsection (a) allows a cancellation or amendment of a payment order to be communicated to the receiving bank "orally, electronically, or in writing." The quoted phrase is consistent with the language of Section 4A-103(a) applicable to payment orders. Cancellations and amendments are normally subject to verification pursuant to security procedures to the same extent as payment orders. Subsection (a) recognizes this fact by providing that in cases in which there is a security procedure in effect between the sender and the receiving bank the bank is not bound by a communication cancelling or amending an order unless verification has been made. This is necessary to protect the bank because under subsection (b) a cancellation or amendment can be effective by unilateral action of the sender. Without verification the bank cannot be sure whether the communication was or was not effective to cancel or amend a previously verified payment order.

3. If the receiving bank has not yet accepted

the order, there is no reason why the sender should not be able to cancel or amend the order unilaterally so long as the requirements of subsection (a) and (b) are met. If the receiving bank has accepted the order, it is possible to cancel or amend but only if the requirements of subsection (c) are met.

First consider the case of a receiving bank other than the beneficiary's bank. If the bank has not yet accepted the order, the sender can unilaterally cancel or amend. The communication amending or cancelling the payment order must be received in time to allow the bank to act on it before the bank issues its payment order in execution of the sender's order. The time that the sender's communication is received is governed by Section 4A-106. If a payment order does not specify a delayed payment date or execution date, the order will normally be executed shortly after receipt. Thus, as a practical matter, the sender will have very little time in which to instruct cancellation or amendment before acceptance. In addition, a receiving bank will normally have cut-off times for receipt of such communications, and the receiving bank is not obliged to act on communications received after the cut-off hour. Cancellation by the sender after execution of the order by the receiving bank requires the agreement of the bank unless a funds transfer rule otherwise provides. Subsection (c). Although execution of the sender's order by the receiving bank does not itself impose liability on the receiving bank (under Section 4A-402 no liability is incurred by the receiving bank to pay its order until it is accepted), it would commonly be the case that acceptance follows shortly after issuance. Thus, as a practical matter, a receiving bank that has executed a payment order will incur a liability to the next bank in the chain before it would be able to act on the cancellation request of its customer. It is unreasonable to impose on the receiving bank a risk of loss with respect to a cancellation request without the consent of the receiving bank.

The statute does not state how or when the agreement of the receiving bank must be obtained for cancellation after execution. The receiving bank's consent could be obtained at the time cancellation occurs or it could be based on a preexisting agreement. Or, a funds transfer system rule could provide that cancellation can be made unilaterally by the sender. By virtue of that rule any receiving bank covered by the rule is bound. Section 4A-501. If the receiving bank has already executed the sender's order, the bank would not consent to cancellation unless the bank to which the receiving bank has issued its payment order consents to cancellation of that order. It makes no sense to allow cancellation of a payment order unless all subsequent payment orders in the funds transfer that were issued because of the cancelled payment order are also cancelled. Under subsection (c)(1), if a receiving bank consents to cancellation of the payment order after it is executed, the cancellation is not effective unless the receiving bank also cancels the payment order issued by the bank.

4. With respect to a payment order issued to the beneficiary's bank, acceptance is particularly important because it creates liability to pay the beneficiary, it defines when the originator pays its obligation to the beneficiary, and it defines when any obligation for which the payment is made is discharged. Since acceptance affects the rights of the originator and the beneficiary it is not appropriate to allow the beneficiary's bank to agree to cancellation or amendment except in unusual cases. Except as provided in subsection (c)(2), cancellation or amendment after acceptance by the beneficiary's bank is not possible unless all parties affected by the order agree. Under subsection (c)(2), cancellation or amendment is possible only in the four cases stated. The following examples illustrate subsection (c)(2):

Case #1. Originator's Bank executed a payment order issued in the name of its customer as sender. The order was not authorized by the customer and was fraudulently issued. Beneficiary's Bank accepted the payment order issued by Originator's Bank. Under subsection (c)(2) Originator's Bank can cancel the order if Beneficiary's Bank consents. It doesn't make any difference whether the payment order that Originator's Bank accepted was or was not enforceable against the customer under Section 4A-202(b). Verification under that provision is important in determining whether Originator's Bank or the customer has the risk of loss, but it has no relevance under Section 4A-211(c)(2). Whether or not verified, the payment order was not authorized by the customer. Cancellation of the payment order to Beneficiary's Bank causes the acceptance of Beneficiary's Bank to be nullified. Subsection (e). Beneficiary's Bank is entitled to recover payment from the beneficiary to the extent allowed by the law of mistake and restitution. In this kind of case the beneficiary is usually a party to the fraud who has no right to receive or retain payment of the order.

Case #2. Originator owed Beneficiary $1,000,000 and ordered Bank A to pay that amount to the account of Beneficiary in Bank B. Bank A issued a complying order to Bank B, but by mistake issued a duplicate order as well. Bank B accepted both orders. Under subsection (c)(2)(i) cancellation of the duplicate order could be made by Bank A with the consent of Bank B. Beneficiary has no right to receive or retain payment of the duplicate payment order if only $1,000,000 was owed by Originator to Beneficiary. If Originator owed $2,000,000 to Beneficiary, the law of restitution might allow Bene-

ficiary to retain the $1,000,000 paid by Bank B on the duplicate order. In that case Bank B is entitled to reimbursement from Bank A under subsection (f).

Case #3. Originator owed $1,000,000 to X. Intending to pay X, Originator ordered Bank A to pay $1,000,000 to Y's account in Bank B. Bank A issued a complying payment order to Bank B which Bank B accepted by releasing the $1,000,000 to Y. Under subsection (c)(2)(ii) Bank A can cancel its payment order to Bank B with the consent of Bank B if Y was not entitled to receive payment from Originator. Originator can also cancel its order to Bank A with Bank A's consent. Subsection (c)(1). Bank B may recover the $1,000,000 from Y unless the law of mistake and restitution allows Y to retain some or all of the amount paid. If no debt was owed to Y, Bank B should have a right of recovery.

Case #4. Originator owed Beneficiary $10,000. By mistake Originator ordered Bank A to pay $1,000,000 to the account of Beneficiary in Bank B. Bank A issued a complying order to Bank B which accepted by notifying Beneficiary of its right to withdraw $1,000,000. Cancellation is permitted in this case under subsection (c)(2)(iii). If Bank B paid Beneficiary it is entitled to recover the payment except to the extent the law of mistake and restitution allows Beneficiary to retain payment. In this case Beneficiary might be entitled to retain $10,000, the amount of the debt owed to Beneficiary. If Beneficiary may retain $10,000, Bank B would be entitled to $10,000 from Bank A pursuant to subsection (f). In this case Originator also cancelled its order. Thus Bank A would be entitled to $10,000 from Originator pursuant to subsection (f).

5. Unless constrained by a funds transfer system rule, a receiving bank may agree to cancellation or amendment of the payment order under subsection (c) but is not required to do so regardless of the circumstances. If the receiving bank has incurred liability as a result of its acceptance of the sender's order, there are substantial risks in agreeing to cancellation or amendment. This is particularly true for a beneficiary's bank. Cancellation or amendment after acceptance by the beneficiary's bank can be made only in the four cases stated and the beneficiary's bank may not have any way of knowing whether the requirements of subsection (c) have been met or whether it will be able to recover payment from the beneficiary that received payment. Even with indemnity the beneficiary's bank may be reluctant to alienate its customer, the beneficiary, by denying the customer the funds. Subsection (c) leaves the decision to the beneficiary's bank unless the consent of the beneficiary's bank is not required under a funds transfer system rule or other interbank agreement. If a receiving bank agrees to cancellation or amendment under subsection (c)(1) or (2), it is automatically entitled to indemnification from the sender under subsection (f). The indemnification provision recognizes that a sender has no right to cancel a payment order after it is accepted by the receiving bank. If the receiving bank agrees to cancellation, it is doing so as an accommodation to the sender and it should not incur a risk of loss in doing so.

6. Acceptance by the receiving bank of a payment order issued by the sender is comparable to acceptance of an offer under the law of contracts. Under that law the death or legal incapacity of an offeror terminates the offer even though the offeree has no notice of the death or incapacity. Restatement Second, Contracts s 48. Comment a. to that section state that the "rule seems to be a relic of the obsolete view that a contract requires a 'meeting of minds,' and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent." Subsection (g), which reverses the Restatement rule in the case of a payment order, is similar to Section 4-405(1) which applies to checks. Subsection (g) does not address the effect of the bankruptcy of the sender of a payment order before the order is accepted, but the principle of subsection (g) has been recognized in Bank of Marin v. England, 385 U.S. 99 (1966). Although Bankruptcy Code Section 542(c) may not have been drafted with wire transfers in mind, its language can be read to allow the receiving bank to charge the sender's account for the amount of the payment order if the receiving bank executed it in ignorance of the bankruptcy.

7. Subsection (d) deals with stale payment orders. Payment orders normally are executed on the execution date or the day after. An order issued to the beneficiary's bank is normally accepted on the payment date or the day after. If a payment order is not accepted on its execution or payment date or shortly thereafter, it is probable that there was some problem with the terms of the order or the sender did not have sufficient funds or credit to cover the amount of the order. Delayed acceptance of such an order is normally not contemplated, but the order may not have been cancelled by the sender. Subsection (d) provides for cancellation by operation of law to prevent an unexpected delayed acceptance.

8. A funds transfer system rule can govern rights and obligations between banks that are parties to payment orders transmitted over the system even if the rule conflicts with Article 4A. In some cases, however, a rule governing a transaction between two banks can affect a third party in an unacceptable way. Subsection (h) deals with such a case. A funds transfer system rule cannot allow cancellation of a payment order accepted by the beneficiary's bank if

the rule conflicts with subsection (c)(2). Because rights of the beneficiary and the originator are directly affected by acceptance, subsection (c)(2) severely limits cancellation. These limitations cannot be altered by funds transfer system rule.

§ 28:4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this article, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this article or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in § 28:4A-209, and liability is limited to that provided in this article. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this article or by express agreement.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-212.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

With limited exceptions stated in this Article, the duties and obligations of receiving banks that carry out a funds transfer arise only as a result of acceptance of payment orders or of agreements made by receiving banks. Exceptions are stated in Section 4A-209(b)(3) and Section 4A-210(b). A receiving bank is not like a collecting bank under Article 4. No receiving bank, whether it be an originator's bank, an intermediary bank or a beneficiary's bank, is an agent for any other party in the funds transfer.

Part 3. Execution of Sender's Payment Order by Receiving Bank.

§ 28:4A-301. Execution and execution date.

(a) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-301.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The terms "executed," "execution" and "execution date" are used only with respect to a payment order to a receiving bank other than the beneficiary's bank. The beneficiary's bank can accept the payment order that it receives, but it does not execute the order. Execution refers to the act of the receiving bank in issuing a payment order "intended to carry out" the payment order that the bank received. A receiving bank has executed an order even if the order issued by the bank does not carry out the order received by the bank. For example, the bank may have erroneously issued an order to the wrong beneficiary, or in the wrong amount or to the wrong beneficiary's bank. In each of these cases execution has occurred but the execution is erroneous. Erroneous execution is covered in Section 4A-303.

2. "Execution date" refers to the time a payment order should be executed rather than the day it is actually executed. Normally the sender will not specify an execution date, but most payment orders are meant to be executed immediately. Thus, the execution date is normally the day the order is received by the receiving bank. It is common for the sender to specify a "payment date" which is defined in Section 4A-401 as "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank." Except for automated clearing house transfers, if a funds transfer is entirely within the United States and the payment is to be carried out electronically, the execution date is the payment date unless the order is received after the payment date. If the payment is to be carried out through an automated clearing house, execution may occur before the payment date. In an ACH transfer the beneficiary is usually paid one or two days after issue of the originator's payment order. The execution date is determined by the stated payment date and is a date before the payment date on which execution is reasonably necessary to allow payment on the payment date. A funds transfer system rule could also determine the execution date of orders received by the receiving bank if both the sender and the receiving bank are participants in the funds transfer system. The execution date can be determined by the payment order itself or by separate instructions of the sender or an agreement of the sender and the receiving bank. The second sentence of subsection (b) must be read in the light of Section 4A-106 which states that if a payment order is received after the cut-off time of the receiving bank it may be treated by the bank as received at the opening of the next funds transfer business day.

3. Execution on the execution date is timely, but the order can be executed before or after the execution date. Section 4A-209(d) and Section 4A-402(c) state the consequences of early execution and Section 4A-305(a) states the consequences of late execution.

§ 28:4A-302. Obligations of receiving bank in execution of payment order.

(a) Except as provided in subsections (b) through (d) of this section, if the receiving bank accepts a payment order pursuant to § 28:4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) of this section applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-208, § 28:4A-305, and § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-302.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. In the absence of agreement, the receiving bank is not obliged to execute an order of the sender. Section 4A-212. Section 4A-302 states the manner in which the receiving bank may execute the sender's order if execution occurs. Subsection (a)(1) states the residual rule. The payment order issued by the receiving bank must comply with the sender's order and, unless some other rule is stated in the section, the receiving bank is obliged to follow any instruction of the sender concerning which funds transfer system is to be used, which intermediary banks are to be used, and what means of transmission is to be used. The instruction of the sender may be incorporated in the payment order itself or may be given separately. For

example, there may be a master agreement between the sender and receiving bank containing instructions governing payment orders to be issued from time to time by the sender to the receiving bank. In most funds transfers, speed is a paramount consideration. A sender that wants assurance that the funds transfer will be expeditiously completed can specify the means to be used. The receiving bank can follow the instructions literally or it can use an equivalent means. For example, if the sender instructs the receiving bank to transmit by telex, the receiving bank could use telephone instead. Subsection (c). In most cases the sender will not specify a particular means but will use a general term such as "by wire" or "wire transfer" or "as soon as possible." These words signify that the sender wants a same-day transfer. In these cases the receiving bank is required to use a telephonic or electronic communication to transmit its order and is also required to instruct any intermediary bank to which it issues its order to transmit by similar means. Subsection (a)(2). In other cases, such as an automated clearing house transfer, a same-day transfer is not contemplated. Normally the sender's instruction or the context in which the payment order is received makes clear the type of funds transfer that is appropriate. If the sender states a payment date with respect to the payment order, the receiving bank is obliged to execute the order at a time and in a manner to meet the payment date if that is feasible. Subsection (a)(2). This provision would apply to many ACH transfers made to pay recurring debts of the sender. In other cases, involving relatively small amounts, time may not be an important factor and cost may be a more important element. Fast means, such as telephone or electronic transmission, are more expensive than slow means such as mailing. Subsection (c) states that in the absence of instructions the receiving bank is given discretion to decide. It may issue its payment order by first class mail or by any means reasonable in the circumstances. Section 4A-305 states the liability of a receiving bank for breach of the obligations stated in Section 4A-302.

2. Subsection (b) concerns the choice of intermediary banks to be used in completing the funds transfer, and the funds transfer system to be used. If the receiving bank is not instructed about the matter, it can issue an order directly to the beneficiary's bank or can issue an order to an intermediary bank. The receiving bank also has discretion concerning use of a funds transfer system. In some cases it may be reasonable to use either an automated clearing house system or a wire transfer system such as Fedwire or CHIPS. Normally, the receiving bank will follow the instruction of the sender in these matters, but in some cases it may be prudent for the bank not to follow instructions. The sender may have designated a funds transfer system to be used in carrying out the funds transfer, but it may not be feasible to use the designated system because of some impediment such as a computer breakdown which prevents prompt execution of the order. The receiving bank is permitted to use an alternate means of transmittal in a good faith effort to execute the order expeditiously. The same leeway is not given to the receiving bank if the sender designates an intermediary bank through which the funds transfer is to be routed. The sender's designation of that intermediary bank may mean that the beneficiary's bank is expecting to obtain a credit from that intermediary bank and may have relied on that anticipated credit. If the receiving bank uses another intermediary bank the expectations of the beneficiary's bank may not be realized. The receiving bank could choose to route the transfer to another intermediary bank and then to the designated intermediary bank if there was some reason such as a lack of a correspondent-bank relationship or a bilateral credit limitation, but the designated intermediary bank cannot be circumvented. To do so violates the sender's instructions.

3. The normal rule, under subsection (a)(1), is that the receiving bank, in executing a payment order, is required to issue a payment order that complies as to amount with that of the sender's order. In most cases the receiving bank issues an order equal to the amount of the sender's order and makes a separate charge for services and expenses in executing the sender's order. In some cases, particularly if it is an intermediary bank that is executing an order, charges are collected by deducting them from the amount of the payment order issued by the executing bank. If that is done, the amount of the payment order accepted by the beneficiary's bank will be slightly less than the amount of the originator's payment order. For example, Originator, in order to pay an obligation of $1,000,000 owed to Beneficiary, issues a payment order to Originator's Bank to pay $1,000,000 to the account of Beneficiary in Beneficiary's Bank. Originator's Bank issues a payment order to Intermediary Bank for $1,000,000 and debits Originator's account for $1,000,010. The extra $10 is the fee of Originator's Bank. Intermediary Bank executes the payment order of Originator's Bank by issuing a payment order to Beneficiary's Bank for $999,990, but under s 4A-402(c) is entitled to receive $1,000,000 from Originator's Bank. The $10 difference is the fee of Intermediary Bank. Beneficiary's Bank credits Beneficiary's account for $999,990. When Beneficiary's Bank accepts the payment order of Intermediary Bank the result is a payment of $999,990 from Originator to Beneficiary. Section 4A-406(a). If that payment discharges the $1,000,000 debt,

the effect is that Beneficiary has paid the charges of Intermediary Bank and Originator has paid the charges of Originator's Bank. Subsection (d) of Section 4A-302 allows Intermediary Bank to collect its charges by deducting them from the amount of the payment order, but only if instructed to do so by Originator's Bank. Originator's Bank is not authorized to give that instruction to Intermediary Bank unless Originator authorized the instruction. Thus, Originator can control how the charges of Originator's Bank and Intermediary Bank are to be paid. Subsection (d) does not apply to charges of Beneficiary's Bank to Beneficiary.

In the case discussed in the preceding paragraph the $10 charge is trivial in relation to the amount of the payment and it may not be important to Beneficiary how the charge is paid. But it may be very important if the $1,000,000 obligation represented the price of exercising a right such as an option favorable to Originator and unfavorable to Beneficiary. Beneficiary might well argue that it was entitled to receive $1,000,000. If the option was exercised shortly before its expiration date, the result could be loss of the option benefit because the required payment of $1,000,000 was not made before the option expired. Section 4A-406(c) allows Originator to preserve the option benefit. The amount received by Beneficiary is deemed to be $1,000,000 unless Beneficiary demands the $10 and Originator does not pay it.

§ 28:4A-303. Erroneous execution of payment order.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under § 28:4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under § 28:4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-304 and § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-303.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 4A-303 states the effect of erroneous execution of a payment order by the receiving bank. Under Section 4A-402(c) the sender of a payment order is obliged to pay the amount of the order to the receiving bank if the bank executes the order, but the obligation to pay is excused if the beneficiary's bank does not accept a payment order instructing payment to the beneficiary of the sender's order. If erroneous execution of the sender's order causes the wrong beneficiary to be paid, the sender is not required to pay. If erroneous execution causes the wrong amount to be paid the sender is not obliged to pay the receiving bank an amount in excess of the amount of the sender's order. Section 4A-303 takes precedence over Section 4A-402(c) and states the liability of the sender and the rights of the receiving bank in various cases of erroneous execution.

2. Subsections (a) and (b) deal with cases in which the receiving bank executes by issuing a payment order in the wrong amount. If Originator ordered Originator's Bank to pay $1,000,000 to the account of Beneficiary in Beneficiary's Bank, but Originator's Bank erroneously instructed Beneficiary's Bank to pay $2,000,000 to Beneficiary's account, subsection (a) applies. If Beneficiary's bank accepts the order of Originator's Bank, Beneficiary's Bank is entitled to receive $2,000,000 from Originator's Bank, but Originator's Bank is entitled to receive only $1,000,000 from Originator. Originator's Bank is entitled to recover the overpayment from Beneficiary to the extent allowed by the law governing mistake and restitution. Originator's Bank would normally have a right to recover the overpayment from Beneficiary, but in unusual cases the law of restitution might allow Beneficiary to keep all or part of the overpayment. For example, if Originator owed $2,000,000 to Beneficiary and Beneficiary received the extra $1,000,000 in good faith in discharge of the debt, Beneficiary may be allowed to keep it. In this case Originator's Bank has paid an obligation of Originator and under the law of restitution, which applies through Section 1-103, Originator's Bank would be subrogated to Beneficiary's rights against Originator on the obligation paid by Originator's Bank.

If Originator's Bank erroneously executed Originator's order by instructing Beneficiary's Bank to pay less than $1,000,000, subsection (b) applies. If Originator's Bank corrects its error by issuing another payment order to Beneficiary's Bank that results in payment of $1,000,000 to Beneficiary, Originator's Bank is entitled to payment of $1,000,000 from Originator. If the mistake is not corrected, Originator's Bank is entitled to payment from Originator only in the amount of the order issued by Originator's Bank.

3. Subsection (a) also applies to duplicate payment orders. Assume Originator's Bank properly executes Originator's $1,000,000 payment order and then by mistake issues a second $1,000,000 payment order in execution of Originator's order. If Beneficiary's Bank accepts both orders issued by Originator's Bank, Beneficiary's Bank is entitled to receive $2,000,000 from Originator's Bank but Originator's Bank is entitled to receive only $1,000,000 from Originator. The remedy of Originator's Bank is the same as that of a receiving bank that executes by issuing an order in an amount greater than the sender's order. It may recover the overpayment from Beneficiary to the extent allowed by the law governing mistake and restitution and in a proper case as stated in Comment 2 may have subrogation rights if it is not entitled to recover from Beneficiary.

4. Suppose Originator instructs Originator's Bank to pay $1,000,000 to Account #12345 in Beneficiary's Bank. Originator's Bank erroneously instructs Beneficiary's Bank to pay $1,000,000 to Account #12346 and Beneficiary's Bank accepted. Subsection (c) covers this case. Originator is not obliged to pay its payment order, but Originator's Bank is required to pay $1,000,000 to Beneficiary's Bank. The remedy of Originator's Bank is to recover $1,000,000 from the holder of Account #12346 that received payment by mistake. Recovery based on the law of mistake and restitution is described in Comment 2.

CASE NOTES

Unjust enrichment.

Construction company's retention of duplicate payment of $474,677, which bank mistakenly transferred to company on behalf of news agency that had hired company for remodeling project, was unjust, and thus company was unjustly enriched under District of Columbia law and bank was entitled to restitution; company received actual notice of bank's mistake, in form of agency's letter informing company that duplicate payment was in error, before it credited agency's account. Qatar Nat'l Bank v. Winmar, Inc., 650 F.Supp.2d 1, 2009 U.S. Dist. LEXIS 80605 (2009).

§ 28:4A-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in § 28:4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under § 28:4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-402.

Prior Codifications. — 1981 Ed., § 28:4A-304.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is identical in effect to Section 4A-204 which applies to unauthorized orders issued in the name of a customer of the receiving bank. The rationale is stated in Comment 2 to Section 4A-204.

§ 28:4A-305. Liability for late or improper execution or failure to execute payment order.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of § 28:4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c) of this section, additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of § 28:4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a) of this section, resulting from the improper execution. Except as provided in subsection (c) of this section, additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b) of this section, damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) of this section is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) of this section and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) of this section is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) of this section may not be varied by agreement.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-305.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) covers cases of delay in completion of a funds transfer resulting from an execution by a receiving bank in breach of Section 4A-302(a). The receiving bank is obliged to pay interest on the amount of the order for the period of the delay.

The rate of interest is stated in Section 4A-506. With respect to wire transfers (other than ACH transactions) within the United States, the expectation is that the funds transfer will be completed the same day. In those cases, the originator can reasonably expect that the originator's account will be debited on the same day as the beneficiary's account is credited. if the funds transfer is delayed, compensation can be paid either to the originator or to the beneficiary. The normal practice is to compensate the beneficiary's bank to allow that bank to compensate the beneficiary by back-valuing the payment by the number of days of delay.

Thus, the beneficiary is in the same position that it would have been in if the funds transfer had been completed on the same day.

Assume on Day 1, Originator's Bank issues its payment order to Intermediary Bank which is received on that day. Intermediary Bank does not execute that order until Day 2 when it issues an order to Beneficiary's Bank which is accepted on that day. Intermediary Bank complies with subsection (a) by paying one day's interest to Beneficiary's Bank for the account of Beneficiary.

2. Subsection (b) applies to cases of breach of Section 4A-302 involving more than mere delay. In those cases the bank is liable for damages for improper execution but they are limited to compensation for interest losses and incidental expenses of the sender resulting from the breach, the expenses of the sender in the funds transfer and attorney's fees. This subsection reflects the judgment that imposition of consequential damages on a bank for commission of an error is not justified.

The leading common law case on the subject of consequential damages is Evra Corp. v. Swiss Bank Corp., 673 F.2d 951 (7th Cir.1982), in which Swiss Bank, an intermediary bank, failed to execute a payment order. Because the beneficiary did not receive timely payment the originator lost a valuable ship charter. The lower court awarded the originator $2.1 million for lost profits even though the amount of the payment order was only $27,000. The Seventh Circuit reversed, in part on the basis of the common law rule of Hadley v. Baxendale that consequential damages may not be awarded unless the defendant is put on notice of the special circumstances giving rise to them. Swiss Bank may have known that the originator was paying the shipowner for the hire of a vessel but did not know that a favorable charter would be lost if the payment was delayed. "Electronic payments are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $27,000 payment

order it would face liability in excess of $2 million.“ 673 F.2d at 956.

If Evra means that consequential damages can be imposed if the culpable bank has notice of particular circumstances giving rise to the damages, it does not provide an acceptable solution to the problem of bank liability for consequential damages. In the typical case transmission of the payment order is made electronically. Personnel of the receiving bank that process payment orders are not the appropriate people to evaluate the risk of liability for consequential damages in relation to the price charged for the wire transfer service. Even if notice is received by higher level management personnel who could make an appropriate decision whether the risk is justified by the price, liability based on notice would require evaluation of payment orders on an individual basis. This kind of evaluation is inconsistent with the high-speed, low-price, mechanical nature of the processing system that characterizes wire transfers. Moreover, in Evra the culpable bank was an intermediary bank with which the originator did not deal. Notice to the originator's bank would not bind the intermediary bank, and it seems impractical for the originator's bank to convey notice of this kind to intermediary banks in the funds transfer. The success of the wholesale wire transfer industry has largely been based on its ability to effect payment at low cost and great speed. Both of the these essential aspects of the modern wire transfer system would be adversely affected by a rule that imposed on banks liability for consequential damages.

A banking industry amicus brief in Evra stated: "Whether banks can continue to make EFT services available on a widespread basis, by charging reasonable rates, depends on whether they can do so without incurring unlimited consequential risks. Certainly, no bank would handle for $3.25 a transaction entailing potential liability in the millions of dollars."

As the court in Evra also noted, the originator of the funds transfer is in the best position to evaluate the risk that a funds transfer will not be made on time and to manage that risk by issuing a payment order in time to allow monitoring of the transaction. The originator, by asking the beneficiary, can quickly determine if the funds transfer has been completed. If the originator has sent the payment order at a time that allows a reasonable margin for correcting error, no loss is likely to result if the transaction is monitored. The other published cases on this issue reach the Evra result. Central Coordinates, Inc. v. Morgan Guaranty Trust Co., 40 U.C.C. Rep. Serv. 1340 (N.Y.Sup.Ct.1985), and Gatoil (U.S.A.), Inc. v. Forest Hill State Bank, 1 U.C.C. Rep.Serv.2d 171 (D.Md.1986).

Subsection (c) allows the measure of damages in subsection (b) to be increased by an express written agreement of the receiving bank. An originator's bank might be willing to assume additional responsibilities and incur additional liability in exchange for a higher fee.

3. Subsection (d) governs cases in which a receiving bank has obligated itself by express agreement to accept payment orders of a sender. In the absence of such an agreement there is no obligation by a receiving bank to accept a payment order. Section 4A-212.

The measure of damages for breach of an agreement to accept a payment order is the same as that stated in subsection (b). As in the case of subsection (b), additional damages, including consequential damages, may be recovered to the extent stated in an express written agreement of the receiving bank.

4. Reasonable attorney's fees are recoverable only in cases in which damages are limited to statutory damages stated in subsection (a), (b) and (d). If additional damages are recoverable because provided for by an express written agreement, attorney's fees are not recoverable. The rationale is that there is no need for statutory attorney's fees in the latter case, because the parties have agreed to a measure of damages which may or may not provide for attorney's fees.

5. The effect of subsection (f) is to prevent reduction of a receiving bank's liability under Section 4A-305.

Part 4. Payment.

§ 28:4A-401. Payment date.

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-401.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

"Payment date" refers to the day the beneficiary's bank is to pay the beneficiary. The payment date may be expressed in various ways so long as it indicates the day the beneficiary is to receive payment. For example, in ACH transfers the payment date is the equivalent of "settlement date" or "effective date." Payment date applies to the payment order issued to the beneficiary's bank, but a payment order issued to a receiving bank other than the beneficiary's bank may also state a date for payment to the beneficiary. In the latter case, the statement of a payment date is to instruct the receiving bank concerning time of execution of the sender's order. Section 4A-301(b).

§ 28:4A-402. Obligation of sender to pay receiving bank.

(a) This section is subject to §§ 28:4A-205 and 28:4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) of this section and to § 28:4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in §§ 28:4A-204 and 28:4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) of this section and an intermediary bank is obliged to refund payment as stated in subsection (d) of this section but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in § 28:4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d) of this section.

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) of this section or to receive refund under subsection (d) of this section may not be varied by agreement.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-303, § 28:4A-304, § 28:4A-403, and § 28:4A-405.

Prior Codifications. — 1981 Ed., § 28:4A-402.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (b) states that the sender of a payment order to the beneficiary's bank must pay the order when the beneficiary's bank accepts the order. At that point the beneficiary's bank is obliged to pay the beneficiary. Section 4A-404(a). The last clause of subsection (b) covers a case of premature acceptance by the beneficiary's bank. In some funds transfers, notably automated clearing house transfers, a beneficiary's bank may receive a payment order with a payment date after the day the order is received. The beneficiary's bank might accept the order before the payment date by notifying the beneficiary of receipt of the order. Although the acceptance obliges the beneficiary's bank to pay the beneficiary, payment is not due until the payment date. The last clause of subsection (b) is consistent with that result. The beneficiary's bank is also not entitled to payment from the sender until the payment date.

2. Assume that Originator instructs Bank A to order immediate payment to the account of Beneficiary in Bank B. Execution of Originator's payment order by Bank A is acceptance under Section 4A-209(a). Under the second sentence of Section 4A-402(c) the acceptance creates an obligation of Originator to pay Bank A the amount of the order. The last clause of that sentence deals with attempted funds transfers that are not completed. In that event the obligation of the sender to pay its payment order is excused. Originator makes payment to Beneficiary when Bank B, the beneficiary's bank, accepts a payment order for the benefit of Beneficiary. Section 4A-406(a). If that acceptance by Bank B does not occur, the funds transfer has miscarried because Originator has not paid Beneficiary. Originator doesn't have to pay its payment order, and if it has already paid it is entitled to refund of the payment with interest. The rate of interest is stated in Section 4A-506. This "money-back guarantee" is an important protection of Originator. Originator is assured that it will not lose its money if something goes wrong in the transfer. For example, risk of loss resulting from payment to the wrong beneficiary is borne by some bank, not by Originator. The most likely reason for noncompletion is a failure to execute or an erroneous execution of a payment order by Bank A or an intermediary bank. Bank A may have issued its payment order to the wrong bank or it may have identified the wrong beneficiary in its order. The money-back guarantee is particularly important to Originator if noncompletion of the funds transfer is due to the fault of an intermediary bank rather than Bank A. In that case Bank A must refund payment to Originator, and Bank A has the burden of obtaining refund from the intermediary bank that it paid.

Subsection (c) can result in loss if an intermediary bank suspends payments. Suppose Originator instructs Bank A to pay to Beneficiary's account in Bank B and to use Bank C as an intermediary bank. Bank A executes Originator's order by issuing a payment order to Bank C. Bank A pays Bank C. Bank C fails to execute the order of Bank A and suspends payments. Under subsections (c) and (d), Originator is not obliged to pay Bank A and is entitled to refund from Bank A of any payment that it may have made. Bank A is entitled to a refund from Bank C, but Bank C is insolvent. Subsection (e) deals with this case. Bank A was required to issue its payment order to Bank C because Bank C was designated as an intermediary bank by Originator. Section 4A-302(a)(1). In this case Originator takes the risk of insolvency of Bank C. Under subsection (e), Bank A is entitled to payment from Originator and Originator is subrogated to the right of Bank A under subsection (d) to refund of payment from Bank C.

3. A payment order is not like a negotiable instrument on which the drawer or maker has liability. Acceptance of the order by the receiving bank creates an obligation of the sender to pay the receiving bank the amount of the order. That is the extent of the sender's liability to the receiving bank and no other person has any rights against the sender with respect to the sender's order.

§ 28:4A-403. Payment by sender to receiving bank.

(a) Payment of the sender's obligation under § 28:4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve Bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under § 28:4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a) of this section, the time when payment of the sender's obligation under §§ 28:4A-402(b) or 28:4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105 and § 28:4A-209.

Prior Codifications. — 1981 Ed., § 28:4A-403.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section defines when a sender pays the obligation stated in Section 4A-402. If a group of two or more banks engage in funds transfers with each other, the participating banks will sometimes be senders and sometimes receiving banks. With respect to payment orders other than Fedwires, the amounts of the various payment orders may be credited and debited to accounts of one bank with another or to a clearing house account of each bank and amounts owed and amounts due are netted. Settlement is made through a Federal Reserve Bank by charges to the Federal Reserve accounts of the net debtor banks and credits to the Federal Reserve accounts of the net creditor banks. In the case of Fedwires the sender's obligation is settled by a debit to the Federal Reserve account of the sender and a credit to the Federal Reserve account of the receiving bank at the time the receiving bank receives the payment order. Both of these cases are covered by subsection (a)(1). When the Federal Reserve settlement becomes final the obligation of the sender under Section 4A-402 is paid.

2. In some cases a bank does not settle an obligation owed to another bank through a Federal Reserve Bank. This is the case if one of the banks is a foreign bank without access to the Federal Reserve payment system. In this kind of case, payment is usually made by credits or debits to accounts of the two banks with each other or to accounts of the two banks in a third bank. Suppose Bank B has an account in Bank A. Bank A advises Bank B that its account in Bank A has been credited $1,000,000 and that the credit is immediately withdrawable. Bank A also instructs Bank B to pay $1,000,000 to the account of Beneficiary in Bank B. This case is covered by subsection (a)(2). Bank B may want to immediately withdraw this credit. For example, it might do so by instructing Bank A to debit the account and pay some third party. Payment by Bank A to Bank B of Bank A's payment order occurs when the withdrawal is made. Suppose Bank B does not withdraw the credit. Since Bank B is the beneficiary's bank, one of the effects of receipt of payment by Bank B is that acceptance of Bank A's payment order automatically occurs at the time of payment. Section 4A-209(b)(2). Acceptance means that Bank B is obliged to pay $1,000,000 to Beneficiary. Section 4A-404(a). Subsection (a)(2) of Section 4A-403 states that payment does not occur until midnight if the credit is not withdrawn. This allows Bank B an opportunity to reject the order if it does not have time to withdraw the credit to its account and it is not willing to incur the liability to Beneficiary before it has use of the funds represented by the credit.

3. Subsection (a)(3) applies to a case in which the sender (bank or nonbank) has a funded account in the receiving bank. If Sender has an account in Bank and issues a payment order to Bank, Bank can obtain payment from Sender by debiting the account of Sender, which pays its Section 4A-402 obligation to Bank when the debit is made.

4. Subsection (b) deals with multilateral settlements made through a funds transfer system and is based on the CHIPS settlement system. In a funds transfer system such as CHIPS, which allows the various banks that transmit payment orders over the system to settle obligations at the end of each day, settlement is not based on individual payment orders. Each bank using the system engages in funds transfers with many other banks using the system. Settlement for any participant is based on the net credit or debit position of that participant with all other banks using the system. Subsection (b) is designed to make clear that the obligations of any sender are paid when the net position of that sender is settled in accordance with the rules of the funds transfer system. This provision is intended to invalidate any argument, based on common-law principles, that multilateral netting is not valid because mutuality of obligation is not present. Subsection (b) dispenses with any mutuality of obligation requirements. Subsection (c) applies to cases in which two banks send payment orders to each other during the day and settle with each other at the end of the day or at the end of some other period. It is similar to subsection (b) in that it recognizes that a sender's obligation to pay a payment order is satisfied by a setoff. The obligations of each bank as sender to the other as receiving bank are obligations of the bank itself and not as representative of customers. These two sections are important in the case of insolvency of a bank. They make clear that liability under Section 4A-402 is based on the net position of the insolvent bank after setoff.

5. Subsection (d) relates to the uncommon case in which the sender doesn't have an account relationship with the receiving bank and doesn't settle through a Federal Reserve Bank. An example would be a customer that pays over the counter for a payment order that the customer issues to the receiving bank. Payment would normally be by cash, check or bank obligation. When payment occurs is determined by law outside Article 4A.

§ 28:4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(a) Subject to §§ 28:4A-211(e), 28:4A-405(d), and 28:4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) of this section may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) of this section may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rules before initiation of the funds transfer.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-405, § 28:4A-406, and § 28:4A-501.

Prior Codifications. — 1981 Ed., § 28:4A-404.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The first sentence of subsection (a) states the time when the obligation of the beneficiary's bank arises. The second and third sentences state when the beneficiary's bank must make funds available to the beneficiary. They also state the measure of damages for failure, after demand, to comply. Since the Expedited Funds Availability Act, 12 U.S.C. 4001 et seq., also governs funds availability in a funds transfer, the second and third sentences of subsection (a) may be subject to preemption by that Act.

2. Subsection (a) provides that the beneficiary of an accepted payment order may recover

consequential damages if the beneficiary's bank refuses to pay the order after demand by the beneficiary if the bank at that time had notice of the particular circumstances giving rise to the damages. Such damages are recoverable only to the extent the bank had "notice of the damages." The quoted phrase requires that the bank have notice of the general type or nature of the damages that will be suffered as a result of the refusal to pay and their general magnitude. There is no requirement that the bank have notice of the exact or even the approximate amount of the damages, but if the amount of damages is extraordinary the bank is entitled to notice of that fact. For example, in Evra Corp. v. Swiss Bank Corp., 673 F.2d 951 (7th Cir.1982), failure to complete a funds transfer of only $27,000 required to retain rights to a very favorable ship charter resulted in a claim for more than $2,000,000 of consequential damages. Since it is not reasonably foreseeable that a failure to make a relatively small payment will result in damages of this magnitude, notice is not sufficient if the beneficiary's bank has notice only that the $27,000 is necessary to retain rights on a ship charter. The bank is entitled to notice that an exceptional amount of damages will result as well. For example, there would be adequate notice if the bank had been made aware that damages of $1,000,000 or more might result.

3. Under the last clause of subsection (a) the beneficiary's bank is not liable for damages if its refusal to pay was "because of a reasonable doubt concerning the right of the beneficiary to payment." Normally there will not be any question about the right of the beneficiary to receive payment. Normally, the bank should be able to determine whether it has accepted the payment order and, if it has been accepted, the first sentence of subsection (a) states that the bank is obliged to pay. There may be uncommon cases, however, in which there is doubt whether acceptance occurred. For example, if acceptance is based on receipt of payment by the beneficiary's bank under Section 4A-403 (a)(1) or (2), there may be cases in which the bank is not certain that payment has been received. There may also be cases in which there is doubt about whether the person demanding payment is the person identified in the payment order as beneficiary of the order.

The last clause of subsection (a) does not apply to cases in which a funds transfer is being used to pay an obligation and a dispute arises between the originator and the beneficiary concerning whether the obligation is in fact owed. For example, the originator may try to prevent payment to the beneficiary by the beneficiary's bank by alleging that the beneficiary is not entitled to payment because of fraud against the originator or a breach of contract relating to the obligation. The fraud or breach of contract claim of the originator may be grounds for recovery by the originator from the beneficiary after the beneficiary is paid, but it does not affect the obligation of the beneficiary's bank to pay the beneficiary. Unless the payment order has been cancelled pursuant to Section 4A-211(c), there is no excuse for refusing to pay the beneficiary and, in a proper case, the refusal may result in consequential damages. Except in the case of a book transfer, in which the beneficiary's bank is also the originator's bank, the originator of a funds transfer cannot cancel a payment order to the beneficiary's bank, with or without the consent of that bank, because the originator is not the sender of that order. Thus, the beneficiary's bank may safely ignore any instruction by the originator to withhold payment to the beneficiary.

4. Subsection (b) states the duty of the beneficiary's bank to notify the beneficiary of receipt of the order. If acceptance occurs under Section 4A-209(b)(1) the beneficiary is normally notified. Thus, subsection (b) applies primarily to cases in which acceptance occurs under Section 4A-209(b)(2) or (3). Notice under subsection (b) is not required if the person entitled to the notice agrees or a funds transfer system rule provides that notice is not required and the beneficiary is given notice of the rule.

In ACH transactions the normal practice is not to give notice to the beneficiary unless notice is requested by the beneficiary. This practice can be continued by adoption of a funds transfer system rule. Subsection (a) is not subject to variation by agreement or by a funds transfer system rule.

§ 28:4A-405. Payment by beneficiary's bank to beneficiary.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under § 28:4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of

a payment order, the time when payment of the bank's obligation under § 28:4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e) of this section, if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under § 28:4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under § 28:4A-406, and (iv) subject to § 28:4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under § 28:4A-402(c) because the funds transfer has not been completed.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105, § 28:4A-209, § 28:4A-404, § 28:4A-406, and § 28:4A-501.

Prior Codifications. — 1981 Ed., § 28:4A-405.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section defines when the beneficiary's bank pays the beneficiary and when the obligation of the beneficiary's bank under Section 4A-404 to pay the beneficiary is satisfied. In almost all cases the bank will credit an account of the beneficiary when it receives a payment order. In the typical case the beneficiary is paid when the beneficiary is given notice of the right

to withdraw the credit. Subsection (a)(i). In some cases payment might be made to the beneficiary not by releasing funds to the beneficiary, but by applying the credit to a debt of the beneficiary. Subsection (a)(ii). In this case the beneficiary gets the benefit of the payment order because a debt of the beneficiary has been satisfied. The two principal cases in which payment will occur in this manner are setoff by the beneficiary's bank and payment of the proceeds of the payment order to a garnishing creditor of the beneficiary. These cases are discussed in Comment 2 to Section 4A-502.

2. If a beneficiary's bank releases funds to the beneficiary before it receives payment from the sender of the payment order, it assumes the risk that the sender may not pay the sender's order because of suspension of payments or other reason. Subsection (c).

As stated in Comment 5 to Section 4A-209, the beneficiary's bank can protect itself against this risk by delaying acceptance. But if the bank accepts the order it is obliged to pay the beneficiary. If the beneficiary's bank has given the beneficiary notice of the right to withdraw a credit made to the beneficiary's account, the beneficiary has received payment from the bank. Once payment has been made to the beneficiary with respect to an obligation incurred by the bank under Section 4A-404(a), the payment cannot be recovered by the beneficiary's bank unless subsection (d) or (e) applies. Thus, a right to withdraw a credit cannot be revoked if the right to withdraw constituted payment of the bank's obligation. This principle applies even if funds were released as a "loan" (see Comment 5 to Section 4A-209), or were released subject to a condition that they would be repaid in the event the bank does not receive payment from the sender of the payment order, or the beneficiary agreed to return the payment if the bank did not receive payment from the sender.

3. Subsection (c) is subject to an exception stated in subsection (d) which is intended to apply to automated clearing house transfers. ACH transfers are made in batches. A beneficiary's bank will normally accept, at the same time and as part of a single batch, payment orders with respect to many different originator's banks. Comment 2 to Section 4A-206. The custom in ACH transactions is to release funds to the beneficiary early on the payment date even though settlement to the beneficiary's bank does not occur until later in the day. The understanding is that payments to beneficiaries are provisional until the beneficiary's bank receives settlement. This practice is similar to what happens when a depositary bank releases funds with respect to a check forwarded for collection. If the check is dishonored the bank is entitled to recover the funds from the customer. ACH transfers are widely perceived as check substitutes. Section 4A-405(d) allows the funds transfer system to adopt a rule making payments to beneficiaries provisional. If such a rule is adopted, a beneficiary's bank that releases funds to the beneficiary will be able to recover the payment if it doesn't receive payment of the payment order that it accepted. There are two requirements with respect to the funds transfer system rule. The beneficiary, the beneficiary's bank and the originator's bank must all agree to be bound by the rule and the rule must require that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated. There is no requirement that the notice be given with respect to a particular funds transfer. Once notice of the provisional nature of the payment has been given, the notice is effective for all subsequent payments to or from the person to whom the notice was given. Subsection (d) provides only that the funds transfer system rule must require notice to the beneficiary and the originator. The beneficiary's bank will know what the rule requires, but it has no way of knowing whether the originator's bank complied with the rule. Subsection (d) does not require proof that the originator received notice. If the originator's bank failed to give the required notice and the originator suffered as a result, the appropriate remedy is an action by the originator against the originator's bank based on that failure. But the beneficiary's bank will not be able to get the benefit of subsection (d) unless the beneficiary had notice of the provisional nature of the payment because subsection (d) requires an agreement by the beneficiary to be bound by the rule. Implicit in an agreement to be bound by a rule that makes a payment provisional is a requirement that notice be given of what the rule provides. The notice can be part of the agreement or separately given. For example, notice can be given by providing a copy of the system's operating rules.

With respect to ACH transfers made through a Federal Reserve Bank acting as an intermediary bank, the Federal Reserve Bank is obliged under Section 4A-402(b) to pay a beneficiary's bank that accepts the payment order. Unlike Fedwire transfers, under current ACH practice a Federal Reserve Bank that processes a payment order does not obligate itself to pay if the originator's bank fails to pay the Federal Reserve Bank. It is assumed that the Federal Reserve will use its right of preemption which is recognized in Section 4A-107 to disclaim the Section 4A-402(b) obligation in ACH transactions if it decides to retain the provisional payment rule.

4. Subsection (e) is another exception to subsection (c). It refers to funds transfer systems having loss-sharing rules described in the subsection. CHIPS has proposed a rule that fits the

description. Under the CHIPS loss-sharing rule the CHIPS banks will have agreed to contribute funds to allow the system to settle for payment orders sent over the system during the day in the event that one or more banks are unable to meet their settlement obligations. Subsection (e) applies only if CHIPS fails to settle despite the loss-sharing rule. Since funds under the loss-sharing rule will be instantly available to CHIPS and will be in an amount sufficient to cover any failure that can be reasonably anticipated, it is extremely unlikely that CHIPS would ever fail to settle. Thus, subsection (e) addresses an event that should never occur. If that event were to occur, all payment orders made over the system would be cancelled under the CHIPS rule. Thus, no bank would receive settlement, whether or not a failed bank was involved in a particular funds transfer. Subsection (e) provides that each funds transfer in which there is a payment order with respect to which there is a settlement failure is unwound. Acceptance by the beneficiary's bank in each funds transfer is nullified. The consequences of nullification are that the beneficiary has no right to receive or retain payment by the beneficiary's bank, no payment is made by the originator to the beneficiary and each sender in the funds transfer is, subject to Section 4A-402(e), not obliged to pay its payment order and is entitled to refund under Section 4A-402(d) if it has already paid.

§ 28:4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

(a) Subject to §§ 28:4A-211(e), 28:4A-405(d), and 28:4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) of this section is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) of this section was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under § 28:4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b) of this section, if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4-213, § 28:4A-105, and § 28:4A-405.

Prior Codifications. — 1981 Ed., § 28:4A-406.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code—Letters of Credit Act of 1996," was introduced in Council and assigned Bill No. 11-574, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-498 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states the fundamental rule of Article 4A that payment by the originator to the beneficiary is accomplished by providing to the beneficiary the obligation of the beneficiary's bank to pay. Since this obligation arises when the beneficiary's bank accepts a payment order, the originator pays the beneficiary at the time of acceptance and in the amount of the payment order accepted.

2. In a large percentage of funds transfers, the transfer is made to pay an obligation of the originator. Subsection (a) states that the beneficiary is paid by the originator when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. When that happens the effect under subsection (b) is to substitute the obligation of the beneficiary's bank for the obligation of the originator. The effect is similar to that under Article 3 if a cashier's check payable to the beneficiary had been taken by the beneficiary. Normally, payment by funds transfer is sought by the beneficiary because it puts money into the hands of the beneficiary more quickly. As a practical matter the beneficiary and the originator will nearly always agree to the funds transfer in advance. Under subsection (b) acceptance by the beneficiary's bank will result in discharge of the obligation for which payment was made unless the beneficiary had made a contract with respect to the obligation which did not permit payment by the means used. Thus, if there is no contract of the beneficiary with respect to the means of payment of the obligation, acceptance by the beneficiary's bank of a payment order to the account of the beneficiary can result in discharge.

3. Suppose Beneficiary's contract stated that payment of an obligation owed by Originator was to be made by a cashier's check of Bank A. Instead Originator paid by a funds transfer to Beneficiary's account in Bank B. Bank B accepted a payment order for the benefit of Beneficiary by immediately notifying Beneficiary that the funds were available for withdrawal. Before Beneficiary had a reasonable opportunity to withdraw the funds Bank B suspended payments. Under the unless clause of subsection (b) Beneficiary is not required to accept the payment as discharging the obligation owed by Originator to Beneficiary if Beneficiary's contract means that Beneficiary was not required to accept payment by wire transfer. Beneficiary could refuse the funds transfer as payment of the obligation and could resort to rights under the underlying contract to enforce the obligation. The rationale is that Originator cannot impose the risk of Bank B's insolvency on Beneficiary if Beneficiary had specified another means of payment that did not entail that risk. If Beneficiary is required to accept Originator's payment, Beneficiary would suffer a loss that would not have occurred if payment had been made by a cashier's check on Bank A, and Bank A has not suspended payments. In this case Originator will have to pay twice. It is obliged to pay the amount of its payment order to the bank that accepted it and has to pay the obligation it owes to Beneficiary which has not been discharged. Under the last sentence of subsection (b) Originator is subrogated to Beneficiary's right to receive payment from Bank B under Section 4A-404(a).

4. Suppose Beneficiary's contract called for payment by a Fedwire transfer to Bank B, but the payment order accepted by Bank B was not a Fedwire transfer. Before the funds were withdrawn by Beneficiary, Bank B suspended payments. The sender of the payment order to Bank B paid the amount of the order to Bank B. In this case the payment by Originator did not comply with Beneficiary's contract, but the noncompliance did not result in a loss to Beneficiary as required by subsection (b)(iv). A Fedwire transfer avoids the risk of insolvency of the sender of the payment order to Bank B, but it does not affect the risk that Bank B will suspend payments before withdrawal of the funds by Beneficiary. Thus, the unless clause of subsection (b) is not applicable and the obligation owed to Beneficiary is discharged.

5. Charges of receiving banks in a funds transfer normally are nominal in relationship to the amount being paid by the originator to the beneficiary. Wire transfers are normally agreed to in advance and the parties may agree concerning how these charges are to be divided

between the parties. Subsection (c) states a rule that applies in the absence of agreement. In some funds transfers charges of banks that execute payment orders are collected by deducting the charges from the amount of the payment order issued by the bank, i.e. the bank issues a payment order that is slightly less than the amount of the payment order that is being executed.

The process is described in Comment 3 to Section 4A-302. The result in such a case is that the payment order accepted by the beneficiary's bank will be slightly less than the amount of the originator's order. Subsection (c) recognizes the principle that a beneficiary is entitled to full payment of a debt paid by wire transfer as a condition to discharge. On the other hand, Subsection (c) prevents a beneficiary from denying the originator the benefit of the payment by asserting that discharge did not occur because deduction of bank charges resulted in less than full payment. The typical case is one in which the payment is made to exercise a valuable right such as an option which is unfavorable to the beneficiary. Subsection (c) allows discharge notwithstanding the deduction unless the originator fails to reimburse the beneficiary for the deducted charges after demand by the beneficiary.

Part 5. Miscellaneous Provisions.

§ 28:4A-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "Funds-transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this article and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in §§ 28:4A-404(c), 28:4A-405(d), and 28:4A-507(c).

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:4A-105.

Prior Codifications. — 1981 Ed., § 28:4A-501.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is designed to give some flexibility to Article 4A. Funds transfer system rules govern rights and obligations between banks that use the system. They may cover a wide variety of matters such as form and content of payment orders, security procedures, cancellation rights and procedures, indemnity rights, compensation rules for delays in completion of a funds transfer, time and method of settlement, credit restrictions with respect to senders of payment orders and risk allocation with respect to suspension of payments by a participating bank. Funds transfer system rules can be very effective in supplementing the provisions of Article 4A and in filling gaps that may be present in Article 4A. To the extent they do not conflict with Article 4A there is no problem with respect to their effectiveness. In

that case they merely supplement Article 4A. Section 4A-501 goes further. It states that unless the contrary is stated, funds transfer system rules can override provisions of Article 4A. Thus, rights and obligations of a sender bank and a receiving bank with respect to each other can be different from that stated in Article 4A to the extent a funds transfer system rule applies. Since funds transfer system rules are defined as those governing the relationship between participating banks, a rule can have a direct effect only on participating banks. But a rule that affects the conduct of a participating bank may indirectly affect the rights of nonparticipants such as the originator or beneficiary of a funds transfer, and such a rule can be effective even though it may affect nonparticipants without their consent. For example, a rule might prevent execution of a payment order or might allow cancellation of a payment order with the result that a funds transfer is not completed or is delayed. But a rule purporting to define rights and obligations of nonparticipants in the system would not be effective to alter Article 4A rights because the rule is not within the definition of funds transfer system rule. Rights and obligations arising under Article 4A may also be varied by agreement of the affected parties, except to the extent Article 4A otherwise provides. Rights and obligations arising under Article 4A can also be changed by Federal Reserve regulations and operating circulars of Federal Reserve Banks. Section 4A-107.

2. Subsection (b)(ii) refers to ACH transfers. Whether an ACH transfer is made through an automated clearing house of a Federal Reserve Bank or through an automated clearing house of another association of banks, the rights and obligations of the originator's bank and the beneficiary's bank are governed by uniform rules adopted by various associations of banks in various parts of the nation. With respect to transfers in which a Federal Reserve Bank acts as intermediary bank these rules may be incorporated, in whole or in part, in operating circulars of the Federal Reserve Bank. Even if not so incorporated these rules can still be binding on the association banks. If a transfer is made through a Federal Reserve Bank, the rules are effective under subsection (b)(ii). If the transfer is not made through a Federal Reserve Bank, the association rules are effective under subsection (b)(i).

§ 28:4A-502. Creditor process served on receiving bank; setoff by beneficiary's bank.

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank

may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-502.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. When a receiving bank accepts a payment order, the bank normally receives payment from the sender by debiting an authorized account of the sender. In accepting the sender's order the bank may be relying on a credit balance in the account. If creditor process is served on the bank with respect to the account before the bank accepts the order but the bank employee responsible for the acceptance was not aware of the creditor process at the time the acceptance occurred, it is unjust to the bank to allow the creditor process to take the credit balance on which the bank may have relied. Subsection (b) allows the bank to obtain payment from the sender's account in this case. Under that provision, the balance in the sender's account to which the creditor process applies is deemed to be reduced by the amount of the payment order unless there was sufficient time for notice of the service of creditor process to be received by personnel of the bank responsible for the acceptance.

2. Subsection (c) deals with payment orders issued to the beneficiary's bank. The bank may credit the beneficiary's account when the order is received, but under Section 4A-404(a) the bank incurs no obligation to pay the beneficiary until the order is accepted pursuant to Section 4A-209(b). Thus, before acceptance, the credit to the beneficiary's account is provisional. But under Section 4A-209(b) acceptance occurs if the beneficiary's bank pays the beneficiary pursuant to Section 4A-405(a). Under that provision, payment occurs if the credit to the beneficiary's account is applied to a debt of the beneficiary. Subsection (c)(1) allows the bank to credit the beneficiary's account with respect to a payment order and to accept the order by setting off the credit against an obligation owed to the bank or applying the credit to creditor process with respect to the account.

Suppose a beneficiary's bank receives a payment order for the benefit of a customer. Before the bank accepts the order, the bank learns that creditor process has been served on the bank with respect to the customer's account. Normally there is no reason for a beneficiary's bank to reject a payment order, but if the beneficiary's account is garnished, the bank may be faced with a difficult choice. If it rejects the order, the garnishing creditor's potential recovery of funds of the beneficiary is frustrated. It may be faced with a claim by the creditor that the rejection was a wrong to the creditor. If the bank accepts the order, the effect is to allow the creditor to seize funds of its customer, the beneficiary. Subsection (c)(3) gives the bank no choice in this case. It provides that it may not favor its customer over the creditor by rejecting the order. The beneficiary's bank may rightfully reject only if there is an independent basis for rejection.

3. Subsection (c)(2) is similar to subsection (b). Normally the beneficiary's bank will release funds to the beneficiary shortly after acceptance or it will accept by releasing funds. Since the bank is bound by a garnishment order served before funds are released to the beneficiary, the bank might suffer a loss if funds were released without knowledge that a garnishment order had been served. Subsection (c)(2) protects the bank if it did not have adequate notice of the garnishment when the funds were released.

4. A creditor may want to reach funds involved in a funds transfer. The creditor may try to do so by serving process on the originator's bank, an intermediary bank or the beneficiary's bank. The purpose of subsection (d) is to guide the creditor and the court as to the proper method of reaching the funds involved in a funds transfer. A creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated, but that levy is subject to the limitations stated in subsection (b). The creditor of the originator cannot reach any other funds because no property of the originator is being

transferred. A creditor of the beneficiary cannot levy on property of the originator and until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach. A creditor of the beneficiary that wants to reach the funds to be received by the beneficiary must serve creditor process on the beneficiary's bank to reach the obligation of the beneficiary's bank to pay the beneficiary which arises upon acceptance by the beneficiary's bank under Section 4A-404(a).

5. "Creditor process" is defined in subsection (a) to cover a variety of devices by which a creditor of the holder of a bank account or a claimant to a bank account can seize the account. Procedure and nomenclature varies widely from state to state. The term used in Section 4A-502 is a generic term.

§ 28:4A-503. Injunction or restraining order with respect to funds transfer.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-503.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is related to Section 4A-502(d) and to Comment 4 to Section 4A-502. It is designed to prevent interruption of a funds transfer after it has been set in motion. The initiation of a funds transfer can be prevented by enjoining the originator or the originator's bank from issuing a payment order. After the funds transfer is completed by acceptance of a payment order by the beneficiary's bank, that bank can be enjoined from releasing funds to the beneficiary or the beneficiary can be enjoined from withdrawing the funds. No other injunction is permitted. In particular, intermediary banks are protected, and injunctions against the originator and the originator's bank are limited to issuance of a payment order. Except for the beneficiary's bank, nobody can be enjoined from paying a payment order, and no receiving bank can be enjoined from receiving payment from the sender of the order that it accepted.

§ 28:4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.

(a) If a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-504.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) concerns priority among various obligations that are to be paid from the same account. A customer may have written checks on its account with the receiving bank and may have issued one or more payment orders payable from the same account.

If the account balance is not sufficient to cover all of the checks and payment orders, some checks may be dishonored and some payment orders may not be accepted. Although there is no concept of wrongful dishonor of a payment order in Article 4A in the absence of an agreement to honor by the receiving bank, some rights and obligations may depend on the amount in the customer's account. Section 4A-209(b)(3) and Section 4A-210(b). Whether dishonor of a check is wrongful also may depend upon the balance in the customer's account. Under subsection (a), the bank is not required to consider the competing items and payment orders in any particular order. Rather it may charge the customer's account for the various items and orders in any order. Suppose there is $12,000 in the customer's account. If a check for $5,000 is presented for payment and the bank receives a $10,000 payment order from the customer, the bank could dishonor the check and accept the payment order. Dishonor of the check is not wrongful because the account balance was less than the amount of the check after the bank charged the account $10,000 on account of the payment order. Or, the bank could pay the check and not execute the payment order because the amount of the order is not covered by the balance in the account.

2. Subsection (b) follows Section 4-208(b) in using the first-in-first-out rule for determining the order in which credits to an account are withdrawn.

§ 28:4A-505. Preclusion of objection to debit of customer's account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-505.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is in the nature of a statute of repose for objecting to debits made to the customer's account. A receiving bank that executes payment orders of a customer may have received payment from the customer by debiting the customer's account with respect to a payment order that the customer was not required to pay. For example, the payment order may not have been authorized or verified pursuant to Section 4A-202 or the funds transfer may not have been completed. In either case the receiving bank is obliged to refund the payment to the customer and this obligation to refund payment cannot be varied by agreement. Section 4A-204 and Section 4A-402. Refund may also be required if the receiving bank is not entitled to payment from the customer because the bank erroneously executed a payment order. Section 4A-303. A similar analysis applies to that case. Section 4A-402(d) and (f) require refund and the obligation to refund may not be varied by agreement. Under 4A-505, however, the obligation to refund may not be asserted by the customer if the customer has not objected to the

debiting of the account within one year after the customer received notification of the debit.

§ 28:4A-506. Rate of interest.

(a) If, under this article, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a) of this section, the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rate published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by 360. The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Prior Codifications. — 1981 Ed., § 28:4A-506.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. A receiving bank is required to pay interest on the amount of a payment order received by the bank in a number of situations. Sometimes the interest is payable to the sender and in other cases it is payable to either the originator or the beneficiary of the funds transfer. The relevant provisions are Section 4A-204(a), Section 4A-209(b)(3), Section 4A-210(b), Section 4A-305(a), Section 4A-402(d) and Section 4A-404(b). The rate of interest may be governed by a funds transfer system rule or by agreement as stated in subsection (a). If subsection (a) doesn't apply, the rate is determined under subsection (b). Subsection (b) is illustrated by the following example. A bank is obliged to pay interest on $1,000,000 for three days, July 3, July 4, and July 5. The published Fed Funds rate is .082 for July 3 and .081 for July 5. There is no published rate for July 4 because that day is not a banking day. The rate for July 3 applies to July 4. The applicable Fed Funds rate is .08167 (the average of .082, .082, and. 081) divided by 360 which equals .0002268. The amount of interest payable is $1,000,000 X .0002268 X 3 = $680.40.

2. In some cases, interest is payable in spite of the fact that there is no fault by the receiving bank. The last sentence of subsection (b) applies to those cases. For example, a funds transfer might not be completed because the beneficiary's bank rejected the payment order issued to it by the originator's bank or an intermediary bank. Section 4A-402(c) provides that the originator is not obliged to pay its payment order and Section 4A-402(d) provides that the originator's bank must refund any payment received plus interest. The requirement to pay interest in this case is not based on fault by the originator's bank. Rather, it is based on restitution. Since the originator's bank had the use of the originator's money, it is required to pay the originator for the value of that use. The value of that use is not determined by multiplying the interest rate by the

refundable amount because the originator's bank is required to deposit with the Federal Reserve a percentage of the bank's deposits as a reserve requirement. Since that deposit does not bear interest, the bank had use of the refundable amount reduced by a percentage equal to the reserve requirement. If the reserve requirement is 12%, the amount of interest payable by the bank under the formula stated in subsection (b) is reduced by 12%.

§ 28:4A-507. Choice of law.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) of this section applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) of this section have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) of this section and a choice-of-law rule under subsection (c) of this section, the agreement under subsection (b) of this section prevails.

(e) If a funds transfer is made by use of more than one funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

(Apr. 30, 1992, D.C. Law 9-95, § 2(c), 39 DCR 1595.)

Section references. — This section is referenced in § 28:1-301 and § 28:4A-501.

Prior Codifications. — 1981 Ed., § 28:4A-507.

Legislative history of Law 9-95. — For legislative history of D.C. Law 9-95, see Historical and Statutory Notes following § 28:4A-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Funds transfers are typically interstate or international in character. If part of a funds transfer is governed by Article 4A and another part is governed by other law, the rights and obligations of parties to the funds transfer may be unclear because there is no clear consensus in various jurisdictions concerning the juridical nature of the transaction. Unless all of a funds transfer is governed by a single law it may be very difficult to predict the result if something goes wrong in the transfer. Section 4A-507 deals with this problem. Subsection (b) allows parties to a funds transfer to make a choice-of-law agreement. Subsection (c) allows a funds transfer system to select the law of a particular jurisdiction to govern funds transfers carried out by means of the system. Subsection (a) states residual rules if no choice of law has occurred under subsection (b) or subsection (c).

2. Subsection (a) deals with three sets of relationships. Rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located. If the receiving bank is the beneficiary's bank the rights and obligations of the beneficiary are also governed by the law of the jurisdiction in which the receiving bank is located. Suppose Originator, located in Canada, sends a payment order to Originator's Bank located in a state in which Article 4A has been enacted. The order is for payment to an account of Beneficiary in a bank in England. Under subsection (a)(1), the rights and obligations of Originator and Originator's Bank toward each other are governed by Article 4A if an action is brought in a court in the Article 4A state. If an action is brought in a Canadian court, the conflict of laws issue will be determined by Canadian law which might or might not apply the law of the state in which Originator's Bank is located. If that law is applied, the execution of Originator's order will be governed by Article 4A, but with respect to the payment order of Originator's Bank to the English bank, Article 4A may or may not be applied with respect to the rights and obligations between the two banks. The result may depend upon whether action is brought in a court in the state in which Originator's Bank is located or in an English court. Article 4A is binding only on a court in a state that enacts it. It can have extraterritorial effect only to the extent courts of another jurisdiction are willing to apply it. Subsection (c) also bears on the issues discussed in this Comment.

Under Section 4A-406 payment by the originator to the beneficiary of the funds transfer occurs when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. A jurisdiction in which Article 4A is not in effect may follow a different rule or it may not have a clear rule. Under Section 4A-507(a)(3) the issue is governed by the law of the jurisdiction in which the beneficiary's bank is located. Since the payment to the beneficiary is made through the beneficiary's bank it is reasonable that the issue of when payment occurs be governed by the law of the jurisdiction in which the bank is located. Since it is difficult in many cases to determine where a beneficiary is located, the location of the beneficiary's bank provides a more certain rule.

3. Subsection (b) deals with choice-of-law agreements and it gives maximum freedom of choice. Since the law of funds transfers is not highly developed in the case law there may be a strong incentive to choose the law of a jurisdiction in which Article 4A is in effect because it provides a greater degree of certainly with respect to the rights of various parties. With respect to commercial transactions, it is often said that "[u]niformity and predictability based upon commercial convenience are the prime considerations in making the choice of governing law ...." R. Leflar, American Conflicts Law,s 185 (1977). Subsection (b) is derived in part from recently enacted choice-of-law rules in the States of New York and California. N.Y. Gen. Obligations Law 5-1401 (McKinney's 1989 Supp.) and California Civil Code s 1646.5. This broad endorsement of freedom of contract is an enhancement of the approach taken by Restatement (Second) of Conflict of Laws s 187(b) (1971). The Restatement recognizes the basic right of freedom of contract, but the freedom granted the parties may be more limited than the freedom granted here. Under the formulation of the Restatement, if there is no substantial relationship to the jurisdiction whose law is selected and there is no "other" reasonable basis for the parties' choice, then the selection of the parties need not be honored by a court. Further, if the choice is violative of a fundamental policy of a state which has a materially greater interest than the chosen state, the selection could be disregarded by a court. Those limitations are not found in subsection (b).

4. Subsection (c) may be the most important provision in regard to creating uniformity of law in funds transfers. Most rights stated in

Article 4A regard parties who are in privity of contract such as originator and beneficiary, sender and receiving bank, and beneficiary's bank and beneficiary. Since they are in privity they can make a choice of law by agreement. But that is not always the case. For example, an intermediary bank that improperly executes a payment order is not in privity with either the originator or the beneficiary. The ability of a funds transfer system to make a choice of law by rule is a convenient way of dispensing with individual agreements and to cover cases in which agreements are not feasible. It is probable that funds transfer systems will adopt a governing law to increase the certainty of commercial transactions that are effected over such systems. A system rule might adopt the law of an Article 4A state to govern transfers on the system in order to provide a consistent, unitary, law governing all transfers made on the system. To the extent such system rules develop, individual choice-of-law agreements become unnecessary.

Subsection (c) has broad application. A system choice of law applies not only to rights and obligations between banks that use the system, but may also apply to other parties to the funds transfer so long as some part of the transfer was carried out over the system. The originator and any other sender or receiving bank in the funds transfer is bound if at the time it issues or accepts a payment order it had notice that the funds transfer involved use of the system and that the system chose the law of a particular jurisdiction. Under Section 4A-107, the Federal Reserve by regulation could make a similar choice of law to govern funds transfers carried out by use of Federal Reserve Banks. Subsection (d) is a limitation on subsection (c). If parties have made a choice-of-law agreement that conflicts with a choice of law made under subsection (c), the agreement prevails.

5. Subsection (e) addresses the case in which a funds transfer involves more than one funds transfer system and the systems adopt conflicting choice-of-law rules. The rule that has the most significant relationship to the matter at issue prevails. For example, each system should be able to make a choice of law governing payment orders transmitted over that system without regard to a choice of law made by another system.

ARTICLE 5. LETTERS OF CREDIT.

§ 28:5-101. Indemnities.

This article may be cited as "Uniform Commercial Code—Letters of Credit".

(Dec. 30, 1963, 77 Stat. 708, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923; Apr. 9, 1997, D.C. Law 11-255, § 27(tt), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28:5-101.

1973 Ed., § 28:5-101.

Legislative history of Law 11-238. — Law 11-238, the "Uniform Commercial Code—Letters of Credit Act of 1996," was introduced in Council and assigned Bill No. 11-574, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-498 and transmitted to both Houses of Congress for its review. D.C. Law 11-238 became effective on April 9, 1997.

Legislative history of Law 11-255. — Law 11-255; the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

The Official Comment to the original Section 5-101 was a remarkably brief inaugural address. Noting that letters of credit had not been the subject of statutory enactment and that the law concerning them had been developed in the cases, the Comment stated that Article 5 was intended "within its limited scope" to set an independent theoretical frame for the further development of letters of credit. That statement addressed accurately conditions as they existed when the statement was made, nearly half a century ago. Since Article 5 was originally drafted, the use of letters of credit has expanded and developed, and the case law concerning these developments is, in some respects, discordant.

Revision of Article 5 therefore has required reappraisal both of the statutory goals and of the extent to which particular statutory provisions further or adversely affect achievement of those goals.

The statutory goal of Article 5 was originally stated to be: (1) to set a substantive theoretical frame that describes the function and legal nature of letters of credit; and (2) to preserve procedural flexibility in order to accommodate further development of the efficient use of letters of credit. A letter of credit is an idiosyncratic form of undertaking that supports performance of an obligation incurred in a separate financial, mercantile, or other transaction or arrangement. The objectives of the original and revised Article 5 are best achieved (1) by defining the peculiar characteristics of a letter of credit that distinguish it and the legal consequences of its use from other forms of assurance such as secondary guarantees, performance bonds, and insurance policies, and from ordinary contracts, fiduciary engagements, and escrow arrangements; and (2) by preserving flexibility through variation by agreement in order to respond to and accommodate developments in custom and usage that are not inconsistent with the essential defini-

tions and substantive mandates of the statute. No statute can, however, prescribe the manner in which such substantive rights and duties are to be enforced or imposed without risking stultification of wholesome developments in the letter of credit mechanism. Letter of credit law should remain responsive to commercial reality and in particular to the customs and expectations of the international banking and mercantile community. Courts should read the terms of this article in a manner consistent with these customs and expectations.

The subject matter in Article 5, letters of credit, may also be governed by an international convention that is now being drafted by UNCITRAL, the draft Convention on Independent Guarantees and Standby Letters of Credit. The Uniform Customs and Practice is an international body of trade practice that is commonly adopted by international and domestic letters of credit and as such is the "law of the transaction" by agreement of the parties. Article 5 is consistent with and was influenced by the rules in the existing version of the UCP. In addition to the UCP and the international convention, other bodies of law apply to letters of credit. For example, the federal bankruptcy law applies to letters of credit with respect to applicants and beneficiaries that are in bankruptcy; regulations of the Federal Reserve Board and the Comptroller of the Currency lay out requirements for banks that issue letters of credit and describe how letters of credit are to be treated for calculating asset risk and for the purpose of loan limitations. In addition there is an array of anti-boycott and other similar laws that may affect the issuance and performance of letters of credit. All of these laws are beyond the scope of Article 5, but in certain circumstances they will override Article 5.

CASE NOTES

Analysis

Demand for payment.
Duty of confirming bank.
In general.

Demand for payment.

Bank was not required to honor demand for payment under letter of credit (LOC) when beneficiary tendered photocopy of promissory note instead of original note as required by terms of LOC, despite beneficiary's contention that he strictly complied in that underlying credit transaction involved nonrecourse promissory note providing no more than a schedule of payments; unqualified nature of issuer's duty to pay upon satisfaction of LOC's terms relieved it of any duty to consult legal counsel about recourse versus nonrecourse negotiable instruments in assessing its risk of double presentment or of rebuff by customer in demanding reimbursement after accepting substitute for original note. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Beneficiary did not strictly comply with letter of credit (LOC) securing promissory note, which expressly required that demand for payment be accompanied by original of note, where note tendered to bank was photocopy that was signed by borrower a second time eight years after original execution. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Duty of confirming bank.

Bank which agreed to serve as confirming bank in United States as to international letter of credit with respect to transaction whereby Portuguese corporations purchased computer controlled production system to be delivered in Portugal owed no duty to Portuguese corporations as account party under Uniform Commercial Code (U.C.C.); confirming bank's only customer was issuing bank and only duty owed by confirming bank was to its customer, the issuing bank. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

Under Uniform Commercial Code (U.C.C.), confirming bank owes duty only to its customer, the issuing bank, and not to the issuing bank's customer, the account party. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

In general.

Unique feature of letter of credit transaction is that it deals in documents and is wholly independent of underlying transaction in goods or credit. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Even under strict compliance standard for letters of credit, variance between documents specified and documents submitted with demand for payment may be put aside if there is no possibility that documents could mislead paying bank to its detriment, but court must truly be able to say that variance was "de minimis" to justify departure from strict compliance rule. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

§ 28:5-102. Definitions.

(a) For the purposes of this article, the term:

(1) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term "applicant" includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term "beneficiary" includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in § 28:5-108(e), and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) "Good faith" means honesty in fact in the conduct or transaction concerned.

(8) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, honor occurs

(A) Upon payment;

(B) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(C) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.

(10) "Letter of credit" means a definite undertaking that satisfies the requirements of § 28:5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.

(12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(b) Definitions in other articles applying to this article and the sections in which they appear are:

"Accept" or "Acceptance."	§ 28:3-409
"Value."	§ 28:3-303, § 28:4-211

(c) Article 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 709, Pub. L. 88-243, § 1; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-103, § 28:5-108, and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:5-102.
1973 Ed., § 28:5-102.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Since no one can be a confirmer unless that person is a nominated person as defined in Section 5-102(a)(11), those who agree to "confirm" without the designation or authorization of the issuer are not confirmers under Article 5. Nonetheless, the undertakings to the beneficiary of such persons may be enforceable by the beneficiary as letters of credit issued by the "confirmer" for its own account or as guarantees or contracts outside of Article 5.

2. The definition of "document" contemplates and facilitates the growing recognition of electronic and other nonpaper media as "documents," however, for the time being, data in those media constitute documents only in certain circumstances. For example, a facsimile received by an issuer would be a document only if the letter of credit explicitly permitted it, if the standard practice authorized it and the letter did not prohibit it, or the agreement of the issuer and beneficiary permitted it. The fact that data transmitted in a nonpaper (unwritten) medium can be recorded on paper by a recipient's computer printer, facsimile machine, or the like does not under current practice render the data so transmitted a "document." A facsimile or S.W.I.F.T. message received directly by the issuer is in an electronic medium when it crosses the boundary of the issuer's place of business. One wishing to make a presentation by facsimile (an electronic medium) will have to procure the explicit agreement of the issuer (assuming that the standard practice does not authorize it). Where electronic transmissions are authorized neither by the letter of credit nor by the practice, the beneficiary may transmit the data electronically to its agent who may be able to put it in written form and make a conforming presentation.

3. "Good faith" continues in revised Article 5 to be defined as "honesty in fact." "Observance of reasonable standards of fair dealing" has not been added to the definition. The narrower definition of "honesty in fact" reinforces the "independence principle" in the treatment of "fraud," "strict compliance," "preclusion," and other tests affecting the performance of obligations that are unique to letters of credit. This narrower definition—which does not include "fair dealing"—is appropriate to the decision to honor or dishonor a presentation of documents specified in a letter of credit. The narrower

definition is also appropriate for other parts of revised Article 5 where greater certainty of obligations is necessary and is consistent with the goals of speed and low cost. It is important that U.S. letters of credit have continuing vitality and competitiveness in international transactions.

For example, it would be inconsistent with the "independence" principle if any of the following occurred: (i) the beneficiary's failure to adhere to the standard of "fair dealing" in the underlying transaction or otherwise in presenting documents were to provide applicants and issuers with an "unfairness" defense to dishonor even when the documents complied with the terms of the letter of credit; (ii) the issuer's obligation to honor in "strict compliance in accordance with standard practice" were changed to "reasonable compliance" by use of the "fair dealing" standard, or (iii) the preclusion against the issuer (Section 5-108(d)) were modified under the "fair dealing" standard to enable the issuer later to raise additional deficiencies in the presentation. The rights and obligations arising from presentation, honor, dishonor and reimbursement, are independent and strict, and thus "honesty in fact" is an appropriate standard.

The contract between the applicant and beneficiary is not governed by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts. "Good faith" in that contract is defined by other law, such as Section 2-103(1)(b) or Restatement of Contracts 2d, s 205, which incorporate the principle of "fair dealing" in most cases, or a State's common law or other statutory provisions that may apply to that contract.

The contract between the applicant and the issuer (sometimes called the "reimbursement" agreement) is governed in part by this article (e.g., Sections 5-108(i), 5-111(b), and 5-103(c)) and partly by other law (e.g., the general law of contracts). The definition of good faith in Section 5-102(a)(7) applies only to the extent that the reimbursement contract is governed by provisions in this article; for other purposes good faith is defined by other law.

4. Payment and acceptance are familiar modes of honor. A third mode of honor, incurring an unconditional obligation, has legal effects similar to an acceptance of a time draft but does not technically constitute an acceptance. The practice of making letters of credit available by "deferred payment undertaking" as now provided in UCP 500 has grown up in other countries and spread to the United States. The definition of "honor" will accommodate that practice.

5. The exclusion of consumers from the definition of "issuer" is to keep creditors from using a letter of credit in consumer transactions in which the consumer might be made the issuer and the creditor would be the beneficiary. If that transaction were recognized under Article 5, the effect would be to leave the consumer without defenses against the creditor. That outcome would violate the policy behind the Federal Trade Commission Rule in 16 CFR Part 433. In a consumer transaction, an individual cannot be an issuer where that person would otherwise be either the principal debtor or a guarantor.

6. The label on a document is not conclusive; certain documents labelled "guarantees" in accordance with European (and occasionally, American) practice are letters of credit. On the other hand, even documents that are labelled "letter of credit" may not constitute letters of credit under the definition in Section 5-102(a). When a document labelled a letter of credit requires the issuer to pay not upon the presentation of documents, but upon the determination of an extrinsic fact such as applicant's failure to perform a construction contract, and where that condition appears on its face to be fundamental and would, if ignored, leave no obligation to the issuer under the document labelled letter of credit, the issuer's undertaking is not a letter of credit.

It is probably some form of suretyship or other contractual arrangement and may be enforceable as such. See Sections 5-102(a)(10) and 5-103(d). Therefore, undertakings whose fundamental term requires an issuer to look beyond documents and beyond conventional reference to the clock, calendar, and practices concerning the form of various documents are not governed by Article 5. Although Section 5-108(g) recognizes that certain nondocumentary conditions can be included in a letter of credit without denying the undertaking the status of letter of credit, that section does not apply to cases where the nondocumentary condition is fundamental to the issuer's obligation. The rules in Sections 5-102(a)(10), 5-103(d), and 5-108(g) approve the conclusion in Wichita Eagle & Beacon Publishing Co. v. Pacific Nat. Bank, 493 F.2d 1285 (9th Cir.1974).

The adjective "definite" is taken from the UCP. It approves cases that deny letter of credit status to documents that are unduly vague or incomplete. See, e.g., Transparent Products Corp. v. Paysaver Credit Union, 864 F.2d 60 (7th Cir.1988). Note, however, that no particular phrase or label is necessary to establish a letter of credit. It is sufficient if the undertaking of the issuer shows that it is intended to be a letter of credit. In most cases the parties' intention will be indicated by a label on the undertaking itself indicating that it is a "letter of credit," but no such language is necessary.

A financial institution may be both the issuer and the applicant or the issuer and the beneficiary. Such letters are sometimes issued by a

bank in support of the bank's own lease obligations or on behalf of one of its divisions as an applicant or to one of its divisions as beneficiary, such as an overseas branch. Because wide use of letters of credit in which the issuer and the applicant or the issuer and the beneficiary are the same would endanger the unique status of letters of credit, only financial institutions are authorized to issue them.

In almost all cases the ultimate performance of the issuer under a letter of credit is the payment of money. In rare cases the issuer's obligation is to deliver stock certificates or the like. The definition of letter of credit in Section 5-102(a)(10) contemplates those cases.

7. Under the UCP any bank is a nominated bank where the letter of credit is "freely negotiable." A letter of credit might also nominate by the following: "We hereby engage with the drawer, indorsers, and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same will be duly honored on due presentation" or "available with any bank by negotiation." A restricted negotiation credit might be "available with x bank by negotiation" or the like.

Several legal consequences may attach to the status of nominated person. First, when the issuer nominates a person, it is authorizing that person to pay or give value and is authorizing the beneficiary to make presentation to that person. Unless the letter of credit provides otherwise, the beneficiary need not present the documents to the issuer before the letter of credit expires; it need only present those documents to the nominated person. Secondly, a nominated person that gives value in good faith has a right to payment from the issuer despite fraud. Section 5-109(a)(1).

8. A "record" must be in or capable of being converted to a perceivable form. For example, an electronic message recorded in a computer memory that could be printed from that memory could constitute a record. Similarly, a tape recording of an oral conversation could be a record.

9. Absent a specific agreement to the contrary, documents of a beneficiary delivered to an issuer or nominated person are considered to be presented under the letter of credit to which they refer, and any payment or value given for them is considered to be made under that letter of credit. As the court held in Alaska Textile Co. v. Chase Manhattan Bank, N.A., 982 F.2d 813, 820 (2d Cir.1992), it takes a "significant showing" to make the presentation of a beneficiary's documents for "collection only" or otherwise outside letter of credit law and practice.

10. Although a successor of a beneficiary is one who succeeds "by operation of law," some of the successions contemplated by Section 5-102(a)(15) will have resulted from voluntary action of the beneficiary such as merger of a corporation. Any merger makes the successor corporation the "successor of a beneficiary" even though the transfer occurs partly by operation of law and partly by the voluntary action of the parties. The definition excludes certain transfers, where no part of the transfer is "by operation of law"—such as the sale of assets by one company to another.

11. "Draft" in Article 5 does not have the same meaning it has in Article 3. For example, a document may be a draft under Article 5 even though it would not be a negotiable instrument, and therefore would not qualify as a draft under Section 3-104(e).

CASE NOTES

ANALYSIS

Choice of law.

Contract between seller and intermediate buyer of machinery for resale to Iraqi agency was governed by law of Missouri as place where contract was made and was to be performed. Engel Industries, Inc. v. First American Bank, N.A., 798 F. Supp. 9, 1992 U.S. Dist. LEXIS 7724 (1992).

In general.

Uniform Commercial Code (U.C.C.) governed transaction whereby confirming bank honored international letter of credit by allegedly negligent acceptance of nonconforming documents and application of common-law tort principles would be contrary to goals and policies of U.C.C.; to broaden confirming party's duty as defined by U.C.C. to include account party, party with whom it had never dealt, would discourage rather than encourage use of letter of credit device. D.C. Code 1981, § 28:5-102(3). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

§ 28:5-103. Scope.

(a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this article.

(c) With the exception of this subsection, subsections (a) and (d) of this section, §§ 28:5-102(a)(9) and (10), 28:5-106(d), and 28:5-114(d), and except to the extent prohibited in §§ 28:1-302 and 28:5-117(d), the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

(Dec. 30, 1963, 77 Stat. 708, Pub. L. 88-243, § 1; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923; Apr. 27, 2013, D.C. Law 19-299, § 8, 60 DCR 2634.)

Section references. — This section is referenced in § 28:5-116.

Prior Codifications. — 1981 Ed., § 28:5-103.

1973 Ed., § 28:5-103.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "28:1-302" for "28:1-102(3)" in the first sentence of (c).

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013. Subtitle

UNIFORM COMMERCIAL CODE COMMENT

1. Sections 5-102(a)(10) and 5-103 are the principal limits on the scope of Article 5. Many undertakings in commerce and contract are similar, but not identical to the letter of credit. Principal among those are "secondary," "accessory," or "suretyship" guarantees. Although the word "guarantee" is sometimes used to describe an independent obligation like that of the issuer of a letter of credit (most often in the case of European bank undertakings but occasionally in the case of undertakings of American banks), in the United States the word "guarantee" is more typically used to describe a suretyship transaction in which the "guarantor" is only secondarily liable and has the right to assert the underlying debtor's defenses. This article does not apply to secondary or accessory guarantees and it is important to recognize the distinction between letters of credit and those guarantees. It is often a defense to a secondary or accessory guarantor's liability that the underlying debt has been discharged or that the debtor has other defenses to the underlying liability. In letter of credit law, on the other hand, the independence principle recognized throughout Article 5 states that the issuer's liability is independent of the underlying obligation. That the beneficiary may have breached the underlying contract and thus have given a good defense on that contract to the applicant against the beneficiary is no defense for the issuer's refusal to honor. Only staunch recogni-

tion of this principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit. To that end, it is important that the law not carry into letter of credit transactions rules that properly apply only to secondary guarantees or to other forms of engagement.

2. Like all of the provisions of the Uniform Commercial Code, Article 5 is supplemented by Section 1-103 and, through it, by many rules of statutory and common law. Because this article is quite short and has no rules on many issues that will affect liability with respect to a letter of credit transaction, law beyond Article 5 will often determine rights and liabilities in letter of credit transactions. Even within letter of credit law, the article is far from comprehensive; it deals only with "certain" rights of the parties. Particularly with respect to the standards of performance that are set out in Section 5-108, it is appropriate for the parties and the courts to turn to customs and practice such as the Uniform Customs and Practice for Documentary Credits, currently published by the International Chamber of Commerce as I.C.C. Pub. No. 500 (hereafter UCP). Many letters of credit specifically adopt the UCP as applicable to the particular transaction. Where the UCP are adopted but conflict with Article 5 and except where variation is prohibited, the UCP terms are permissible contractual modifications under Sections 1-102(3) and 5-103(c).

See Section 5-116(c). Normally Article 5 should not be considered to conflict with practice except when a rule explicitly stated in the UCP or other practice is different from a rule explicitly stated in Article 5.

Except by choosing the law of a jurisdiction that has not adopted the Uniform Commercial Code, it is not possible entirely to escape the Uniform Commercial Code. Since incorporation of the UCP avoids only "conflicting" Article 5 rules, parties who do not wish to be governed by the nonconflicting provisions of Article 5 must normally either adopt the law of a jurisdiction other than a State of the United States or state explicitly the rule that is to govern. When rules of custom and practice are incorporated by reference, they are considered to be explicit terms of the agreement or undertaking.

Neither the obligation of an issuer under Section 5-108 nor that of an adviser under Section 5-107 is an obligation of the kind that is invariable under Section 1-102(3). Section 5-103(c) and Comment 1 to Section 5-108 make it clear that the applicant and the issuer may agree to almost any provision establishing the obligations of the issuer to the applicant. The last sentence of subsection (c) limits the power of the issuer to achieve that result by a nonnegotiated disclaimer or limitation of remedy.

What the issuer could achieve by an explicit agreement with its applicant or by a term that explicitly defines its duty, it cannot accomplish by a general disclaimer. The restriction on disclaimers in the last sentence of subsection (c) is based more on procedural than on substantive unfairness. Where, for example, the reimbursement agreement provides explicitly that the issuer need not examine any documents, the applicant understands the risk it has undertaken. A term in a reimbursement agreement which states generally that an issuer will not be liable unless it has acted in "bad faith" or committed "gross negligence" is ineffective under Section 5-103(c). On the other hand, less general terms such as terms that permit issuer reliance on an oral or electronic message believed in good faith to have been received from the applicant or terms that entitle an issuer to reimbursement when it honors a "substantially" though not "strictly" complying presentation, are effective. In each case the question is whether the disclaimer or limitation is sufficiently clear and explicit in reallocating a liability or risk that is allocated differently under a variable Article 5 provision.

Of course, no term in a letter of credit, whether incorporated by reference to practice rules or stated specifically, can free an issuer from a conflicting contractual obligation to its applicant. If, for example, an issuer promised its applicant that it would pay only against an inspection certificate of a particular company but failed to require such a certificate in its letter of credit or made the requirement only a nondocumentary condition that had to be disregarded, the issuer might be obliged to pay the beneficiary even though its payment might violate its contract with its applicant.

3. Parties should generally avoid modifying the definitions in Section 5-102. The effect of such an agreement is almost inevitably unclear. To say that something is a "guarantee" in the typical domestic transaction is to say that the parties intend that particular legal rules apply to it. By acknowledging that something is a guarantee, but asserting that it is to be treated as a "letter of credit," the parties leave a court uncertain about where the rules on guarantees stop and those concerning letters of credit begin.

4. Section 5-102(2) and (3) of Article 5 are omitted as unneeded; the omission does not change the law.

CASE NOTES

Confirming bank.

Bank which agreed to serve as confirming bank in United States as to international letter of credit with respect to transaction whereby Portuguese corporations purchased computer controlled production system to be delivered in Portugal owed no duty to Portuguese corporations as account party under Uniform Commercial Code (U.C.C.); confirming bank's only customer was issuing bank and only duty owed by confirming bank was to its customer, the issuing bank. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

§ 28:5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice referred to in § 28:5-108(e).

(Dec. 30, 1963, 77 Stat. 709, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-102 and § 28:5-116.

Prior Codifications. — 1981 Ed., § 28:5-104.

1973 Ed., § 28:5-104.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Neither Section 5-104 nor the definition of letter of credit in Section 5-102(a)(10) requires inclusion of all the terms that are normally contained in a letter of credit in order for an undertaking to be recognized as a letter of credit under Article 5. For example, a letter of credit will typically specify the amount available, the expiration date, the place where presentation should be made, and the documents that must be presented to entitle a person to honor. Undertakings that have the formalities required by Section 5-104 and meet the conditions specified in Section 5-102(a)(10) will be recognized as letters of credit even though they omit one or more of the items usually contained in a letter of credit.

2. The authentication specified in this section is authentication only of the identity of the issuer, confirmer, or adviser.

An authentication agreement may be by system rule, by standard practice, or by direct agreement between the parties. The reference to practice is intended to incorporate future developments in the UCP and other practice rules as well as those that may arise spontaneously in commercial practice.

3. Many banking transactions, including the issuance of many letters of credit, are now conducted mostly by electronic means. For example, S.W.I.F.T. is currently used to transmit letters of credit from issuing to advising banks. The letter of credit text so transmitted may be printed at the advising bank, stamped "original" and provided to the beneficiary in that form. The printed document may then be used as a way of controlling and recording payments and of recording and authorizing assignments of proceeds or transfers of rights under the letter of credit. Nothing in this section should be construed to conflict with that practice.

To be a record sufficient to serve as a letter of credit or other undertaking under this section, data must have a durability consistent with that function. Because consideration is not required for a binding letter of credit or similar undertaking (Section 5-105) yet those undertakings are to be strictly construed (Section 5-108), parties to a letter of credit transaction are especially dependent on the continued availability of the terms and conditions of the letter of credit or other undertaking. By declining to specify any particular medium in which the letter of credit must be established or communicated, Section 5-104 leaves room for future developments.

§ 28:5-105. Consideration.

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

(Dec. 30, 1963, 77 Stat. 710, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-105.

1973 Ed., § 28:5-105.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

It is not to be expected that any issuer will issue its letter of credit without some form of remuneration. But it is not expected that the beneficiary will know what the issuer's remuneration was or whether in fact there was any identifiable remuneration in a given case. And it might be difficult for the beneficiary to prove the issuer's remuneration. This section dispenses with this proof and is consistent with the position of Lord Mansfield in Pillans v. Van Mierop, 97 Eng.Rep. 1035 (K.B. 1765) in making consideration irrelevant.

§ 28:5-106. Issuance, amendment, cancellation, and duration.

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires 5 years after its stated date of issuance, or if none is stated, after the date on which it is issued.

(Dec. 30, 1963, 77 Stat. 710, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-103.

Prior Codifications. — 1981 Ed., § 28:5-106.

1973 Ed., § 28:5-106.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section adopts the position taken by several courts, namely that letters of credit that are silent as to revocability are irrevocable. See, e.g., Weyerhaeuser Co. v. First Nat. Bank, 27 UCC Rep.Serv. 777 (S.D. Iowa 1979); West Va. Hous. Dev. Fund v. Sroka, 415 F.Supp.

1107 (W.D.Pa.1976). This is the position of the current UCP (500). Given the usual commercial understanding and purpose of letters of credit, revocable letters of credit offer unhappy possibilities for misleading the parties who deal with them.

2. A person can consent to an amendment by implication. For example, a beneficiary that tenders documents for honor that conform to an amended letter of credit but not to the original letter of credit has probably consented to the amendment. By the same token an applicant that has procured the issuance of a transferable letter of credit has consented to its transfer and to performance under the letter of credit by a person to whom the beneficiary's rights are duly transferred. If some, but not all of the persons involved in a letter of credit transaction consent to performance that does not strictly conform to the original letter of credit, those persons assume the risk that other nonconsenting persons may insist on strict compliance with the original letter of credit. Under subsection (b) those not consenting are not bound. For example, an issuer might agree to amend its letter of credit or honor documents presented after the expiration date in the belief that the applicant has consented or will consent to the amendment or will waive presentation after the original expiration date. If that belief is mistaken, the issuer is bound to the beneficiary by the terms of the letter of credit as amended or waived, even though it may be unable to recover from the applicant.

In general, the rights of a recognized transferee beneficiary cannot be altered without the transferee's consent, but the same is not true of the rights of assignees of proceeds from the beneficiary. When the beneficiary makes a complete transfer of its interest that is effective under the terms for transfer established by the issuer, adviser, or other party controlling transfers, the beneficiary no longer has an interest in the letter of credit, and the transferee steps into the shoes of the beneficiary as the one with rights under the letter of credit. Section 5-102(a)(3). When there is a partial transfer, both the original beneficiary and the transferee beneficiary have an interest in performance of the letter of credit and each expects that its rights will not be altered by amendment unless it consents.

The assignee of proceeds under a letter of credit from the beneficiary enjoys no such expectation. Notwithstanding an assignee's notice to the issuer of the assignment of proceeds, the assignee is not a person protected by subsection (b). An assignee of proceeds should understand that its rights can be changed or completely extinguished by amendment or cancellation of the letter of credit. An assignee's claim is precarious, for it depends entirely upon the continued existence of the letter of credit and upon the beneficiary's preparation and presentation of documents that would entitle the beneficiary to honor under Section 5-108.

3. The issuer's right to cancel a revocable letter of credit does not free it from a duty to reimburse a nominated person who has honored, accepted, or undertaken a deferred obligation prior to receiving notice of the amendment or cancellation. Compare UCP Article 8.

4. Although all letters of credit should specify the date on which the issuer's engagement expires, the failure to specify an expiration date does not invalidate the letter of credit, or diminish or relieve the obligation of any party with respect to the letter of credit. A letter of credit that may be revoked or terminated at the discretion of the issuer by notice to the beneficiary is not "perpetual."

§ 28:5-107. Confirmer, nominated person, and adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c) of this section. The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

(Dec. 30, 1963, 77 Stat. 710, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-107.

1973 Ed., § 28:5-107.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. A confirmer has the rights and obligations identified in Section 5-108. Accordingly, unless the context otherwise requires, the terms "confirmer" and "confirmation" should be read into this article wherever the terms "issuer" and "letter of credit" appear.

A confirmer that has paid in accordance with the terms and conditions of the letter of credit is entitled to reimbursement by the issuer even if the beneficiary committed fraud (see Section 5-109(a)(1)(ii)) and, in that sense, has greater rights against the issuer than the beneficiary has. To be entitled to reimbursement from the issuer under the typical confirmed letter of credit, the confirmer must submit conforming documents, but the confirmer's presentation to the issuer need not be made before the expiration date of the letter of credit.

A letter of credit confirmation has been analogized to a guarantee of issuer performance, to a parallel letter of credit issued by the confirmer for the account of the issuer or the letter of credit applicant or both, and to a back-to-back letter of credit in which the confirmer is a kind of beneficiary of the original issuer's letter of credit. Like letter of credit undertakings, confirmations are both unique and flexible, so that no one of these analogies is perfect, but unless otherwise indicated in the letter of credit or confirmation, a confirmer should be viewed by the letter of credit issuer and the beneficiary as an issuer of a parallel letter of credit for the account of the original letter of credit issuer. Absent a direct agreement between the applicant and a confirmer, normally the obligations of a confirmer are to the issuer not the applicant, but the applicant might have a right to injunction against a confirmer under Section 5-109 or warranty claim under Section 5-110, and either might have claims against the other under Section 5-117.

2. No one has a duty to advise until that person agrees to be an adviser or undertakes to act in accordance with the instructions of the issuer. Except where there is a prior agreement to serve or where the silence of the adviser would be an acceptance of an offer to contract, a person's failure to respond to a request to advise a letter of credit does not in and of itself create any liability, nor does it establish a relationship of issuer and adviser between the two. Since there is no duty to advise a letter of credit in the absence of a prior agreement, there can be no duty to advise it timely or at any particular time. When the adviser manifests its agreement to advise by actually doing so (as is normally the case), the adviser cannot have violated any duty to advise in a timely way. This analysis is consistent with the result of Sound of Market Street v. Continental Bank International, 819 F.2d 384 (3d Cir.1987) which held that there is no such duty. This section takes no position on the reasoning of that case, but does not overrule the result. By advising or agreeing to advise a letter of credit, the adviser assumes a duty to the issuer and to the beneficiary accurately to report what it has received from the issuer, but, beyond determining the apparent authenticity of the letter, an adviser has no duty to investigate the accuracy of the message it has received from the issuer. "Checking" the apparent authenticity of the request to advise means only that the prospective adviser must attempt to authenticate the message (e.g., by "testing" the telex that comes from the purported issuer), and if it is unable to authenticate the message must report that fact to the issuer and, if it chooses to advise the message, to the beneficiary. By proper agreement, an adviser may disclaim its obligation under this section.

3. An issuer may issue a letter of credit which the adviser may advise with different terms. The issuer may then believe that it has under-

taken a certain engagement, yet the text in the hands of the beneficiary will contain different terms, and the beneficiary would not be entitled to honor if the documents it submitted did not comply with the terms of the letter of credit as originally issued. On the other hand, if the adviser also confirmed the letter of credit, then as a confirmer it will be independently liable on the letter of credit as advised and confirmed. If in that situation the beneficiary's ultimate presentation entitled it to honor under the terms of the confirmation but not under those in the original letter of credit, the confirmer would have to honor but might not be entitled to reimbursement from the issuer.

4. When the issuer nominates another person to "pay," "negotiate," or otherwise to take up the documents and give value, there can be confusion about the legal status of the nominated person. In rare cases the person might actually be an agent of the issuer and its act might be the act of the issuer itself. In most cases the nominated person is not an agent of the issuer and has no authority to act on the issuer's behalf. Its "nomination" allows the beneficiary to present to it and earns it certain rights to payment under Section 5-109 that others do not enjoy. For example, when an issuer issues a "freely negotiable credit," it contemplates that banks or others might take up documents under that credit and advance value against them, and it is agreeing to pay those persons but only if the presentation to the issuer made by the nominated person complies with the credit. Usually there will be no agreement to pay, negotiate, or to serve in any other capacity by the nominated person, therefore the nominated person will have the right to decline to take the documents. It may return them or agree merely to act as a forwarding agent for the documents but without giving value against them or taking any responsibility for their conformity to the letter of credit.

CASE NOTES

ANALYSIS

Confirming banks.
Guaranty.

Confirming banks.

Bank which agreed to serve as confirming bank in United States as to international letter of credit with respect to transaction whereby Portuguese corporations purchased computer controlled production system to be delivered in Portugal owed no duty to Portuguese corporations as account party under Uniform Commercial Code (U.C.C.); confirming bank's only customer was issuing bank and only duty owed by confirming bank was to its customer, the issuing bank. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

Under Uniform Commercial Code (U.C.C.), confirming bank owes duty only to its customer, the issuing bank, and not to the issuing bank's customer, the account party. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

Guaranty.

Buyer of equipment who signed note and security agreement guaranteeing letter of credit from American bank to pay for equipment was liable to American bank after American bank was required to pay on letter of credit, although Arab bank gave buyer letter of credit guaranteeing payment on American bank's letter of credit, buyer never received payment from Arab bank, and buyer could not now collect payment from Arab bank due to freeze on Iraqi assets, where buyer could get judgment for payment against Arab bank. D.C. Code 1981, § 28:5-107(2). Engel Indus., Inc. v. First Am. Bank, 803 F. Supp. 426, 1992 U.S. Dist. LEXIS 14632 (1992).

§ 28:5-108. Issuer's rights and obligations.

(a) Except as otherwise provided in § 28:5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in § 28:5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the

end of the seventh business day of the issuer after the day of its receipt of documents:

(1) To honor;

(2) If the letter of credit provides for honor to be completed more than 7 business days after presentation, to accept a draft or incur a deferred obligation; or

(3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d) of this section, an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) of this section or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in § 28:5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) The performance or nonperformance of the underlying contract, arrangement, or transaction;

(2) An act or omission of others; or

(3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e) of this section.

(g) If an undertaking constituting a letter of credit under § 28:5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) Takes the documents free of claims of the beneficiary or presenter;

(3) Is precluded from asserting a right of recourse on a draft under § 28:3-414 and 28:3-415;

(4) Except as otherwise provided in § 28:5-110 and § 28:5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

(Dec. 30, 1963, 77 Stat. 711, Pub. L. 88-243, § 1; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-102, § 28:5-104, § 28:5-112, and § 28:5-113.

Prior Codifications. — 1981 Ed., § 28:5-108. 1973 Ed., § 28:5-108.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section combines some of the duties previously included in Sections 5-114 and 5-109. Because a confirmer has the rights and duties of an issuer, this section applies equally to a confirmer and an issuer. See Section 5-107(a).

The standard of strict compliance governs the issuer's obligation to the beneficiary and to the applicant. By requiring that a "presentation" appear strictly to comply, the section requires not only that the documents themselves appear on their face strictly to comply, but also that the other terms of the letter of credit such as those dealing with the time and place of presentation are strictly complied with. Typically, a letter of credit will provide that presentation is timely if made to the issuer, confirmer, or any other nominated person prior to expiration of the letter of credit. Accordingly, a nominated person that has honored a demand or otherwise given value before expiration will have a right to reimbursement from the issuer even though presentation to the issuer is made after the expiration of the letter of credit. Conversely, where the beneficiary negotiates documents to one who is not a nominated person, the beneficiary or that person acting on behalf of the beneficiary must make presentation to a nominated person, confirmer, or issuer prior to the expiration date.

This section does not impose a bifurcated standard under which an issuer's right to reimbursement might be broader than a beneficiary's right to honor. However, the explicit deference to standard practice in Section 5-108(a) and (e) and elsewhere expands issuers' rights of reimbursement where that practice so provides. Also, issuers can and often do contract with their applicants for expanded rights of reimbursement. Where that is done, the beneficiary will have to meet a more stringent standard of compliance as to the issuer than the issuer will have to meet as to the applicant. Similarly, a nominated person may have reimbursement and other rights against the issuer based on this article, the UCP, bank-to-bank reimbursement rules, or other agreement or undertaking of the issuer. These rights may allow the nominated person to recover from the issuer even when the nominated person would have no right to obtain honor under the letter of credit.

The section adopts strict compliance, rather than the standard that commentators have called "substantial compliance," the standard arguably applied in Banco Español de Credito v. State Street Bank and Trust Company, 385 F.2d 230 (1st Cir.1967) and Flagship Cruises Ltd. v. New England Merchants Nat. Bank, 569 F.2d 699 (1st Cir.1978). Strict compliance does not mean slavish conformity to the terms of the letter of credit. For example, standard practice (what issuers do) may recognize certain presentations as complying that an unschooled layman would regard as discrepant. By adopting standard practice as a way of measuring strict compliance, this article indorses the conclusion of the court in New Braunfels Nat. Bank v. Odiorne, 780 S.W.2d 313 (Tex.Ct.App. 1989) (beneficiary could collect when draft requested payment on "Letter of Credit No. 86-122-5" and letter of credit specified "Letter of Credit No. 86-122-S" holding strict compliance does not demand oppressive perfectionism). The section also indorses the result in Tosco Corp. v. Federal Deposit Insurance Corp., 723 F.2d 1242 (6th Cir.1983). The letter of credit in that case called for "drafts Drawn under Bank of Clarksville Letter of Credit Number 105." The draft presented stated "drawn under Bank of Clarksville, Clarksville, Tennessee letter of Credit No. 105." The court correctly found that despite the change of upper case "L" to a lower case "l" and the use of the word "No." instead of "Number," and despite the addition of the words "Clarksville, Tennessee," the presentation conformed. Similarly a document addressed by a foreign person to General Motors as "Jeneral Motors" would strictly conform in the absence of other defects.

Identifying and determining compliance with standard practice are matters of interpretation for the court, not for the jury. As with similar rules in Sections 4A-202(c) and 2-302, it is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if the responsibility for determining the nature and scope of standard practice is granted to the court, not to a jury. Granting the court authority to make these decisions will also encourage the salutary practice of courts' granting summary judgment in circumstances where there are no significant factual disputes. The statute encourages outcomes such as American Coleman Co. v. Intrawest Bank, 887 F.2d 1382 (10th Cir.1989), where summary judgment was granted.

In some circumstances standards may be established between the issuer and the applicant by agreement or by custom that would free the issuer from liability that it might otherwise have. For example, an applicant might agree that the issuer would have no duty whatsoever to examine documents on certain presentations (e.g., those below a certain dollar amount). Where the transaction depended upon the issuer's payment in a very short time period (e.g., on the same day or within a few hours of presentation), the issuer and the applicant might agree to reduce the issuer's responsibility for failure to discover discrepancies. By the same token, an agreement between the applicant and the issuer might permit the issuer to examine documents exclusively by electronic or electro-optical means. Neither those agreements nor others like them explicitly made by issuers and applicants violate the terms of Section 5-108(a) or (b) or Section 5-103(c).

2. Section 5-108(a) balances the need of the issuer for time to examine the documents against the possibility that the examiner (at the urging of the applicant or for fear that it will not be reimbursed) will take excessive time to search for defects. What is a "reasonable time" is not extended to accommodate an issuer's procuring a waiver from the applicant. See Article 14c of the UCP.

Under both the UCC and the UCP the issuer has a reasonable time to honor or give notice. The outside limit of that time is measured in business days under the UCC and in banking days under the UCP, a difference that will rarely be significant. Neither business nor banking days are defined in Article 5, but a court may find useful analogies in Regulation CC, 12 CFR 229.2, in state law outside of the Uniform Commercial Code, and in Article 4.

Examiners must note that the seven-day period is not a safe harbor. The time within which the issuer must give notice is the lesser of a reasonable time or seven business days. Where there are few documents (as, for example, with the mine run standby letter of credit), the reasonable time would be less than seven days. If more than a reasonable time is consumed in examination, no timely notice is possible. What is a "reasonable time" is to be determined by examining the behavior of those in the business of examining documents, mostly banks. Absent prior agreement of the issuer, one could not expect a bank issuer to examine documents while the beneficiary waited in the lobby if the normal practice was to give the documents to a person who had the opportunity to examine those together with many others in an orderly process. That the applicant has not yet paid the issuer or that the applicant's account with the issuer is insufficient to cover the amount of the draft is not a basis for extension of the time period.

This section does not preclude the issuer from contacting the applicant during its examination; however, the decision to honor rests with the issuer, and it has no duty to seek a waiver from the applicant or to notify the applicant of receipt of the documents. If the issuer dishonors a conforming presentation, the beneficiary will be entitled to the remedies under Section 5-111, irrespective of the applicant's views.

Even though the person to whom presentation is made cannot conduct a reasonable examination of documents within the time after presentation and before the expiration date, presentation establishes the parties' rights. The beneficiary's right to honor or the issuer's right to dishonor arises upon presentation at the place provided in the letter of credit even though it might take the person to whom presentation has been made several days to determine whether honor or dishonor is the proper course. The issuer's time for honor or giving notice of dishonor may be extended or shortened by a term in the letter of credit. The time for the issuer's performance may be otherwise modified or waived in accordance with Section 5-106.

The issuer's time to inspect runs from the time of its "receipt of documents." Documents are considered to be received only when they are received at the place specified for presentation by the issuer or other party to whom presentation is made.

Failure of the issuer to act within the time permitted by subsection (b) constitutes dishonor. Because of the preclusion in subsection (c) and the liability that the issuer may incur under Section 5-111 for wrongful dishonor, the effect of such a silent dishonor may ultimately be the same as though the issuer had honored, i.e., it may owe damages in the amount drawn but unpaid under the letter of credit.

3. The requirement that the issuer send notice of the discrepancies or be precluded from asserting discrepancies is new to Article 5. It is taken from the similar provision in the UCP and is intended to promote certainty and finality.

The section thus substitutes a strict preclusion principle for the doctrines of waiver and estoppel that might otherwise apply under Section 1-103. It rejects the reasoning in Flagship Cruises Ltd. v. New England Merchants' Nat. Bank, 569 F.2d 699 (1st Cir.1978) and Wing On Bank Ltd. v. American Nat. Bank & Trust Co., 457 F.2d 328 (5th Cir.1972) where the issuer was held to be estopped only if the beneficiary relied on the issuer's failure to give notice.

Assume, for example, that the beneficiary presented documents to the issuer shortly before the letter of credit expired, in circumstances in which the beneficiary could not have cured any discrepancy before expiration. Under

the reasoning of Flagship and Wing On, the beneficiary's inability to cure, even if it had received notice, would absolve the issuer of its failure to give notice. The virtue of the preclusion obligation adopted in this section is that it forecloses litigation about reliance and detriment.

Even though issuers typically give notice of the discrepancy of tardy presentation when presentation is made after the expiration of a credit, they are not required to give that notice and the section permits them to raise late presentation as a defect despite their failure to give that notice.

4. To act within a reasonable time, the issuer must normally give notice without delay after the examining party makes its decision. If the examiner decides to dishonor on the first day, it would be obliged to notify the beneficiary shortly thereafter, perhaps on the same business day. This rule accepts the reasoning in cases such as Datapoint Corp. v. M & I Bank, 665 F.Supp. 722 (W.D.Wis.1987) and Esso Petroleum Canada, Div. of Imperial Oil, Ltd. v. Security Pacific Bank, 710 F.Supp. 275 (D.Or.1989).

The section deprives the examining party of the right simply to sit on a presentation that is made within seven days of expiration. The section requires the examiner to examine the documents and make a decision and, having made a decision to dishonor, to communicate promptly with the presenter. Nevertheless, a beneficiary who presents documents shortly before the expiration of a letter of credit runs the risk that it will never have the opportunity to cure any discrepancies.

5. Confirmers, other nominated persons, and collecting banks acting for beneficiaries can be presenters and, when so, are entitled to the notice provided in subsection (b). Even nominated persons who have honored or given value against an earlier presentation of the beneficiary and are themselves seeking reimbursement or honor need notice of discrepancies in the hope that they may be able to procure complying documents. The issuer has the obligations imposed by this section whether the issuer's performance is characterized as "reimbursement" of a nominated person or as "honor."

6. In many cases a letter of credit authorizes presentation by the beneficiary to someone other than the issuer. Sometimes that person is identified as a "payor" or "paying bank," or as an "acceptor" or "accepting bank," in other cases as a "negotiating bank," and in other cases there will be no specific designation. The section does not impose any duties on a person other than the issuer or confirmer, however a nominated person or other person may have liability under this article or at common law if it fails to perform an express or implied agreement with the beneficiary.

7. The issuer's obligation to honor runs not only to the beneficiary but also to the applicant. It is possible that an applicant who has made a favorable contract with the beneficiary will be injured by the issuer's wrongful dishonor. Except to the extent that the contract between the issuer and the applicant limits that liability, the issuer will have liability to the applicant for wrongful dishonor under Section 5-111 as a matter of contract law. A good faith extension of the time in Section 5-108(b) by agreement between the issuer and beneficiary binds the applicant even if the applicant is not consulted or does not consent to the extension.

The issuer's obligation to dishonor when there is no apparent compliance with the letter of credit runs only to the applicant. No other party to the transaction can complain if the applicant waives compliance with terms or conditions of the letter of credit or agrees to a less stringent standard for compliance than that supplied by this article. Except as otherwise agreed with the applicant, an issuer may dishonor a noncomplying presentation despite an applicant's waiver.

Waiver of discrepancies by an issuer or an applicant in one or more presentations does not waive similar discrepancies in a future presentation. Neither the issuer nor the beneficiary can reasonably rely upon honor over past waivers as a basis for concluding that a future defective presentation will justify honor. The reasoning of Courtaulds of North America Inc. v. North Carolina Nat. Bank, 528 F.2d 802 (4th Cir.1975) is accepted and that expressed in Schweibish v. Pontchartrain State Bank, 389 So.2d 731 (La.App.1980) and Titanium Metals Corp. v. Space Metals, Inc., 529 P.2d 431 (Utah 1974) is rejected.

8. The standard practice referred to in subsection (e) includes (i) international practice set forth in or referenced by the Uniform Customs and Practice, (ii) other practice rules published by associations of financial institutions, and (iii) local and regional practice. It is possible that standard practice will vary from one place to another. Where there are conflicting practices, the parties should indicate which practice governs their rights. A practice may be overridden by agreement or course of dealing. See Section 1-205(4).

9. The responsibility of the issuer under a letter of credit is to examine documents and to make a prompt decision to honor or dishonor based upon that examination. Nondocumentary conditions have no place in this regime and are better accommodated under contract or suretyship law and practice. In requiring that nondocumentary conditions in letters of credit be ignored as surplusage, Article 5 remains aligned with the UCP (see UCP

500 Article 13c), approves cases like Pringle-Associated Mortgage Corp. v. Southern National Bank, 571 F.2d 871, 874 (5th Cir.1978), and rejects the reasoning in cases such as Sherwood & Roberts, Inc. v. First Security Bank, 682 P.2d 149 (Mont. 1984).

Subsection (g) recognizes that letters of credit sometimes contain nondocumentary terms or conditions. Conditions such as a term prohibiting "shipment on vessels more than 15 years old," are to be disregarded and treated as surplusage. Similarly, a requirement that there be an award by a "duly appointed arbitrator" would not require the issuer to determine whether the arbitrator had been "duly appointed." Likewise a term in a standby letter of credit that provided for differing forms of certification depending upon the particular type of default does not oblige the issuer independently to determine which kind of default has occurred. These conditions must be disregarded by the issuer. Where the nondocumentary conditions are central and fundamental to the issuer's obligation (as for example a condition that would require the issuer to determine in fact whether the beneficiary had performed the underlying contract or whether the applicant had defaulted) their inclusion may remove the undertaking from the scope of Article 5 entirely. See Section 5-102(a)(10) and Comment 6 to Section 5-102.

Subsection (g) would not permit the beneficiary or the issuer to disregard terms in the letter of credit such as place, time, and mode of presentation. The rule in subsection (g) is intended to prevent an issuer from deciding or even investigating extrinsic facts, but not from consulting the clock, the calendar, the relevant law and practice, or its own general knowledge of documentation or transactions of the type underlying a particular letter of credit.

Even though nondocumentary conditions must be disregarded in determining compliance of a presentation (and thus in determining the issuer's duty to the beneficiary), an issuer that has promised its applicant that it will honor only on the occurrence of those nondocumentary conditions may have liability to its applicant for disregarding the conditions.

10. Subsection (f) condones an issuer's ignorance of "any usage of a particular trade"; that trade is the trade of the applicant, beneficiary, or others who may be involved in the underlying transaction. The issuer is expected to know usage that is commonly encountered in the course of document examination. For example, an issuer should know the common usage with respect to documents in the maritime shipping trade but would not be expected to understand synonyms used in a particular trade for product descriptions appearing in a letter of credit or an invoice.

11. Where the issuer's performance is the delivery of an item of value other than money, the applicant's reimbursement obligation would be to make the "item of value" available to the issuer.

12. An issuer is entitled to reimbursement from the applicant after honor of a forged or fraudulent drawing if honor was permitted under Section 5-109(a).

13. The last clause of Section 5-108(i)(5) deals with a special case in which the fraud is not committed by the beneficiary, but is committed by a stranger to the transaction who forges the beneficiary's signature. If the issuer pays against documents on which a required signature of the beneficiary is forged, it remains liable to the true beneficiary.

CASE NOTES

In general.

Unique feature of letter of credit transaction is that it deals in documents and is wholly independent of underlying transaction in goods or credit. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Bank was not required to honor demand for payment under letter of credit (LOC) when beneficiary tendered photocopy of promissory note instead of original note as required by terms of LOC, despite beneficiary's contention that he strictly complied in that underlying credit transaction involved nonrecourse promissory note providing no more than a schedule of payments; unqualified nature of issuer's duty to pay upon satisfaction of LOC's terms relieved it of any duty to consult legal counsel about recourse versus nonrecourse negotiable instruments in assessing its risk of double presentment or of rebuff by customer in demanding reimbursement after accepting substitute for original note. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Beneficiary did not strictly comply with letter of credit (LOC) securing promissory note, which expressly required that demand for payment be accompanied by original of note, where note tendered to bank was photocopy that was signed by borrower a second time eight years after original execution. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

§ 28:5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) All of the conditions to entitle a person to the relief under the law of the District of Columbia have been met; and

(4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1) of this section.

(Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:2-512, § 28:5-108, § 28:5-110, and § 28:5-113.

Prior Codifications. — 1981 Ed., § 28:5-109.

1973 Ed., § 28:5-109.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This recodification makes clear that fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. See Cromwell v. Commerce & Energy Bank, 464 So.2d 721 (La.1985).

Secondly, it makes clear that fraud must be "material." Necessarily courts must decide the breadth and width of "materiality."

The use of the word requires that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in

the underlying transaction. Assume, for example, that the beneficiary has a contract to deliver 1,000 barrels of salad oil. Knowing that it has delivered only 998, the beneficiary nevertheless submits an invoice showing 1,000 barrels. If two barrels in a 1,000 barrel shipment would be an insubstantial and immaterial breach of the underlying contract, the beneficiary's act, though possibly fraudulent, is not materially so and would not justify an injunction. Conversely, the knowing submission of those invoices upon delivery of only five barrels would be materially fraudulent. The courts must examine the underlying transaction when there is an allegation of material fraud, for only by examining that transaction can one determine whether a document is fraudulent or the beneficiary has committed fraud and, if so, whether the fraud was material.

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in Intraworld Indus. v. Girard Trust Bank, 336 A.2d 316 (Pa.1975), Roman Ceramics Corp. v. People's Nat. Bank, 714 F.2d 1207 (3d Cir.1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in Ground Air Transfer, Inc. v. Westate's Airlines, Inc., 899 F.2d 1269, 1272-73 (1st Cir.1990):

We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in Itek, 730 F.2d at 24-25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, Itek, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, id., at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see Dynamics Corp. of America, 356 F.Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," Itek, 730 F.2d at 25 (quoting Roman Ceramics Corp. v. Peoples National Bank, 714 F.2d 1207, 1212 n.12, 1215 (3d Cir.1983) (quoting Intraworld Indus., 336 A.2d at 324-25)); then a court may enjoin payment.

2. Subsection (a)(2) makes clear that the issuer may honor in the face of the applicant's claim of fraud. The subsection also makes clear what was not stated in former Section 5-114, that the issuer may dishonor and defend that dishonor by showing fraud or forgery of the kind stated in subsection (a). Because issuers may be liable for wrongful dishonor if they are unable to prove forgery or material fraud, presumably most issuers will choose to honor despite applicant's claims of fraud or forgery unless the applicant procures an injunction. Merely because the issuer has a right to dishonor and to defend that dishonor by showing forgery or material fraud does not mean it has a duty to the applicant to dishonor. The applicant's normal recourse is to procure an injunction, if the applicant is unable to procure an injunction, it will have a claim against the issuer only in the rare case in which it can show that the issuer did not honor in good faith.

3. Whether a beneficiary can commit fraud by presenting a draft under a clean letter of credit (one calling only for a draft and no other documents) has been much debated. Under the current formulation it would be possible but difficult for there to be fraud in such a presentation. If the applicant were able to show that the beneficiary were committing material fraud on the applicant in the underlying transaction, then payment would facilitate a material fraud by the beneficiary on the applicant and honor could be enjoined. The courts should be skeptical of claims of fraud by one who has signed a "suicide" or clean credit and thus granted a beneficiary the right to draw by mere presentation of a draft.

4. The standard for injunctive relief is high, and the burden remains on the applicant to show, by evidence and not by mere allegation, that such relief is warranted. Some courts have enjoined payments on letters of credit on insufficient showing by the applicant. For example, in Griffin Cos. v. First Nat. Bank, 374 N.W.2d 768 (Minn.App.1985), the court enjoined payment under a standby letter of credit, basing its decision on plaintiff's allegation, rather than competent evidence, of fraud.

There are at least two ways to prohibit injunctions against honor under this section after acceptance of a draft by the issuer. First is to define honor (see Section 5-102(a)(8)) in the particular letter of credit to occur upon acceptance and without regard to later payment of the acceptance. Second is explicitly to agree that the applicant has no right to an injunction after acceptance—whether or not the acceptance constitutes honor.

5. Although the statute deals principally with injunctions against honor, it also cautions against granting "similar relief" and the same principles apply when the applicant or issuer attempts to achieve the same legal outcome by injunction against presentation (see Ground Air Transfer, Inc. v. Westates Airlines, Inc., 899 F.2d 1269 (1st Cir.1990)), interpleader, declaratory judgment, or attachment. These attempts

should face the same obstacles that face efforts to enjoin the issuer from paying. Expanded use of any of these devices could threaten the independence principle just as much as injunctions against honor. For that reason courts should have the same hostility to them and place the same restrictions on their use as would be applied to injunctions against honor. Courts should not allow the "sacred cow of equity to trample the tender vines of letter of credit law."

6. Section 5-109(a)(1) also protects specified third parties against the risk of fraud. By issuing a letter of credit that nominates a person to negotiate or pay, the issuer (ultimately the applicant) induces that nominated person to give value and thereby assumes the risk that a draft drawn under the letter of credit will be transferred to one with a status like that of a holder in due course who deserves to be protected against a fraud defense.

7. The "loss" to be protected against—by bond or otherwise under subsection (b)(2)—includes incidental damages. Among those are legal fees that might be incurred by the beneficiary or issuer in defending against an injunction action.

CASE NOTES

ANALYSIS

Confirming banks.

Bank which agreed to serve as confirming bank in United States as to international letter of credit with respect to transaction whereby Portuguese corporations purchased computer controlled production system to be delivered in Portugal owed no duty to Portuguese corporations as account party under Uniform Commercial Code (U.C.C.); confirming bank's only customer was issuing bank and only duty owed by confirming bank was to its customer, the issuing bank. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

Under Uniform Commercial Code (U.C.C.), confirming bank owes duty only to its customer, the issuing bank, and not to the issuing bank's customer, the account party. U.C.C. § 5-101 et seq.; D.C. Code 1981, §§ 28:5-101 to 28:5-117, 28:5-103(1)(g), 28:5-107(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

Confirming bank's stamped declaration on international letter of credit stating that bank confirmed credit and thereby undertook that any draft drawn under and presented in compliance with terms of credit would be duly honored on due presentation did not make promise to any parties other than those who might duly present appropriate draft to bank so as to extend confirming bank's liability under statutory warranties to account party with whom it had never dealt. D.C. Code 1981, § 28:5-111(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

In general.

Even under strict compliance standard for letters of credit, variance between documents specified and documents submitted with demand for payment may be put aside if there is no possibility that documents could mislead paying bank to its detriment, but court must truly be able to say that variance was "de minimis" to justify departure from strict compliance rule. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

Bank was not required to honor demand for payment under letter of credit (LOC) when beneficiary tendered photocopy of promissory note instead of original note as required by terms of LOC, despite beneficiary's contention that he strictly complied in that underlying credit transaction involved nonrecourse promissory note providing no more than a schedule of payments; unqualified nature of issuer's duty to pay upon satisfaction of LOC's terms relieved it of any duty to consult legal counsel about recourse versus nonrecourse negotiable instruments in assessing its risk of double presentment or of rebuff by customer in demanding reimbursement after accepting substitute for original note. D.C. Code 1981, § 28:5-101 et seq. Bisker v. Nationsbank, N.A., 686 A.2d 561, 1996 D.C. App. LEXIS 276 (1996).

§ 28:5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

(1) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in § 28:5-109(a); and

(2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) of this section are in addition to warranties arising under Articles 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those articles.

(Dec. 30, 1963, 77 Stat. 711, Pub. L. 88-243, § 1; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-108.

Prior Codifications. — 1981 Ed., § 28:5-110.

1973 Ed., § 28:5-110.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Since the warranties in subsection (a) are not given unless a letter of credit has been honored, no breach of warranty under this subsection can be a defense to dishonor by the issuer. Any defense must be based on Section 5-108 or 5-109 and not on this section. Also, breach of the warranties by the beneficiary in subsection (a) cannot excuse the applicant's duty to reimburse.

2. The warranty in Section 5-110(a)(2) assumes that payment under the letter of credit is final. It does not run to the issuer, only to the applicant. In most cases the applicant will have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary. It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108(a). It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor. If, for example, an underlying sales contract authorized the beneficiary to draw only upon "due performance" and the beneficiary drew even though it had breached the underlying contract by delivering defective goods, honor of its draw would break the warranty. By the same token, if the underlying contract authorized the beneficiary to draw only upon actual default or upon its or a third party's determination of default by the applicant and if the beneficiary drew in violation of its authorization, then upon honor of its draw the warranty would be breached. In many cases, therefore, the documents presented to the issuer will contain inaccurate statements (concerning the goods delivered or concerning default or other matters), but the breach of warranty arises not because the statements are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction.

3. The damages for breach of warranty are not specified in Section 5-111. Courts may find damage analogies in Section 2-714 in Article 2 and in warranty decisions under Articles 3 and 4.

Unlike wrongful dishonor cases—where the damages usually equal the amount of the draw—the damages for breach of warranty will often be much less than the amount of the draw, sometimes zero. Assume a seller entitled to draw only on proper performance of its sales contract. Assume it breaches the sales contract in a way that gives the buyer a right to damages but no right to reject. The applicant's damages for breach of the warranty in subsection (a)(2) are limited to the damages it could recover for breach of the contract of sale. Alternatively assume an underlying agreement that authorizes a beneficiary to draw only the "amount in default.“ Assume a default of $200,000 and a draw of $500,000. The damages for breach of warranty would be no more than $300,000.

§ 28:5-111. Remedies.

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the

amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this article or an issuer breaches an obligation not covered in subsection (a) or (b) of this section, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b) of this section.

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) of this section shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

(Dec. 30, 1963, 77 Stat. 713, Pub. L. 88-243, § 1; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-111.

1973 Ed., § 28:5-111.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The right to specific performance is new. The express limitation on the duty of the beneficiary to mitigate damages adopts the position of certain courts and commentators. Because the letter of credit depends upon speed and certainty of payment, it is important that the issuer not be given an incentive to dishonor. The issuer might have an incentive to dishonor if it could rely on the burden of mitigation falling on the beneficiary, (to sell goods and sue only for the difference between the price of the goods sold and the amount due under the letter of credit). Under the scheme contemplated by Section 5-111(a), the beneficiary would present

the documents to the issuer. If the issuer wrongfully dishonored, the beneficiary would have no further duty to the issuer with respect to the goods covered by documents that the issuer dishonored and returned. The issuer thus takes the risk that the beneficiary will let the goods rot or be destroyed. Of course the beneficiary may have a duty of mitigation to the applicant arising from the underlying agreement, but the issuer would not have the right to assert that duty by way of defense or setoff. See Section 5-117(d). If the beneficiary sells the goods covered by dishonored documents or if the beneficiary sells a draft after acceptance but before dishonor by the issuer, the net amount so gained should be subtracted from the amount of the beneficiary's damages—at least where the damage claim against the issuer equals or exceeds the damage suffered by the beneficiary. If, on the other hand, the beneficiary suffers damages in an underlying transaction in an amount that exceeds the amount of the wrongfully dishonored demand (e.g., where the letter of credit does not cover 100 percent of the underlying obligation), the damages avoided should not necessarily be deducted from the beneficiary's claim against the issuer. In such a case, the damages would be the lesser of (i) the amount recoverable in the absence of mitigation (that is, the amount that is subject to the dishonor or repudiation plus any incidental damages) and (ii) the damages remaining after deduction for the amount of damages actually avoided.

A beneficiary need not present documents as a condition of suit for anticipatory repudiation, but if a beneficiary could never have obtained documents necessary for a presentation conforming to the letter of credit, the beneficiary cannot recover for anticipatory repudiation of the letter of credit. Doelger v. Battery Park Bank, 201 A.D. 515, 194 N.Y.S. 582 (1922) and Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, 497 F.Supp. 893 (S.D.N.Y.1980), aff'd, 647 F.2d 300 (2d Cir.1981), cert. denied, 454 U.S. 1148 (1982). The last sentence of subsection (c) does not expand the liability of a confirmer to persons to whom the confirmer would not otherwise be liable under Section 5-107.

Almost all letters of credit, including those that call for an acceptance, are "obligations to pay money" as that term is used in Section 5-111(a).

2. What damages "result" from improper honor is for the courts to decide. Even though an issuer pays a beneficiary in violation of Section 5-108(a) or of its contract with the applicant, it may have no liability to an applicant. If the underlying contract has been fully performed, the applicant may not have been damaged by the issuer's breach. Such a case would occur when A contracts for goods at $100 per ton, but, upon delivery, the market value of conforming goods has decreased to $25 per ton. If the issuer pays over discrepancies, there should be no recovery by A for the price differential if the issuer's breach did not alter the applicant's obligation under the underlying contract, i.e., to pay $100 per ton for goods now worth $25 per ton. On the other hand, if the applicant intends to resell the goods and must itself satisfy the strict compliance requirements under a second letter of credit in connection with its sale, the applicant may be damaged by the issuer's payment despite discrepancies because the applicant itself may then be unable to procure honor on the letter of credit where it is the beneficiary, and may be unable to mitigate its damages by enforcing its rights against others in the underlying transaction. Note that an issuer found liable to its applicant may have recourse under Section 5-117 by subrogation to the applicant's claim against the beneficiary or other persons.

One who inaccurately advises a letter of credit breaches its obligation to the beneficiary, but may cause no damage. If the beneficiary knows the terms of the letter of credit and understands the advice to be inaccurate, the beneficiary will have suffered no damage as a result of the adviser's breach.

3. Since the confirmer has the rights and duties of an issuer, in general it has an issuer's liability, see subsection (c). The confirmer is usually a confirming bank. A confirming bank often also plays the role of an adviser. If it breaks its obligation to the beneficiary, the confirming bank may have liability as an issuer or, depending upon the obligation that was broken, as an adviser. For example, a wrongful dishonor would give it liability as an issuer under Section 5-111(a). On the other hand a confirming bank that broke its obligation to advise the credit but did not commit wrongful dishonor would be treated under Section 5-111(c).

4. Consequential damages for breach of obligations under this article are excluded in the belief that these damages can best be avoided by the beneficiary or the applicant and out of the fear that imposing consequential damages on issuers would raise the cost of the letter of credit to a level that might render it uneconomic. A fortiori punitive and exemplary damages are excluded, however, this section does not bar recovery of consequential or even punitive damages for breach of statutory or common law duties arising outside of this article.

5. The section does not specify a rate of interest. It leaves the setting of the rate to the court. It would be appropriate for a court to use the rate that would normally apply in that court in other situations where interest is imposed by law.

6. The court must award attorney's fees to the prevailing party, whether that party is an applicant, a beneficiary, an issuer, a nominated person, or adviser. Since the issuer may be entitled to recover its legal fees and costs from the applicant under the reimbursement agreement, allowing the issuer to recover those fees from a losing beneficiary may also protect the applicant against undeserved losses. The party entitled to attorneys' fees has been described as the "prevailing party." Sometimes it will be unclear which party "prevailed," for example, where there are multiple issues and one party wins on some and the other party wins on others. Determining which is the prevailing party is in the discretion of the court. Subsection (e) authorizes attorney's fees in all actions where a remedy is sought "under this article." It applies even when the remedy might be an injunction under Section 5-109 or when the claimed remedy is otherwise outside of Section 5-111. Neither an issuer nor a confirmer should be treated as a "losing" party when an injunction is granted to the applicant over the objection of the issuer or confirmer; accordingly neither should be liable for fees and expenses in that case.

"Expenses of litigation" is intended to be broader than "costs." For example, expense of litigation would include travel expenses of witnesses, fees for expert witnesses, and expenses associated with taking depositions.

7. For the purposes of Section 5-111(f) "harm anticipated" must be anticipated at the time when the agreement that includes the liquidated damage clause is executed or at the time when the undertaking that includes the clause is issued. See Section 2A-504.

CASE NOTES

Scope of warranties.

Confirming bank's stamped declaration on international letter of credit stating that bank confirmed credit and thereby undertook that any draft drawn under and presented in compliance with terms of credit would be duly honored on due presentation did not make promise to any parties other than those who might duly present appropriate draft to bank so as to extend confirming bank's liability under statutory warranties to account party with whom it had never dealt. D.C. Code 1981, § 28:5-111(2). Confeccoes Texteis de Vouzela, Lda. v. Riggs Nat'l Bank, 994 F.2d 851, 1993 U.S. App. LEXIS 13581 (C.A.D.C. 1993).

§ 28:5-112. Transfer of letter of credit.

(a) Except as otherwise provided in § 28:5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) The transfer would violate applicable law; or

(2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in § 28:5-108(e) or is otherwise reasonable under the circumstances.

(Dec. 30, 1963, 77 Stat. 713, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 7, 29 DCR 309; renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-112.

1973 Ed., § 28:5-112.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. In order to protect the applicant's reliance on the designated beneficiary, letter of credit law traditionally has forbidden the beneficiary to convey to third parties its right to draw or demand payment under the letter of credit. Subsection (a) codifies that rule. The term "transfer" refers to the beneficiary's conveyance of that right. Absent incorporation of the UCP (which make elaborate provision for partial transfer of a commercial letter of credit) or similar trade practice and absent other express indication in the letter of credit that the term is used to mean something else, a term in the letter of credit indicating that the beneficiary has the right to transfer should be taken to mean that the beneficiary may convey to a third party its right to draw or demand payment. Even in that case, the issuer or other person controlling the transfer may make the beneficiary's right to transfer subject to conditions, such as timely notification, payment of a fee, delivery of the letter of credit to the issuer or other person controlling the transfer, or execution of appropriate forms to document the transfer. A nominated person who is not a confirmer has no obligation to recognize a transfer.

The power to establish "requirements" does not include the right absolutely to refuse to recognize transfers under a transferable letter of credit. An issuer who wishes to retain the right to deny all transfers should not issue transferable letters of credit or should incorporate the UCP. By stating its requirements in the letter of credit an issuer may impose any requirement without regard to its conformity to practice or reasonableness. Transfer requirements of issuers and nominated persons must be made known to potential transferors and transferees to enable those parties to comply with the requirements. A common method of making such requirements known is to use a form that indicates the information that must be provided and the instructions that must be given to enable the issuer or nominated person to comply with a request to transfer.

2. The issuance of a transferable letter of credit with the concurrence of the applicant is ipso facto an agreement by the issuer and applicant to permit a beneficiary to transfer its drawing right and permit a nominated person to recognize and carry out that transfer without further notice to them. In international commerce, transferable letters of credit are often issued under circumstances in which a nominated person or adviser is expected to facilitate the transfer from the original beneficiary to a transferee and to deal with that transferee. In those circumstances it is the responsibility of the nominated person or adviser to establish procedures satisfactory to protect itself against double presentation or dispute about the right to draw under the letter of credit. Commonly such a person will control the transfer by requiring that the original letter of credit be given to it or by causing a paper copy marked as an original to be issued where the original letter of credit was electronic. By keeping possession of the original letter of credit the nominated person or adviser can minimize or entirely exclude the possibility that the original beneficiary could properly procure payment from another bank. If the letter of credit requires presentation of the original letter of credit itself, no other payment could be procured. In addition to imposing whatever requirements it considers appropriate to protect itself against double payment the person that is facilitating the transfer has a right to charge an appropriate fee for its activity.

"Transfer" of a letter of credit should be distinguished from "assignment of proceeds." The former is analogous to a novation or a substitution of beneficiaries. It contemplates not merely payment to but also performance by the transferee. For example, under the typical terms of transfer for a commercial letter of credit, a transferee could comply with a letter of credit transferred to it by signing and presenting its own draft and invoice. An assignee of proceeds, on the other hand, is wholly dependent on the presentation of a draft and invoice signed by the beneficiary.

By agreeing to the issuance of a transferable letter of credit, which is not qualified or limited, the applicant may lose control over the identity of the person whose performance will earn payment under the letter of credit.

§ 28:5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise

provided in subsection (e) of this section, an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in § 28:5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) of this section has the consequences specified in § 28:5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of § 28:5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) of this section or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

(Dec. 30, 1963, 77 Stat. 713, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 7, 29 DCR 309; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923; Apr. 9, 1997, D.C. Law 11-255, § 27(uu), 44 DCR 1271.)

Section references. — This section is referenced in § 28:5-108 and § 28:5-112.

Prior Codifications. — 1981 Ed., § 28:5-113.

1973 Ed., § 28:5-113.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:5-112.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

This section affirms the result in Pastor v. Nat. Republic Bank of Chicago, 76 Ill.2d 139, 390 N.E.2d 894 (Ill.1979) and Federal Deposit Insurance Co. v. Bank of Boulder, 911 F.2d 1466 (10th Cir.1990).

An issuer's requirements for recognition of a successor's status might include presentation of a certificate of merger, a court order appointing a bankruptcy trustee or receiver, a certificate of appointment as bankruptcy trustee, or the like. The issuer is entitled to rely upon such documents which on their face demonstrate that presentation is made by a successor of a beneficiary. It is not obliged to make an independent investigation to determine the fact of succession.

§ 28:5-114. Assignment of proceeds.

(a) In this section, the term "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit.

The term "proceeds of a letter of credit" does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Article 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 or other law.

(Dec. 30, 1963, 77 Stat. 713, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 7, 29 DCR 309; Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923; Apr. 9, 1997, D.C. Law 11-240, § 3(e), 44 DCR 1087.)

Section references. — This section is referenced in § 28:5-103, § 28:9-102, § 28:9-107, and § 28:9-109.

Prior Codifications. — 1981 Ed., § 28:5-114.

1973 Ed., § 28:5-114.

Legislative history of Law 9-196. — Law 9-196, the "Uniform Commercial Code Investment Securities Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-20, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on the first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-321 and transmitted to both Houses of Congress for its review. D.C. Law 9-196 became effective on March 16, 1993.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:5-112.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 12, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (b) expressly validates the beneficiary's present assignment of letter of credit proceeds if made after the credit is established but before the proceeds are realized. This section adopts the prevailing usage—"assignment of proceeds"—to an assignee. That terminology carries with it no implication, however, that an assignee acquires no interest until the proceeds are paid by the issuer. For example, an "assignment of the right to proceeds" of a letter of credit for purposes of security that meets the requirements of Section 9-203(1) would constitute the present creation of a security interest in that right. This security interest can be perfected by possession (Section 9-305) if the letter of credit is in written form. Although subsection (a) explains the meaning of " 'proceeds' of a letter of credit," it should be emphasized that those proceeds also may be Article 9 proceeds of other collateral. For example, if a seller of inventory receives a letter of credit to support the account that arises upon the sale, payments made under the letter of credit are Article 9 proceeds of the inventory, account, and any document of title covering the inventory. Thus, the secured party who had a perfected security interest in that inventory, account, or document has a perfected security interest in the proceeds collected under the letter of credit, so long as they are identifiable cash proceeds (Section 9-306(2), (3)). This perfection is continuous, regardless of whether the secured party perfected a security interest in the right to letter of credit proceeds.

2. An assignee's rights to enforce an assignment of proceeds against an issuer and the priority of the assignee's rights against a nominated person or transferee beneficiary are governed by Article 5. Those rights and that priority are stated in subsections (c), (d), and (e). Note also that Section 4-210 gives first priority to a collecting bank that has given value for a documentary draft.

3. By requiring that an issuer or nominated person consent to the assignment of proceeds of a letter of credit, subsections (c) and (d) follow more closely recognized national and international letter of credit practices than did prior law. In most circumstances, it has always been advisable for the assignee to obtain the consent of the issuer in order better to safeguard its right to the proceeds. When notice of an assignment has been received, issuers normally have required signatures on a consent form. This practice is reflected in the revision. By unconditionally consenting to such an assignment, the issuer or nominated person becomes bound, subject to the rights of the superior parties specified in subsection (e), to pay to the assignee the assigned letter of credit proceeds that the issuer or nominated person would otherwise pay to the beneficiary or another assignee.

Where the letter of credit must be presented as a condition to honor and the assignee holds and exhibits the letter of credit to the issuer or nominated person, the risk to the issuer or nominated person of having to pay twice is minimized. In such a situation, subsection (d) provides that the issuer or nominated person may not unreasonably withhold its consent to the assignment.

§ 28:5-115. Statute of limitations.

An action to enforce a right or obligation arising under this article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

(Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-115.

1973 Ed., § 28:5-115.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is based upon Sections 4-111 and 2-725(2).

2. This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this article, such as claims for breach of warranty under Section

5-110. Because it covers all claims under Section 5-111, the statute of limitations applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v. issuer).

3. The statute of limitations, like the rest of the statute, applies only to a letter of credit issued on or after the effective date and only to transactions, events, obligations, or duties arising out of or associated with such a letter. If a letter of credit was issued before the effective date and an obligation on that letter of credit was breached after the effective date, the complaining party could bring its suit within the time that would have been permitted prior to the adoption of Section 5-115 and would not be limited by the terms of Section 5-115.

CASE NOTES

Anticipatory breach.

Issuing bank's letters informing advising bank and seller that freeze on Iraqi assets prohibited payment under letter of credit "at this time" was "anticipatory breach" under District of Columbia law, rather than notice of supervening illegality; issuing bank told advising bank that issuing bank would not pay under any circumstances, and issuing bank was acting without any guidance from Office of Foreign Assets Control. D.C. Code 1981, § 28:5-115. Engel Industries, Inc. v. First American Bank, N.A., 798 F. Supp. 9, 1992 U.S. Dist. LEXIS 7724 (1992).

§ 28:5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in § 28:5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) of this section applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b) of this section, (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in § 28:5-103(c).

(d) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.

(e) The forum for settling disputes arising out of an undertaking within this

article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a) of this section.

(Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:1-301 and § 28:9-306.

Prior Codifications. — 1981 Ed., § 28:5-116.

1973 Ed., § 28:5-116.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Although it would be possible for the parties to agree otherwise, the law normally chosen by agreement under subsection (a) and that provided in the absence of agreement under subsection (b) is the substantive law of a particular jurisdiction not including the choice of law principles of that jurisdiction. Thus, two parties, an issuer and an applicant, both located in Oklahoma might choose the law of New York. Unless they agree otherwise, the section anticipates that they wish the substantive law of New York to apply to their transaction and they do not intend that a New York choice of law principle might direct a court to Oklahoma law. By the same token, the liability of an issuer located in New York is governed by New York substantive law—in the absence of agreement—even in circumstances in which choice of law principles found in the common law of New York might direct one to the law of another State. Subsection (b) states the relevant choice of law principles and it should not be subordinated to some other choice of law rule. Within the States of the United States renvoi will not be a problem once every jurisdiction has enacted Section 5-116 because every jurisdiction will then have the same choice of law rule and in a particular case all choice of law rules will point to the same substantive law.

Subsection (b) does not state a choice of law rule for the "liability of an applicant." However, subsection (b) does state a choice of law rule for the liability of an issuer, nominated person, or adviser, and since some of the issues in suits by applicants against those persons involve the "liability of an issuer, nominated person, or adviser," subsection (b) states the choice of law rule for those issues. Because an issuer may have liability to a confirmer both as an issuer (Section 5-108(a), Comment 5 to Section 5-108) and as an applicant (Section 5-107(a), Comment 1 to Section 5-107, Section 5-108(i)), subsection (b) may state the choice of law rule for some but not all of the issuer's liability in a suit by a confirmer.

2. Because the confirmer or other nominated person may choose different law from that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is possible that a confirmer or nominated person may be obligated to pay (under their law) but will not be entitled to payment from the issuer (under its law). Similarly, the rights of an unreimbursed issuer, confirmer, or nominated person against a beneficiary under Section 5-109, 5-110, or 5-117, will not necessarily be governed by the same law that applies to the issuer's or confirmer's obligation upon presentation. Because the UCP and other practice are incorporated in most international letters of credit, disputes arising from different legal obligations to honor have not been frequent. Since Section 5-108 incorporates standard practice, these problems should be further minimized—at least to the extent that the same practice is and continues to be widely followed.

3. This section does not permit what is now authorized by the nonuniform Section 5-102(4) in New York. Under the current law in New York a letter of credit that incorporates the UCP is not governed in any respect by Article 5. Under revised Section 5-116 letters of credit that incorporate the UCP or similar practice will still be subject to Article 5 in certain respects. First, incorporation of the UCP or other practice does not override the nonvariable terms of Article 5. Second, where there is no conflict between Article 5 and the relevant provision of the UCP or other practice, both apply. Third, practice provisions incorporated in a letter of credit will not be effective if they fail to comply with Section 5-103(c). Assume, for example, that a practice provision purported to free a party from any liability unless it were "grossly negligent" or that the

practice generally limited the remedies that one party might have against another. Depending upon the circumstances, that disclaimer or limitation of liability might be ineffective because of Section 5-103(c).

Even though Article 5 is generally consistent with UCP 500, it is not necessarily consistent with other rules or with versions of the UCP that may be adopted after Article 5's revision, or with other practices that may develop. Rules of practice incorporated in the letter of credit or other undertaking are those in effect when the letter of credit or other undertaking is issued. Except in the unusual cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will override the rules of Article 5 and the parties to letter of credit transactions must be familiar with practice (such as future versions of the UCP) that is explicitly adopted in letters of credit.

4. In several ways Article 5 conflicts with and overrides similar matters governed by Articles 3 and 4. For example, "draft" is more broadly defined in letter of credit practice than under Section 3-104. The time allowed for honor and the required notification of reasons for dishonor are different in letter of credit practice than in the handling of documentary and other drafts under Articles 3 and 4.

5. Subsection (e) must be read in conjunction with existing law governing subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction not including letter of credit disputes, subsection (e) does not authorize parties to choose that forum. For example, the parties' agreement under Section 5-116(e) would not confer jurisdiction on a probate court to decide a letter of credit case.

If the parties choose a forum under subsection (e) and if—because of other law—that forum will not take jurisdiction, the parties' agreement or undertaking should then be construed (for the purpose of forum selection) as though it did not contain a clause choosing a particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory where neither the chosen State nor the State which would have jurisdiction but for the clause will take jurisdiction—the former in disregard of the clause and the latter in honor of the clause.

§ 28:5-117. Subrogation of issuer, applicant, and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a) of this section.

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) The applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) of this section do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) of this section do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the

applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

(Dec. 30, 1963, 77 Stat. 712, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 3, 39 DCR 9165, renumbered and amended Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:5-103 and § 28:5-108.

Prior Codifications. — 1981 Ed., § 28:5-117.

1973 Ed., § 28:5-117.

Legislative history of Law 9-196. — Law 9-196, the "Uniform Commercial Code Investment Securities Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-20, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-321 and transmitted to both Houses of Congress for its review. D.C. Law 9-196 became effective on March 16, 1993.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. By itself this section does not grant any right of subrogation. It grants only the right that would exist if the person seeking subrogation "were a secondary obligor." (The term "secondary obligor" refers to a surety, guarantor, or other person against whom or whose property an obligee has recourse with respect to the obligation of a third party. See Restatement of the Law Third, Suretyship and Guaranty s 1 (1996).) If the secondary obligor would not have a right to subrogation in the circumstances in which one is claimed under this section, none is granted by this section. In effect, the section does no more than to remove an impediment that some courts have found to subrogation because they conclude that the issuer's or other claimant's rights are "independent" of the underlying obligation. If, for example, a secondary obligor would not have a subrogation right because its payment did not fully satisfy the underlying obligation, none would be available under this section. The section indorses the position of Judge Becker in Tudor Development Group, Inc. v. United States Fidelity and Guaranty, 968 F.2d 357 (3rd Cir.1991).

2. To preserve the independence of the letter of credit obligation and to insure that subrogation not be used as an offensive weapon by an issuer or others, the admonition in subsection (d) must be carefully observed. Only one who has completed its performance in a letter of credit transaction can have a right to subrogation. For example, an issuer may not dishonor and then defend its dishonor or assert a setoff on the ground that it is subrogated to another person's rights. Nor may the issuer complain after honor that its subrogation rights have been impaired by any good faith dealings between the beneficiary and the applicant or any other person. Assume, for example, that the beneficiary under a standby letter of credit is a mortgagee. If the mortgagee were obliged to issue a release of the mortgage upon payment of the underlying debt (by the issuer under the letter of credit), that release might impair the issuer's rights of subrogation, but the beneficiary would have no liability to the issuer for having granted that release.

§ 28:5-118. Applicability.

This article applies to a letter of credit that is issued on or after the effective date of this article. This article does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this article.

(April 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Section references. — This section is referenced in § 28:9-203, § 28:9-309, and § 28:9-322.

Prior Codifications. — 1981 Ed., § 28:5-118.

Legislative history of Law 11-238. — For

legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section gives the issuer of a letter of credit or a nominated person thereunder an automatic perfected security interest in a "document" (as that term is defined in Section 5-102(a)(6)). The security interest arises only if the document is presented to the issuer or nominated person under the letter of credit and only to the extent of the value that is given. This security interest is analogous to that awarded to a collecting bank under Section 4-210. Subsection (b) contains special rules governing the security interest arising under this section. In all other respects, a security interest arising under this section is subject to Article 9. See Section 9-109. Thus, for example, a security interest arising under this section may give rise to a security interest in proceeds under Section 9-315.

2. Subsection (b)(1) makes a security agreement unnecessary to the creation of a security interest under this section. Under subsection (b)(2), a security interest arising under this section is perfected if the document is presented in a medium other than a written or tangible medium. Documents that are written and that are not an otherwise-defined type of collateral under Article 9 (e.g., an invoice or inspection certificate) may be goods, in which an issuer or nominated person could perfect its security interest by possession. Because the definition of document in Section 5-102(a)(6) includes records (e.g., electronic records) that may not be goods, subsection (b)(2) provides for automatic perfection (i.e., without filing or possession).

Under subsection (b)(3), if the document (i) is in a written or tangible medium, (ii) is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, and (iii) is not in the debtor's possession, the security interest is perfected and has priority over a conflicting security interest. If the document is a type of tangible collateral that subsection (b)(3) excludes from its perfection and priority rules, the issuer or nominated person must comply with the normal method of perfection (e.g., possession of an instrument) and is subject to the applicable Article 9 priority rules. Documents to which subsection (b)(3) applies may be important to an issuer or nominated person. For example, a confirmer who pays the beneficiary must be assured that its rights to all documents are not impaired. It will find it necessary to present all of the required documents to the issuer in order to be reimbursed. Moreover, when a nominated person sends documents to an issuer in connection with the nominated person's reimbursement, that activity is not a collection, enforcement, or disposition of collateral under Article 9.

One purpose of this section is to protect an issuer or nominated person from claims of a beneficiary's creditors. It is a fallback provision inasmuch as issuers and nominated persons frequently may obtain and perfect security interests under the usual Article 9 rules, and, in many cases, the documents will be owned by the issuer, nominated person, or applicant.

§ 28:5-119. Savings clause.

A transaction arising out of or associated with a letter of credit that was issued before the effective date of this article and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this article as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

(Apr. 9, 1997, D.C. Law 11-238, § 2, 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:5-119.

Legislative history of Law 11-238. — For legislative history of D.C. Law 11-238, see Historical and Statutory Notes following § 28:5-101.

§ 28:5-120. Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9, but:

(1) A security agreement is not necessary to make the security interest enforceable under § 28:9-203(b)(3);

(2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

(Oct. 26, 2000, D.C. Law 13-201, § 201(f)(2), 47 DCR 7576; Mar. 13, 2004, D.C. Law 15-105, § 62, 51 DCR 881.)

Cross references. — Business corporations, property and assets, disposition, approval, dissenting shareholders, see § 29-201.39.

Effect of amendments. — D.C. Law 15-105 validated a previously made technical correction.

Legislative history of Law 15-105. — Law 15-105, the "Technical Amendments Act of 2003", was introduced in Council and assigned Bill No. 15-437, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 2003, and December 2, 2003, respectively. Signed by the Mayor on January 6, 2004, it was assigned Act No. 15-291 and transmitted to both Houses of Congress for its review. D.C. Law 15-105 became effective on March 13, 2004.

Article 6. Bulk Transfers.

§ 28:6-101. Short title.

This article may be cited as the "Uniform Commercial Code—Bulk Sales".

(Dec. 30, 1963, 77 Stat. 714, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Prior Codifications. — 1981 Ed., § 28:6-101.

1973 Ed., § 28:6-101.

Legislative history of Law 11-239. — Law 11-239, the "Uniform Commercial Code—Bulk Sales Act of 1996," was introduced in Council and assigned Bill No. 11-575, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 11, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-499 and transmitted to both Houses of Congress for its review. D.C. Law 11-239 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6-101 (1987 Official Text).

Change: This Article applies only to sales, as defined in Section 2-103(1), and not to other transfers.

Purpose of Change: Transfers other than sales, e.g., grants of security interests, do not present risks to creditors necessitating advance notice in accordance with the provisions of this Article. The Uniform Fraudulent Transfer Act affords a remedy to creditors who are injured by donative transfers.

Rationale for Revision of the Article:

Article 6 (1987 Official Text) imposes upon transferees in bulk several duties toward creditors of the transferor. These duties include the duty to notify the creditors of the impending bulk transfer and, in those jurisdictions that have adopted optional Section 6-106, the duty to assure that the new consideration for the transfer is applied to pay debts of the transferor.

Compliance with the provisions of Article 6 can be burdensome, particularly when the transferor has a large number of creditors. When the transferor is actively engaged in business at a number of locations, assembling a current list of creditors may not be possible. Mailing a notice to each creditor may prove costly. When the goods that are the subject of the transfer are located in several jurisdictions, the transferor may be obligated to comply with Article 6 as enacted in each jurisdiction. The widespread enactment of nonuniform amendments makes compliance with Article 6 in multiple-state transactions problematic. Moreover, the Article requires compliance even when there is no reason to believe that the transferor is conducting a fraudulent transfer, e.g., when the transferor is scaling down the business but remaining available to creditors.

Article 6 imposes strict liability for noncompliance. Failure to comply with the provisions of the Article renders the transfer ineffective, even when the transferor has attempted compliance in good faith, and even when no creditor has been injured by the noncompliance. The potential liability for minor noncompliance may be high. If the transferor should enter bankruptcy before the expiration of the limitation period, Bankruptcy Code §§ 544(b), 550(a), 11 U.S.C. §§ 544(b), 550(a), may enable the transferor's bankruptcy trustee to set aside the entire transaction and recover from the noncomplying transferee all the goods transferred or their value. The trustee has this power even though the noncompliance was with respect to only a single creditor holding a small claim.

The benefits that compliance affords to creditors do not justify the substantial burdens and risks that the Article imposes upon good faith purchasers of business assets. The Article requires that notice be sent only ten days before the transferee takes possession of the goods or pays for them, whichever happens first. Given the delay between sending the notice and its receipt, creditors have scant opportunity to avail themselves of a judicial or nonjudicial remedy before the transfer has been consummated.

In some cases Article 6 may have the unintended effect of injuring, rather than aiding, creditors of the transferor. Those transferees who recognize the burdens and risks that Article 6 imposes upon them sometimes agree to purchase only at a reduced price. Others refuse to purchase at all, leaving the creditors to realize only the liquidation value, rather than the going concern value, of the business goods.

As a response to these inadequacies and others, the National Conference of Commissioners on Uniform State Laws has completely revised Article 6. This revision is designed to reduce the burdens and risks imposed upon good-faith buyers of business assets while increasing the protection afforded to creditors. Among the major changes it makes are the following:

—this Article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (Section 6-102(1)(c)).

—this Article does not apply to sales in which the value of the property otherwise available to creditors is less than $10,000 or those in which the value of the property is greater than $25,000,000 (Section 6-103(3)(l)).

—the choice-of-law provision (Sections 6-103(1)(b) and 6-103(2)) limits the applicable law to that of one jurisdiction.

—when the seller if indebted to a large number of persons, the buyer need neither obtain a list of those persons nor send individual notices to each person but instead may give notice by filing (Sections 6-105(2) and 6-104(2)).

—the notice period is increased from 10 days to 45 days (Section 6-105(5)), and the statute of limitations is extended from six months to one year (Section 6-110).

—the notice must include a copy of a "schedule of distribution," which sets forth how the net contract price is to be distributed (Sections 6-105(3) and 6-106(1)).

—a buyer who makes a good faith effort to comply with the requirements of this Article or to exclude the sale from the application of this Article, or who acts on the good faith belief that this Article does not apply to the sale, is not liable for noncompliance (Section 6-107(3)).

—a buyer's noncompliance does not render the sale ineffective or otherwise affect the buyer's title to the goods; rather, the liability of a noncomplying buyer is for damages caused by the noncompliance (Sections 6-107(1) and 6-107(8)).

In addition to making these and other major substantive changes, revised Article 6 resolves the ambiguities that three decades of law practice, judicial construction, and scholarly inquiry have disclosed.

CASE NOTES

Damages.

Damages for violation of the District of Columbia Bulk Transfer Statute, § 28:6-101 et seq., should equal value of items transferred on date of transfer, and such value is not reduced by any posttransfer expenditures that transferee may have made. D.C. Code 1981, § 28:6-101 et seq. In re Villa Roel, Inc., 57 B.R. 835, 1985 Bankr. LEXIS 5596 (1985).

Bankruptcy trustee was entitled to damages of $100,000 from buyer of major part of debtor's inventory and fixtures in violation of requirement that notice be given to creditors under the District of Columbia Bulk Transfer Statute, § 28:6-101 et seq., where $100,000 was paid by buyer to debtor, buyer admitted that he sold, disposed of, and converted to his own use property that he acquired from debtor, and buyer did not dispute that fair market value of items transferred was price he paid of $100,000. D.C. Code 1981, § 28:6-101 et seq. In re Villa Roel, Inc., 57 B.R. 835, 1985 Bankr. LEXIS 5596 (1985).

Buyer of major part of debtor's inventory and fixtures in violation of the Bulk Transfer Statute, § 28:6-101 et seq., would not be able to trace proceeds of sale to funds held by bankruptcy trustee, and thus, buyer would be liable to trustee for entire purchase price amount, where debtor's estate had no assets. D.C. Code 1981, § 28:6-101 et seq. In re Villa Roel, Inc., 57 B.R. 835, 1985 Bankr. LEXIS 5596 (1985).

§ 28:6-102. Definitions and index of definitions.

(a) In this article, unless the context otherwise requires, the term:

(1) "Assets" means the inventory that is the subject of a bulk sale and any

tangible and intangible personal property used or held for use primarily in, or arising from, the seller's business and sold in connection with that inventory, but the term does not include:

(A) Fixtures (§ 28:9-102(a)(41)) other than readily removable factory and office machines;

(B) The lessee's interest in a lease of real property; or

(C) Property to the extent it is generally exempt from creditor process under nonbankruptcy law.

(2) "Auctioneer" means a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.

(3) "Bulk sale" means:

(A) In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the auctioneer or liquidator has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale or series of sales; and

(B) In all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale.

(4) "Claim" means a right to payment from the seller, whether or not the right is reduced to judgment, liquidated, fixed, matured, disputed, secured, legal, or equitable. The term includes costs of collection and attorney's fees only to the extent that the laws of the District permit the holder of the claim to recover them in an action against the obligor.

(5) "Claimant" means a person holding a claim incurred in the seller's business other than:

(A) An unsecured and unmatured claim for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay;

(B) A claim for injury to an individual or to property, or for breach of warranty, unless:

(i) A right of action for the claim has accrued;

(ii) The claim has been asserted against the seller; and

(iii) The seller knows the identity of the person asserting the claim and the basis upon which the person has asserted it; and

(C) A claim for taxes owing to a governmental unit, if:

(i) A statute governing the enforcement of the claim permits or requires notice of the bulk sale to be given to the governmental unit in a manner other than by compliance with the requirements of this article; and

(ii) Notice is given in accordance with the statute.

(6) "Creditor" means a claimant or other person holding a claim.

(7)(A) "Date of the bulk sale" means:

(i) If the sale is by auction or is conducted by a liquidator on the

seller's behalf, the date on which more than 10% of the net proceeds is paid to or for the benefit of the seller; and

(ii) In all other cases, the later of the date on which:

(I) More than 10% of the net contract price is paid to or for the benefit of the seller; or

(II) More than 10% of the assets, as measured by value, are transferred to the buyer.

(B) For purposes of this subsection:

(i) Delivery of a negotiable instrument (§ 28:3-104(a)) to or for the benefit of the seller in exchange for assets constitutes payment of the contract price pro tanto;

(ii) To the extent that the contract price is deposited in an escrow, the contract price is paid to or for the benefit of the seller when the seller acquires the unconditional right to receive the deposit or when the deposit is delivered to the seller or for the benefit of the seller, whichever is earlier; and

(iii) An asset is transferred when a person holding an unsecured claim can no longer obtain through judicial proceedings rights to the asset that are superior to those of the buyer arising as a result of the bulk sale. A person holding an unsecured claim can obtain those superior rights to a tangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to possess the asset, and a person holding an unsecured claim can obtain those superior rights to an intangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to use the asset.

(8) "Date of the bulk-sale agreement" means:

(A) In the case of a sale by auction or conducted by a liquidator, the date on which the seller engages the auctioneer or liquidator; and

(B) In all other cases, the date on which a bulk-sale agreement becomes enforceable between the buyer and the seller.

(9) "Debt" means liability on a claim.

(10) "Liquidator" means a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution.

(11) "Mayor" means the Mayor of the District of Columbia.

(12) "Net contract price" means the new consideration the buyer is obligated to pay for the assets less:

(A) The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

(B) The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(13) "Net proceeds" means the new consideration received for assets sold

at a sale by auction or a sale conducted by a liquidator on the seller's behalf less:

(A) Commissions and reasonable expenses of the sale;

(B) The amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

(C) The amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

(14) A sale is "in the ordinary course of the seller's business" if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

(15) "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(16) "Value" means fair market value.

(17) "Verified" means signed and sworn to or affirmed.

(b) The following definitions in other Articles apply to this article:

(1) "Buyer." § 28:2-103(1)(a).

(2) "Equipment." § 28:9-102(a)(33).

(3) "Inventory." § 28:9-102(a)(48).

(4) "Sale." § 28:2-106(1).

(5) "Seller." § 28:2-103(1)(d).

(c) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 714, Pub. L. 88-243, § 1; Feb. 7, 1980, D.C. Law 3-49, § 2, 26 DCR 2731; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936; Oct. 26, 2000, D.C. Law 13-201, § 201(g)(1), 47 DCR 7576.)

Section references. — This section is referenced in § 28:6-104.

Prior Codifications. — 1981 Ed., § 28:6-102.

1973 Ed., § 28:6-102.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 3-49. — Law 3-49, the "Uniform Commercial Code—Bulk Transfers Amendment Act of 1979," was introduced in Council and assigned Bill No. 3-104, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on November 6, 1979 and November 20, 1979, respectively. Signed by the Mayor on December 12, 1979, it was assigned Act No. 3-135 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

Legislative history of Law 13-201. — Law 13-201, the "Uniform Commercial Code Secured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

UNIFORM COMMERCIAL CODE COMMENT

1. (a) "Assets". New. The term generally includes only "personal property." Whether particular property is "personal property" is to be determined by law outside this Article; however, for purposes of this Article, (i) the term includes "readily removable factory and office machines" (compare Section 9-313(4)(c)), even if they are covered by applicable real estate law and thus are "fixtures" as defined in Section 9-313(1)(a); (ii) the term does not include the lessee's interest in a lease of real property, even if that interest is considered to be personal property under other applicable law; and (iii) the term does not include property to the extent that it is "generally exempt from creditor process under nonbankruptcy law."

(b) "Auctioneer". Compare Section 6-108(3) (1987 Official Text).

(c) "Bulk Sale". Bulk sales are of two kinds. Subsection (1)(c)(i) describes bulk sales conducted by a professional intermediary (i.e., an auctioneer or liquidator), as to which sales Section 6-108 applies. If these indirect sales occur as a series of related sales, then the entire series is treated as a single "bulk sale" and the term applies to the sales in the aggregate. Sales made directly by the seller to the buyer, described in subsection (1)(c)(ii), include sales conducted by an auctioneer or liquidator for its own account.

The elements of both direct and indirect sales are the same. Some of these elements have been borrowed from the 1987 Official Text of Article 6 and restated. For example, the term includes only sales that are not "in the ordinary course of the seller's business" (subsection (1)(m)). The sale must be of "more than half of the seller's inventory, as measured by value [subsection (1)(o)] on the date of the bulk-sale agreement [subsection (1)(h)]." All inventory owned by the seller should be included in the calculation, regardless of where it is located. Inventory that is encumbered by a security interest or lien should be counted at its gross value, although the fact that it is encumbered may affect the applicability of this Article to the sale.

The determination whether a sale is a "bulk sale" and thus subject to this Article is not affected by whether other types of property are sold in connection with inventory. However, other provisions of this Article take account of the fact that other property may be sold in connection with inventory. For example, the availability of the exclusion in Section 6-103(3)(l) turns on the value of all the "assets," not just the inventory. Similarly, the notice required by Section 6-105 must describe the "assets," not just the inventory. And Section 6-107(4) measures the buyer's maximum cumulative liability for noncompliance by the value of the inventory and equipment sold in the bulk sale.

In an effort to limit its coverage to sales posing the greatest risks to creditors, this Article adds an additional element to the definition of "bulk sale." A sale is not a "bulk sale" unless the buyer, auctioneer, or liquidator has notice, or after a reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale. Whether a person has "notice" depends upon what the person knows and what the person would have known had the person conducted a reasonable inquiry. The issue of whether a transaction was a bulk sale is likely to be litigated only when the seller has absconded with the sale proceeds. This Article requires that the matters as to which the buyer, auctioneer, or liquidator had notice be determined only by reference to facts that the person knew or would have known at the date of the bulk-sale agreement. Reference to what actually occurred is inappropriate.

Whether an inquiry is "reasonable" depends on the facts and circumstances of each case. These facts and circumstances may include the identities of the buyer and seller and the type of assets being sold. In some cases, a reasonable inquiry may consist of no inquiry at all concerning the seller's future.

Not every change in business operations poses a substantial enough risk to creditors to justify the costs of compliance with this Article. Thus, in determining whether post-sale business is of a kind that is "the same" or "similar" to the business conducted before the sale, a court should consider whether, viewed from the perspective of the creditors of the seller, the change poses extraordinary risks or whether the change is a normal risk that creditors can be assumed to take. In particular, when the post-bulk sale business differs from the pre-bulk sale business only in the size of the business conducted, the seller should be considered to be continuing in the same or a similar kind of business and the sale should not be considered a bulk sale.

The seller must "continue to operate" the same or a similar kind of business as owner. If the owner sells the business assets to a buyer and continues to manage the business as an employee of the buyer, the seller is not continuing to operate the business within the meaning of this Article.

(d) "Claim". New. The first sentence derives from Bankruptcy Code s 101(4), 11 U.S.C. § 101(4). Changes, including the deletion of Section 101(4)(B), were made for stylistic purposes only.

(e) "Claimant". New. This term defines the category of claim holders who are the primary beneficiaries of the duties that this Article imposes. Compare "Creditor" (subsection (1)(f)).

States that choose not to afford taxing authorities the benefits of this Article should adopt Alternative A. Adoption of Alternative B would afford the benefits of this Article to taxing authorities except with respect to those taxes as to which there has been compliance with another statute requiring that notice of the bulk sale be given to the taxing authority.

(f) "Creditor". New. The term includes all holders of claims against the seller, even holders of claims arising from consumer transactions. Compare "Claimant" (subsection (1)(e)).

(g) "Date of the bulk sale". New. The parties are able to control the date of the bulk sale in several ways. They can keep the proceeds of the sale in escrow, thereby delaying the date of payment, or they can specifically agree that the assets remain subject to the reach of the seller's creditors, thereby delaying the date that the assets are transferred. By adjusting the time that the buyer acquires an unconditional right to possess tangible assets and the time the buyer acquires an unconditional right to use intangible assets, the parties may affect the substantive rights of creditors and thereby control the date the assets are transferred.

The connection between the time of transfer and the buyer's rights under the bulk-sale agreement appears only for purposes of sales to which this Article applies. Subsection (1)(g) does not purport to affect the rights of creditors of a seller of property for other purposes or under other circumstances.

(h) "Date of the bulk-sale agreement". New. Law outside this Article, including the provisions of Article 2, determines when an agreement for a bulk sale becomes enforceable between the buyer and the seller and when an auctioneer or liquidator is engaged.

(i) "Debt". New. This subsection is borrowed from Bankruptcy Code Section 101(11).

(j) "Liquidator". New. Although the definition of "liquidator" is quite broad, the term is used with respect to sales that are "conducted" by a liquidator on behalf of the seller. See subsection (1)(c)(i). Thus only those liquidators that "conduct" sales will be affected by this Article.

(k) "Net contract price". New. Consideration is not "new consideration" to the extent that it consists of the partial or total satisfaction of an antecedent debt owed to the buyer by the seller. When the buyer buys assets along with property other than assets, the "net contract price" is that portion of the new consideration allocable to the assets.

(l) "Net proceeds". New. The term appears, without definition, in Section 6-108 (1987 Official Text).

(m) "In the ordinary course of the seller's business". New.

(n) "United States". New. This subsection derives from Section 9-103(3)(c).

(o) "Value". New. The definition in Section 1-201(44) is not appropriate in the context of this Article.

(p) "Verified". New.

2. "Good faith". This Article adopts the definition of "good faith" in Article 1 in all cases, even when the buyer is a merchant.

Point 1(a): Section 9-313.

Point 1(c): Sections 1-201 and 6-103.

Point 1(g): Article 2 generally.

Point 1(h): Section 2-201 and Article 2 generally.

§ 28:6-103. Applicability of article.

(a) Except as otherwise provided in subsection (c) of this section, this article applies to a bulk sale if:

(1) The seller's principal business is:

(A) The sale of inventory from stock; or

(B) A restaurant, cafe, bakery, tavern, or similar establishment where food or drink is furnished for consideration; and

(2) On the date of the bulk-sale agreement the seller is located in the District or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in the District.

(b) A seller is deemed to be located at his or her place of business. If a seller has more than one place of business, the seller is deemed located at his or her chief executive office.

(c) This article does not apply to:

(1) A transfer made to secure payment or performance of an obligation;

(2) A transfer of collateral to a secured party pursuant to § 28:9-609;

(3) A disposition of collateral pursuant to § 28:9-610;

(4) Retention of collateral pursuant to § 28:9-620;

(5) A sale of an asset encumbered by a security interest or lien if (i) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien, or (ii) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero;

(6) A general assignment for the benefit of creditors or to a subsequent transfer by the assignee;

(7) A sale by an executor, administrator, receiver, trustee in bankruptcy, or any public officer under judicial process;

(8) A sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization;

(9) A sale to a buyer whose principal place of business is in the United States and who:

(A) Not earlier than 21 days before the date of the bulk sale, (i) obtains from the seller a verified and dated list of claimants of whom the seller has notice 3 days before the seller sends or delivers the list to the buyer, or (ii) conducts a reasonable inquiry to discover the claimants;

(B) Assumes in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or on the date the buyer completes the reasonable inquiry, as the case may be;

(C) Is not insolvent after the assumption; and

(D) Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to the claimants identified in subparagraph (B) of this paragraph or by filing a notice in the office of the Mayor;

(10) A sale to a buyer whose principal place of business is in the United States and who:

(A) Assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;

(B) Is not insolvent after the assumption; and

(C) Gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed or by filing a notice in the office of the Mayor;

(11) A sale to a new organization that is organized to take over and continue the business of the seller and that has its principal place of business in the United States if:

(A) The buyer assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;

(B) The seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and

(C) The buyer gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed or by filing a notice in the office of the Mayor;

(12) A sale of assets having:

(A) A value, net of liens and security interests, of less than $10,000. If a debt is secured by assets and other property of the seller, the net value of the assets is determined by subtracting from their value an amount equal to the product of the debt multiplied by a fraction, the numerator of which is the value of the assets on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale; or

(B) A value of more than $25,000,000 on the date of the bulk-sale agreement; or

(13) A sale required by, and made pursuant to, statute.

(d) The notice under subsection (c)(9)(D) of this section must state (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual, partnership, or corporate names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or completes a reasonable inquiry to discover the claimants.

(e) The notice under subsections (c)(10)(C) and (c)(11)(C) of this section must state (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual, partnership, or corporate names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume the debts that were incurred in the seller's business before the date of the bulk sale.

(f) For purposes of subsection (c)(12) of this section, the value of assets is presumed to be equal to the price the buyer agrees to pay for the assets. However, in a sale by auction or a sale conducted by a liquidator on the seller's behalf, the value of assets is presumed to be the amount the auctioneer or liquidator reasonably estimates the assets will bring at auction or upon liquidation.

(Dec. 30, 1963, 77 Stat. 714, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936; Oct. 26, 2000, D.C. Law 13-201, § 201(g)(2), 47 DCR 7576.)

Section references. — This section is referenced in § 28:6-107.

Prior Codifications. — 1981 Ed., § 28:6-103.

1973 Ed., § 28:6-103.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 3-49. — Law 3-49, the "Uniform Commercial Code—Bulk Transfers Amendment Act of 1979," was introduced in Council and assigned Bill No. 3-104, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on November 6, 1979 and November 20, 1979, respectively. Signed by the Mayor on December 12, 1979, it was assigned Act No. 3-135 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:6-102.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 6-102 and 6-103 (1987 Official Text).

Changes: New choice-of-law provision; exclusions from the Article clarified, revised, and expanded.

Purposes of Changes and New Matter:

1. Subsection (1)(a) follows Section 6-102(3) of the 1987 Official Text and makes Article 6 applicable only when the seller's principal business is the sale of inventory from stock. This Article does not apply to a sale by a seller whose principal business is the sale of goods other than inventory, e.g., a farmer, is the sale of inventory not from stock, e.g., a manufacturer who produces goods to order, or is the sale of services, e.g., a dry cleaner, barber, or operator of a hotel, tavern, or restaurant.

2. The choice-of-law rule in subsections (1)(b) and (2) derives from Section 9-103(3) and should be interpreted consistently with the Official Comment and case law construing that Section. Any agreement between the buyer and the seller with regard to the law governing a bulk sale does not affect the choice-of-law rule in this Article.

3. Some of the transactions excluded by subsection (3), e.g., those excluded by subsection (3)(a), may not be bulk sales. This Article nevertheless specifically excludes them in order to allay any doubts about the Article's applicability. Certain transactions, e.g., the sale of fully encumbered inventory that remains subject to a security interest, may be excluded by more than one subsection.

4. Subsections (3)(a), (b), (c), (d), and (e) derive from subsections (1) and (3) of Section 6-103 (1987 Official Text).

5. Subsections (3)(f), (g), and (h) restate subsections (2), (4), and (5) of Section 6-103 with minor changes.

6. Subsections (3)(i), (j), and (k) relate to sales in which the buyer assumes specified debts of the seller. A bulk sale does not fall within any of these subsections unless the buyer's assumption of debts is binding and irrevocable.

Subsection (3)(j) derives from subsection (6) of Section 6-103 (1987 Official Text) and is available to buyers who are not insolvent (as defined in Section 1-201(23)), assume all the seller's business debts in full, and give notice of the assumption. Subsection (3)(k) derives from subsection (7) of Section 6-103 (1987 Official Text) and excludes transactions in which the risks to creditors are minimal. Like subsection (3)(j), this subsection applies only if the buyer assumes all the seller's business debts in full and gives notice of the assumption. In addition, the buyer must be a new organization that is organized to take over and continue the seller's business, the seller must receive nothing from the sale other than an interest in the new organization, and the seller's interest must be subordinate to the claims arising from the assumption. Sales that may qualify for the exclusion include the incorporation of a partnership or sole proprietorship.

Buyers often are reluctant to assume debts of which they have no knowledge. Subsection (3)(i), which is new, permits a qualifying buyer to exclude a sale from this Article by assuming only those debts owed to claimants of whom the buyer has knowledge after the buyer either conducts a reasonable inquiry to discover claimants or obtains a list of claimants from the seller. A buyer who takes a verified list from the seller is held to have knowledge of the claimants on the list and is entitled to rely in good faith on the list without making further inquiry. The protection afforded by the assumption of these debts, while not perfect, is sufficiently great to eliminate the need for compliance with Article 6.

7. Subsection (3)(l) is new. Although the bulk sale of even a very small business may be of concern to some creditors, losses to creditors from sales of assets in which the seller's equity is less than $10,000 are not likely to justify the costs of complying with this Article. Sales of assets having a value of more than $25,000,000 have not presented serious risks to creditors. Publicity normally attends sales of that magnitude, and the sellers are unlikely to be able successfully to remove the proceeds from the reach of creditors. As used in this subsection, "price" includes all consideration for the assets, not only new consideration. Compare "Net contract price" (Section 6-102(1)(k)). If the auctioneer or liquidator does not make an estimation, then no presumption arises.

8. Subsection (3)(m) is new. This Article assumes that creditors are aware of statutes that may require their debtors to conduct bulk sales under specified circumstances, e.g., upon the termination of a franchise or of a contract between a dealer and supplier, and are able to take account of any risk that those sales may impose.

Cross-References:

Point 1: Section 9-109.

Point 2: Sections 1-105 and 9-103.

Point 3: Section 6-102.

Point 4: Sections 9-111, 9-503, 9-504, and 9-505.

Point 6: Sections 1-201 and 1-203.

Point 7: Section 6-102.

Definitional Cross-References:

"Asset". Section 6-102.

"Auctioneer". Section 6-102.

"Bulk sale". Section 6-102.

"Buyer". Section 2-103.

"Claimant". Section 6-102.
"Collateral". Section 9-105.
"Date of the bulk sale". Section 6-102.
"Date of the bulk-sale agreement". Section 6-102.
"Debt". Section 6-102.
"Insolvent". Section 1-201.
"Inventory". Section 9-109.
"Knowledge". Section 1-201.
"Liquidator". Section 6-102.
"Net contract price". Section 6-102.
"Notice". Section 1-201.
"Organization". Section 1-201.
"Presumed". Section 1-201.
"Proceeds". Section 9-306.
"Sale". Section 2-106.
"Secured party". Section 9-105.
"Security interest". Section 1-201.
"Seller". Section 2-103.
"Send". Section 1-201.
"United States". Section 6-102.
"Value". Section 6-102.
"Verified". Section 6-102.

§ 28:6-104. Obligations of buyer.

(a) In a bulk sale as defined in § 28:6-102(a)(3)(B), the buyer shall:

(1) Obtain from the seller a list of all business names and addresses used by the seller within 3 years before the date the list is sent or delivered to the buyer;

(2) Unless excused under subsection (b) of this section, obtain from the seller a verified and dated list of claimants of whom the seller has notice 3 days before the seller sends or delivers the list to the buyer and including, to the extent known by the seller, the address of and the amount claimed by each claimant;

(3) Obtain from the seller or prepare a schedule of distribution (§ 28:6-106(a));

(4) Give notice of the bulk sale in accordance with § 28:6-105;

(5) Unless excused under § 28:6-106(d), distribute the net contract price in accordance with the undertakings of the buyer in the schedule of distribution; and

(6) Unless excused under subsection (b) of this section, make available the list of claimants (subsection (a)(2) of this section) by:

(A) Promptly sending or delivering a copy of the list without charge to any claimant whose written request is received by the buyer no later than 6 months after the date of the bulk sale;

(B) Permitting any claimant to inspect and copy the list at any reasonable hour upon request received by the buyer no later than 6 months after the date of the bulk sale; or

(C) Filing a copy of the list in the office of the Mayor no later than the time for giving a notice of the bulk sale (§ 28:6-105(e)). A list filed in accordance with this subparagraph must state the individual, partnership, or corporate name and a mailing address of the seller.

(b) A buyer who gives notice in accordance with § 28:6-105(b) is excused from complying with the requirements of subsection (a)(2) and (6) of this section.

(Dec. 30, 1963, 77 Stat. 715, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Section references. — This section is referenced in § 28:6-105, § 28:6-107, § 28:6-108, and § 47-4461.

Prior Codifications. — 1981 Ed., § 28:6-104.
1973 Ed., § 28:6-104.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6-104 (1987 Official Text).

Changes: Revised and rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) sets forth the buyer's duties in a bulk sale conducted by the seller. The buyer's failure to perform these duties may result in liability under Section 6-107. An auctioneer in a bulk sale by auction and a liquidator in a bulk sale that the liquidator conducts on the seller's behalf have similar duties but may face somewhat different liability. See Section 6-108(1). The buyer's duties are designed to afford the seller's claimants the opportunity to learn of the bulk sale before the seller has removed the assets from their reach and has received payment that is easily secreted.

2. Section 6-104(3) (1987 Official Text) provides that "[r]esponsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge." This sentence has been deleted as superfluous. Nothing in this Article suggests that the buyer is responsible for the completeness or accuracy of the list of claimants. The buyer's only obligations with respect to the list are to obtain it from the seller and to make it available. A buyer who sends or delivers notice of the bulk sale in accordance with Section 6-105(1) may rely in good faith on the list supplied by the seller unless, at the time the notice is sent or delivered, the buyer has knowledge of a claimant not on the list. A buyer who knows of a claimant not on the list is obligated to send notice of the bulk sale to that claimant.

3. The buyer's only obligation with respect to the net contract price is to comply with the schedule of distribution. The schedule may provide for the buyer to pay the entire net contract price to the seller. If so, the buyer complies with the requirements of Section 6-104(1)(e) by paying the entire net contract price to the seller.

4. The purpose of the list of claimants is to enable the buyer to give claimants notice of the bulk sale. If the buyer gives notice by filing in a public office (Section 6-105(2)), then the buyer need not obtain or preserve a list of the seller's claimants.

Cross-References:

Point 1: Sections 6-107 and 6-108.
Point 2: Sections 6-105 and 1-203.
Point 3: Section 6-106.
Point 4: Section 6-105.

Definitional Cross-References:

"Buyer". Section 2-103.
"Bulk sale". Section 6-102.
"Claimant". Section 6-102.
"Date of the bulk sale". Section 6-102.
"Net contract price". Section 6-102.
"Notice". Section 1-201.
"Seller". Section 2-103.
"Verified". Section 6-102.

CASE NOTES

Construction and application.

Evidence established that value of transferred inventory and fixtures from one of debtor's two stores greatly exceeded any contemporaneous wholesale value estimate of assets retained, and thus established that transfer conveyed a major part of debtor's assets so as to subject transfer to the District of Columbia Bulk Transfers Statute. D.C. Code 1981, §§ 28:1-201(12), 28:6-101 et seq., 28:6-102, 28:6-104. In re Villa Roel, Inc., 57 B.R. 835, 1985 Bankr. LEXIS 5596 (1985).

Failure to comply with the District of Columbia Bulk Sales Act does not provide a defense to a claim of conversion against a defendant with actual notice of the plaintiff's claim. Cooper v. McKenzie, 115 WLR 1813 (Super. Ct. 1987).

§ 28:6-105. Notice to claimants.

(a) Except as otherwise provided in subsection (b) of this section, to comply with § 28:6-104(a)(4) the buyer shall send or deliver a written notice of the bulk sale to each claimant on the list of claimants (§ 28:6-104(a)(2)) and to any other claimant of whom the buyer has knowledge at the time the notice of the bulk sale is sent or delivered.

(b) A buyer may comply with § 28:6-104(a)(4) by filing a written notice of the bulk sale in the office of the Mayor if:

(1) On the date of the bulk-sale agreement the seller has 200 or more claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay; or

(2) The buyer has received a verified statement from the seller stating that, as of the date of the bulk-sale agreement, the number of claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay, is 200 or more.

(c) The written notice of the bulk sale must be accompanied by a copy of the schedule of distribution (§ 28:6-106(a)) and state at least:

(1) That the seller and buyer have entered into an agreement for a sale that may constitute a bulk sale under the laws of the District of Columbia;

(2) The date of the agreement;

(3) The date on or after which more than 10% of the assets were or will be transferred;

(4) The date on or after which more than 10% of the net contract price was or will be paid, if the date is not stated in the schedule of distribution;

(5) The name and a mailing address of the seller;

(6) Any other business name and address listed by the seller pursuant to § 28:6-104(a)(1);

(7) The name of the buyer and an address of the buyer from which information concerning the sale can be obtained;

(8) A statement indicating the type of assets or describing the assets item by item;

(9) The manner in which the buyer will make available the list of claimants (§ 28:6-104(a)(6)), if applicable; and

(10) If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied, and the name of the person to whom it is owed.

(d) For purposes of subsection (c)(5) and (7), the name of a person is the person's individual, partnership, or corporate name.

(e) The buyer shall give notice of the bulk sale not less than 25 days before the date of the bulk sale and, if the buyer gives notice in accordance with subsection (a) of this section, not more than 30 days after obtaining the list of claimants.

(f) A written notice substantially complying with the requirements of subsection (c) of this section is effective even though it contains minor errors that are not seriously misleading.

(g) A form substantially as follows is sufficient to comply with subsection (c):

Notice of Sale

(1) ____________________, whose address is ____________________, is described in this notice as the "seller."

(2) ____________________, whose address is ____________________, is described in this notice as the "buyer."

(3) The seller has disclosed to the buyer that within the past 3 years the seller has used other business names, operated at other addresses, or both, as follows: ______________________________.

(4) The seller and the buyer have entered into an agreement dated ______________, for a sale that may constitute a bulk sale under the laws of the state of ______________.

(5) The date on or after which more than 10% of the assets that are the subject of the sale were or will be transferred is ______________, and if not stated in the schedule of distribution the date on or after which more than 10% of the net contract price was or will be paid is ______________.

(6) The following assets are the subject of the sale: ______________.

(7) [If applicable] The buyer will make available to claimants of the seller a list of the seller's claimants in the following manner: ______________.

(8) [If applicable] The sale is to satisfy $ ______________ of an antecedent debt owed by the seller to ______________________________.

(9) A copy of the schedule of distribution of the net contract price accompanies this notice.

(Dec. 30, 1963, 77 Stat. 715, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Section references. — This section is referenced in § 28:6-104, § 28:6-106, and § 28:6-108.

Prior Codifications. — 1981 Ed., § 28:6-105.

1973 Ed., § 28:6-105.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 6-105 and 6-107 (1987 Official Text).

Changes: Revised, alternative method of giving notice added, and form of notice added.

Purposes of Changes and New Matter:

1. Subsection (1) sets forth the method by which the buyer may discharge the duty to notify the seller's claimants of the impending sale. The buyer "has knowledge" of a claimant only if the buyer has actual knowledge sufficient to enable the buyer to send a notice to the claimant. A buyer who knows only that the seller has other, unidentified claimants complies with this subsection by giving notice to the claimants on the seller's list.

2. Subsection (2) is new. It affords the buyer the opportunity to publish notice in cases in which the number of claimants—and thus the costs of compliance and risk of inadvertent noncompliance—are large. Although a filed notice will not inform every claimant of the impending sale, a filed notice is expected to inform a sufficient number of claimants (perhaps through credit reporting services) to enable them to stop an unfair or fraudulent transaction before it occurs.

The buyer may give notice by filing if the seller actually has 200 or more claimants or if the buyer receives a verified statement that the seller has 200 or more claimants. Claimants who hold secured or matured claims for employment compensation and benefits are not counted in determining the number of claimants for this purpose; however, they are entitled to receive notice of the bulk sale.

The duty to give notice must be performed in good faith. A buyer who receives a verified statement from the seller but knows the statement to be false does not act in good faith and thus does not comply with subsection (2)(b).

3. Subsection (3) prescribes the contents of the notice. The contents are the same regardless of whether notice is sent to each claimant or filed, except that the information in subsection (3)(i) is required only when notice is sent. The requirements of subsection (3) are the minimum; a notice that includes additional information is effective. The requirement in subsection (3)(h) for the description of assets is modeled on Section 9-402(1). Neither the identification of assets by serial number nor an item-by-item list of assets is required.

Subsection (3)(j) applies when the sale satisfies a debt owed by the seller to the buyer or to a third party. Section 6-103(3) excludes certain

sales of this kind from the application of this Article.

4. Subsection (4) requires that a notice give the proper name of the seller and the buyer. A trade name is insufficient. See Official Comment 7 to UCC s 9-402. However, subsection (3)(f) requires that trade names be added when the seller has provided them to the buyer. The list need not include trade names or other names that the seller has used but not listed, even if the buyer knows of the names.

5. Subsection (5) requires that notice be given not less than 45 days before the date of the bulk sale. The period was extended from the 10 days afforded by the 1987 Official Text to provide ample time for claimants to receive or discover the notice and to take any action that the law permits to collect their claims from the seller. For example, depending upon the facts of each case and upon applicable law, claimants might seek to enjoin the sale, acquire a judicial lien on the assets or the proceeds, threaten to refuse to deal with the buyer unless the seller's debt is paid, or file an involuntary bankruptcy petition against the seller. The "date of the bulk sale" is defined in such a way as to permit the seller to transfer the assets to the buyer or the buyer to pay the price to the seller (but not both) before or during the 45 days.

6. Subsection (6) derives from Section 9-402(8). The purpose of filing is to give notice to claimants. Whether an error in the seller's name is seriously misleading should depend upon whether a claimant searching under the seller's correct name could have found the filing. Whether an error other than in the seller's name is seriously misleading should depend upon whether the error prejudiced the ability of claimants to assert their rights.

Cross-References:

Point 1: Sections 1-201 and 6-104.
Point 2: Sections 1-203 and 6-104.
Point 3: Sections 6-102, 6-104, and 9-402.
Point 4: Sections 6-104 and 9-402.
Point 5: Section 6-102.
Point 6: Sections 6-107 and 9-402.

Definitional Cross-References:

"Asset". Section 6-102.
"Bulk sale". Section 6-102.
"Buyer". Section 2-103.
"Claim". Section 6-102.
"Claimant". Section 6-102.
"Date of the bulk sale". Section 6-102.
"Date of the bulk-sale agreement". Section 6-102.
"Debt". Section 6-102.
"Knowledge". Section 1-201.
"Net contract price". Section 6-102.
"Seller". Section 2-103.
"Send". Section 1-201.
"Verified". Section 6-102.
"Written". Section 1-201.

CASE NOTES

In general.

Representation that debtor had no creditors having any claims for any unpaid accounts of debtor upon any of stock and fixtures conveyed to buyer could not be reasonably relied upon by buyer in failing to give notice to debtor's creditors as required under the Bulk Transfers Statute, § 28:6-101 et seq., because such Statute requires that all creditors of transferor be given notice of proposed sale. D.C. Code 1981, §§ 28:6-101 et seq., 28:6-104. In re Villa Roel, Inc., 57 B.R. 835, 1985 Bankr. LEXIS 5596 (1985).

Failure to comply with the District of Columbia Bulk Sales Act does not provide a defense to a claim of conversion against a defendant with actual notice of the plaintiff's claim. Cooper v. McKenzie, 115 WLR 1813 (Super. Ct. 1987).

§ 28:6-106. Schedule of distribution.

(a) The seller and buyer shall agree on how the net contract price is to be distributed and set forth their agreement in a written schedule of distribution.

(b) The schedule of distribution may provide for distribution to any person at any time, including distribution of the entire net contract price to the seller.

(c) The buyer's undertakings in the schedule of distribution run only to the seller. However, a buyer who fails to distribute the net contract price in accordance with the buyer's undertakings in the schedule of distribution is liable to a creditor only as provided in § 28:6-107(1).

(d) If the buyer undertakes in the schedule of distribution to distribute any part of the net contract price to a person other than the seller, and, after the buyer has given notice in accordance with § 28:6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a

consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the buyer is excused from any obligation arising under this article or under any contract with the seller to distribute the net contract price in accordance with the buyer's undertakings in the schedule if the buyer:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences a proceeding for interpleader in a court of competent jurisdiction and is discharged from the proceeding; or

(4) Reaches a new agreement with the seller for the distribution of the net contract price remaining available, sets forth the new agreement in an amended schedule of distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the buyer's undertakings in the amended schedule.

(e) The notice under subsection (d)(4) of this section must identify the buyer and the seller, state the filing number, if any, of the original notice, set forth the amended schedule, and be given in accordance with § 28:6-105(a) or (b), whichever is applicable, at least 14 days before the buyer distributes any part of the net contract price remaining available.

(f) If the seller undertakes in the schedule of distribution to distribute any part of the net contract price, and, after the buyer has given notice in accordance with § 28:6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the seller and any person in control of the seller are excused from any obligation arising under this article or under any agreement with the buyer to distribute the net contract price in accordance with the seller's undertakings in the schedule if the seller:

(1) Distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;

(2) Distributes the net contract price remaining available in accordance with an order of court;

(3) Commences a proceeding for interpleader in a court of competent jurisdiction and is discharged from the proceeding; or

(4) Prepares a written amended schedule of distribution of the net contract price remaining available for distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the amended schedule.

(g) The notice under subsection (f)(4) of this section must identify the buyer and the seller, state the filing number, if any, of the original notice, set forth the

amended schedule, and be given in accordance with § 28:6-105(a) or (b), whichever is applicable, at least 14 days before the seller distributes any part of the net contract price remaining available.

(Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Section references. — This section is referenced in § 28:6-104, § 28:6-105, and § 28:6-108.

Prior Codifications. — 1981 Ed., § 28:6-106.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. A principal purpose of bulk sales legislation has been to impair the ability of a seller to liquidate inventory and abscond with the proceeds, leaving creditors unpaid. Toward this end, a significant minority of jurisdictions adopted optional Section 6-106 (1987 Official Text), which imposes upon a transferee in bulk the duty to apply the new consideration for the transfer to the debts of the transferor pro rata. When one or more of these debts is unliquidated, disputed, or allegedly secured, making a pro rata distribution may prove quite difficult and distribution of the consideration may be delayed considerably. In addition, since preferences generally are permitted under state law, the appropriateness of mandating a pro rata distribution is questionable. Accordingly, this Article does not require the buyer to apply the consideration to payment of the seller's debts.

This Article recognizes, however, that the seller's claimants have an interest in learning what will happen to the net contract price. If the contemplated distribution is objectionable, claimants should be able to avail themselves of whatever remedies state law or federal law allows to prevent the sale or tie up the price. On the other hand, if the price is to be distributed in a manner that is favorable to creditors, then advance knowledge of that fact will facilitate the sale by obviating any need for claimants to interfere with it.

To afford advance notice of the intended distribution of the contract price, Section 6-105(3) requires the buyer to include with the notice of the sale a copy of the "schedule of distribution"—i.e., of the agreement between the buyer and the seller on how the net contract price is to be distributed.

2. This Article does not require the net contract price to be applied in any particular fashion. Rather, the buyer and the seller may agree to whatever they wish. They must, however, disclose their agreement in ample time before the date of the bulk sale. See Section 6-105(5). The terms of the schedule of distribution in any given sale will be a function of the negotiations between buyer and seller as affected by any applicable non-Code law (e.g., corporate dissolution statutes) imposing distribution requirements in sales of the kind conducted.

In formulating the schedule, the parties may be well advised to consider the likely reaction of claimants to the schedule. For example, a schedule that contemplates the distribution of the entire net contract price to the seller or to a single creditor may prompt the filing of an involuntary bankruptcy petition. A schedule that contemplates paying the net contract price into an escrow established for the benefit of the seller's claimants may be more favorably received.

The seller may incur additional debt between the time the schedule is published and the time the net contract price is paid. The schedule may provide for payment of those debts from the net contract price.

3. Unless otherwise agreed, the buyer's only liability to creditors for failure to comply with his undertakings in the schedule of distribution is set forth in Section 6-107(1). A creditor named in the schedule may not rely on the creation or publication of the schedule as the basis for imposing liability against the buyer on any other theory, including that of estoppel or third-party beneficiary.

The seller may wish to undertake to pay some of the price to creditors. The seller may, but need not, include this undertaking in the schedule of distribution. The buyer is not responsible for performance of the seller's undertakings. Thus, if the seller makes an undertaking with respect to payment of the net contract price and fails to perform in accordance with it, the buyer faces no liability. However, certain persons in control of the seller may be liable under those circumstances. See Section 6-107(11).

4. In some cases, the precise amount of the net contract price may be unknown at the time that the schedule of distribution is formulated

and notice of the bulk sale is given. In other cases, the net contract price may prove to be less than originally anticipated. Parties who fail to provide for these contingencies in the schedule of distribution and are unable to abide by the original schedule may be required to give a new notice with a new schedule.

The inability to abide by the schedule may be due to an external legal event, e.g., the suffering of a garnishment lien on the net contract price, the filing of a bankruptcy petition, or compliance with a corporate dissolution statute. If so, subsection (4), which applies to the extent that the net contract price is within the control of the buyer, may afford relief to the buyer, and subsection (6), which applies to the extent the net contract prices is within the control of the seller, may afford relief to a person in control of the seller. Although this Article imposes no obligation on sellers with respect to distribution of the net contract price (or otherwise), a seller may incur an obligation of this kind by agreement with the buyer. Accordingly, subsection (6) provides the means by which the seller as well as a person in control of the seller may be excused from any such obligation.

Subsections (4)(a) and (6)(a) permit the buyer or seller respectively to distribute the net contract price remaining available in accordance with any priorities for payment. A schedule need not afford priority to particular debts. If the schedule contains no priorities, then the debts are treated as if they are all of the same priority, and the buyer or seller, as the case may be, may distribute the price pro rata in partial satisfaction of the debts set forth in the schedule. Law other than this Article determines whether a court order or a proceeding for interpleader is available for purposes of subsections (4)(b), (4)(c), (6)(b), and (6)(c).

Cross-References:

Point 1: Sections 6-104 and 6-105.
Point 2: Section 6-105.
Point 3: Sections 1-102 and 6-107.

Definitional Cross-References:

"Buyer". Section 2-103.
"Contract". Section 1-201.
"Creditor". Section 1-201.
"Debt". Section 6-102.
"Net contract price". Section 6-102.
"Person". Section 1-201.
"Seller". Section 2-103.
"Written". Section 1-201.

§ 28:6-107. Liability for noncompliance.

(a) Except as provided in subsection (c) of this section, and subject to the limitation in subsection (d):

(1) A buyer who fails to comply with the requirements of § 28:6-104(a)(5) with respect to a creditor is liable to the creditor for damages in the amount of the claim, reduced by any amount that the creditor would not have realized if the buyer had complied; and

(2) A buyer who fails to comply with the requirements of any other subsection of § 28:6-104 with respect to a claimant is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied.

(b) In an action under subsection (a) of this section, the creditor has the burden of establishing the validity and amount of the claim, and the buyer has the burden of establishing the amount that the creditor would not have realized if the buyer had complied.

(c) A buyer who:

(1) Made a good faith and commercially reasonable effort to comply with the requirements of § 28:6-104(a) or to exclude the sale from the application of this article under § 28:6-103(c); or

(2) On or after the date of the bulk-sale agreement, but before the date of the bulk sale, held a good faith and commercially reasonable belief that this article does not apply to the particular sale is not liable to creditors for failure to comply with the requirements of § 28:6-104. The buyer has the burden of establishing the good faith and commercial reasonableness of the effort or belief.

(d) In a single bulk sale the cumulative liability of the buyer for failure to comply with the requirements of § 28:6-104(a) may not exceed an amount equal to:

(1) If the assets consist only of inventory and equipment, twice the net contract price, less the amount of any part of the net contract price paid to or applied for the benefit of the seller or a creditor; or

(2) If the assets include property other than inventory and equipment, twice the net value of the inventory and equipment less the amount of the portion of any part of the net contract price paid to or applied for the benefit of the seller or a creditor which is allocable to the inventory and equipment.

(e) For the purposes of subsection (d)(2) of this section, the "net value" of an asset is the value of the asset less (i) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset, and (ii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale. The portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is "allocable to the inventory and equipment" is the portion that bears the same ratio to that part of the net contract price as the net value of the inventory and equipment bears to the net value of all of the assets.

(f) A payment made by the buyer to a person to whom the buyer is, or believes he or she is, liable under subsection (a) of this section reduces pro tanto the buyer's cumulative liability under subsection (d) of this section.

(g) No action may be brought under subsection (a)(2) of this section by or on behalf of a claimant whose claim is unliquidated or contingent.

(h) A buyer's failure to comply with the requirements of § 28:6-104(a) does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of his or her claim, or (iv) create liability other than as provided in this article.

(i) Payment of the buyer's liability under subsection (a) of this section discharges pro tanto the seller's debt to the creditor.

(j) Unless otherwise agreed, a buyer has an immediate right of reimbursement from the seller for any amount paid to a creditor in partial or total satisfaction of the buyer's liability under subsection (a) of this section.

(k) If the seller is an organization, a person who is in direct or indirect control of the seller, and who knowingly, intentionally, and without legal justification fails, or causes the seller to fail, to distribute the net contract price in accordance with the schedule of distribution is liable to any creditor to whom the seller undertook to make payment under the schedule for damages caused by the failure.

(Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Section references. — This section is referenced in § 28:6-106, § 28:6-108, and § 28:6-110.

Prior Codifications. — 1981 Ed., § 28:6-107. 1973 Ed., § 28:6-107.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section sets forth the consequences of noncompliance with the requirements of Section 6-104. Although other legal consequences may result from a bulk sale—e.g., the buyer may be liable to the seller under Article 2 or to the seller's creditors under the Uniform Fraudulent Transfer Act—no other consequences may be imposed by reason of the buyer's failure to comply with the requirements of this Article.

The two subsections of Section 6-107(1) reflect the duties set forth in Section 6-104. The duties generally run only to claimants, but the duty to distribute the net contract price in accordance with the schedule of distribution (Section 6-104(1)(e)) may run also to certain creditors.

2. Article 6 (1987 Official Text), like many of its nonuniform predecessors, makes a noncomplying transfer ineffective against aggrieved creditors. In contrast, noncompliance with this Article neither renders the sale ineffective nor otherwise affects the buyer's rights in or title to the assets.

Liability under this Article is for breach of a statutory duty. The buyer's only liability is personal (in personam) liability. Aggrieved creditors may only recover money damages. In rem remedies, which are available upon noncompliance with Article 6 (1987 Official Text), are not available under this Article. Thus, aggrieved creditors no longer may treat the sale as if it had not occurred and use the judicial process to apply assets purchased by the buyer toward the satisfaction of their claims against the seller.

The change in the theory of liability and in the available remedy should be of particular significance if the seller enters bankruptcy after the sale is consummated. When an aggrieved creditor of the transferor has a nonbankruptcy right to avoid a transfer in whole or in part, as may be the case under Article 6 (1987 Official Text), the transferor's bankruptcy trustee may avoid the entire transfer. See Bankruptcy Code s 544(b), 11 U.S.C. § 544(b). Under this Article, a person who is aggrieved by the buyer's noncompliance may not avoid the sale. Rather, the person is entitled only to recover damages as provided in this section. Because no creditor has the right to avoid the transaction or to assert a remedy that is the functional equivalent of avoidance, the seller's bankruptcy trustee likewise should be unable to do so.

3. This Article makes explicit what is implicit in Article 6 (1987 Official Text): only those persons as to whom there has been noncompliance are entitled to a remedy. For example, if notices are sent to each claimant other than claimant A, claimant B cannot recover. Similarly, a creditor who acquires a claim after notice is given has no remedy unless the buyer undertakes in the schedule of distribution to pay that creditor and the buyer fails to meet the obligation.

4. Unlike Article 6 (1987 Official Text), which imposes strict liability upon a noncomplying transferee, this Article imposes liability for noncompliance only when the failure to comply actually has injured a creditor and only to the extent of the injury. Each creditor's damages are measured by the injury that the particular creditor sustained as a consequence of the buyer's failure to comply. This measure is stated as the amount of the debt reduced by any amount that the person would not have realized if the buyer had complied. Compare Section 4-103(5).

5. A buyer is liable only for the buyer's own noncompliance with the requirements of Section 6-104. Under that section, the only step the buyer must take to discover the identity of the seller's claimants is to obtain a list of claimants from the seller. If the seller's list is incomplete and the buyer lacks knowledge of claimant C, then claimant C has no remedy under subsection (1)(b) of this section.

6. The creditor has the burden of establishing the validity and amount of the debt owed by the seller as well as the fact of the buyer's noncompliance. In contesting the allegation of noncompliance, the buyer may introduce evidence tending to show either that the sale was not a bulk sale or that the sale was a bulk sale to which this Article does not apply. In contesting the validity and amount of the debt, the buyer may introduce evidence tending to show that the seller had a defense to the debt. The buyer has the burden of establishing the amount that the creditor would not have realized even if the buyer had complied. Implicit in subsection (2) is that certain failures to comply with the requirements of this Article will cause no injury and thus result in no liability.

The following examples illustrate the operation of subsection (2):

Example 1: The buyer fails to give notice of the bulk sale. Claimant D, who appears on seller's list of claimants, admits to having had actual knowledge of the impending sale two months before it occurred. The buyer is likely to be able to meet the burden of establishing that even had the buyer given notice of the sale, claimant D would not have recovered any more than the claimant actually recovered.

Example 2: The buyer failed to obtain a list of seller's business names (Section 6-104(1)(a)) or to make available the list of claimants. (Section 6-104(1)(f)). In many cases, the buyer may be able to meet the burden of establishing that compliance with those subsections would not have enabled claimants to recover any more than they actually recovered.

7. Subsection (3) may afford a complete defense to a noncomplying buyer. This defense is available to buyers who establish that they made a good faith effort to comply with the requirements of this Article or made a good faith effort to exclude the sale from the application of this Article (e.g., by assuming debts and attempting to comply with the notice requirements of Section 6-103(3)(i), (j), or (k)). When a buyer makes a good faith effort to comply with this Article or to exclude the transaction from its coverage, the injury caused by noncompliance is likely to be de minimis. In any event, the primary responsibility for satisfying claims rests with the creditors, and this Article imposes no greater duty upon buyers who attempt to comply with this Article or to exclude a sale from its application than to make a good faith effort to do so.

The defense of subsection (3) also is available to buyers who act on the good faith belief that this Article does not apply to the sale (e.g., because the sale is not a bulk sale or is excluded under Section 6-103). The good-faith-belief defense is an acknowledgement that reasonable people may disagree over whether a given transaction is or is not a bulk sale and over whether Section 6-103 excludes a particular transaction. A buyer acting in good faith should be protected from the liability that this Article otherwise would impose on buyers who may be completely innocent of wrongdoing. A buyer who is unaware of the requirements of this Article holds no belief concerning the applicability of the Article and so may not use the defense.

8. Even a buyer who completely fails to comply with this Article may not be liable in an amount equal to sum of the seller's debts. Subsection (4) limits the aggregate recovery for "any one bulk sale," which term includes a series of sales by a liquidator. The maximum cumulative liability for noncompliance with this Article parallels the maximum recovery generally available to creditors under the 1987 Official Text of Article 6. Under that Article, the noncomplying transferee may have to "pay twice" for the goods. First, the transferee may pay the purchase price to the transferor; then, the transferee may lose the goods to aggrieved creditors.

Under this Article, the maximum cumulative liability is an amount equal to twice the net contract price of the inventory and equipment (i.e., twice the amount that would be available to unsecured creditors from the inventory and equipment), less the amount of any portion of that net contract price paid to or applied for the benefit of the seller or a creditor of the seller. Unless the buyer receives credit for amounts paid to the seller (which amounts the creditors have a right to apply to payment of their claims), the buyer might wind up paying an amount equal to the net contract price three times (once to the seller and twice to aggrieved creditors). The grant of credit for amounts paid to the seller's creditors recognizes that ordinarily the seller has no obligation to pay creditors pro rata.

When the assets sold consist of only inventory and equipment, calculation of the maximum cumulative liability is relatively simple. But when the assets sold include property in addition to inventory and equipment, the calculation becomes more difficult. When inventory or equipment secures a debt that also is secured by other collateral and the aggregate value of the collateral exceeds the secured debt, a determination of the amount in clause (ii) of subsection (5) may require an allocation of the collateral to the debt in accordance with the statutory formula. In addition, one may need to determine which portion of payments of the net contract price is allocable to inventory and equipment. Subsection (5) directs that this allocation be made by multiplying the part of the net contract price paid to or applied for the benefit of the seller or a creditor by a fraction whose nominator is the net value of the inventory and equipment and whose denominator is the net value of all the assets.

Sometimes the seller may receive the net contract price and pay some or all of it to one or more creditors. In determining whether a payment to a creditor was made from the net contract price or from another source, courts are free to employ tracing rules. Amounts paid to secured parties usually are taken into account in determining the net contract price; if so, the buyer should not receive credit for them.

9. The buyer need not wait for judgment to be entered before paying a person believed to be a creditor of the seller. Indeed, the buyer is entitled to credit for amounts paid to persons who in fact may not be creditors of the seller, as long as the buyer acts with the belief that the seller is so indebted. As is the case with respect to all obligations under the Code, the buyer's belief must be held in good faith.

10. Any amounts paid by the buyer in satisfaction of the liability created by Section 6-107(1) reduce the seller's liability to the recipient pro tanto. Consequently, the buyer is entitled to immediate reimbursement of those amounts from the seller. The right of reimbursement is available only for amounts paid to actual creditors. Amounts paid to those whom the buyer incorrectly believes to be creditors ordinarily are not recoverable from the seller, although the buyer is entitled to credit for those amounts against the aggregate liability in subsection (4). Of course, the buyer and seller may vary the seller's reimbursement obligation by agreement.

11. Because of the difficulty in valuing claims that are unliquidated or contingent, persons holding claims of that kind may not bring an action under subsection (1)(b). If the claim remains unliquidated or contingent throughout the limitation period in Section 6-110, then these creditors have no remedy for noncompliance under that subsection. They may, however, be entitled to a remedy under subsection (1)(a) or (11) for failure to distribute the net contract price in accordance with the schedule of distribution.

12. In certain circumstances, subsection (11) imposes liability on a person in direct or indirect control of a seller that is an organization. Excuse under Section 6-106(6) is a "legal justification" that prevents liability from attaching under subsection (11). No special provision applies to the seller who fails to comply with the schedule. The seller already owes the debt to the creditor, and other law governs the consequences of a debtor who fails to pay a debt when promised.

Cross-References:

Point 1: Section 6-104.
Point 4: Section 4-103.
Point 5: Sections 6-104 and 6-105.
Point 6: Sections 1-201, 6-102, 6-103, and 6-104.
Point 7: Sections 1-102, 1-201, 6-102, and 6-103.
Point 8: Section 6-102.
Point 9: Section 1-203.
Point 10: Section 1-102.
Point 11: Sections 6-102 and 6-110.
Point 12: Section 6-106.

Definitional Cross-References:

"Assets". Section 6-102.
"Bulk sale". Section 6-102.
"Burden of establishing". Section 1-201.
"Buyer". Section 2-103.
"Claim". Section 6-102.
"Claimant". Section 6-102.
"Creditor". Section 6-102.
"Date of the bulk sale". Section 6-102.
"Equipment". Section 6-102.
"Good faith". Section 6-102.
"Inventory". Section 9-109.
"Net contract price". Section 6-102.
"Organization". Section 1-201.
"Person". Section 1-201.
"Proceeds". Section 9-306.
"Security interest". Section 1-201.
"Seller". Section 2-103.
"Written". Section 1-201.

§ 28:6-108. Bulk sales by auction; bulk sales conducted by liquidator.

(a) §§ 28:6-104, 28:6-105, 28:6-106, and 28:6-107 apply to a bulk sale by auction and a bulk sale conducted by a liquidator on the seller's behalf with the following modifications:

(1) "Buyer" refers to auctioneer or liquidator, as the case may be;

(2) "Net contract price" refers to net proceeds of the auction or net proceeds of the sale, as the case may be;

(3) The written notice required under § 28:6-105(c) must be accompanied by a copy of the schedule of distribution (§ 28:6-106(a)) and state at least:

(A) That the seller and the auctioneer or liquidator have entered into an agreement for auction or liquidation services that may constitute an agreement to make a bulk sale under the laws of the District of Columbia;

(B) The date of the agreement;

(C) The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf;

(D) The date on or after which more than 10% of the net proceeds of the sale were or will be paid, if the date is not stated in the schedule of distribution;

(E) The name and a mailing address of the seller;

(F) Any other business name and address listed by the seller pursuant to § 28:6-104(a)(1);

(G) The name of the auctioneer or liquidator and an address of the auctioneer or liquidator from which information concerning the sale can be obtained;

(H) A statement indicating the type of assets or describing the assets item by item;

(I) The manner in which the auctioneer or liquidator will make available the list of claimants (§ 28:6-104(a)(6)), if applicable; and

(J) If the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed; and

(4) In a single bulk sale the cumulative liability of the auctioneer or liquidator for failure to comply with the requirements of this section may not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold less the amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor which is allocable to the inventory and equipment.

(b) A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes he or she is, liable under this section reduces pro tanto the auctioneer's or liquidator's cumulative liability under subsection (a)(4) of this section.

(c) A form substantially as follows is sufficient to comply with subsection (a)(3) of this section:

Notice of Sale

(1) ____________________, whose address is ____________________, is described in this notice as the "seller."

(2) ____________________, whose address is ____________________, is described in this notice as the "auctioneer" or "liquidator."

(3) The seller has disclosed to the auctioneer or liquidator that within the past 3 years the seller has used other business names, operated at other addresses, or both, as follows: ____.

(4) The seller and the auctioneer or liquidator have entered into an agreement dated ____________________ for auction or liquidation services that may constitute an agreement to make a bulk sale under the laws of the District of Columbia.

(5) The date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf is ____________________, and [if not stated in the schedule of distribution] the date on or after which more than 10% of the net proceeds of the sale were or will be paid is ____.

(6) The following assets are the subject of the sale: ____________________.

(7) [If applicable] The auctioneer or liquidator will make available to claimants of the seller a list of the seller's claimants in the following manner: ____.

(8) [If applicable] The sale is to satisfy $ ______________ of an antecedent debt owed by the seller to ______________.

(9) A copy of the schedule of distribution of the net proceeds accompanies this notice.

(d) A person who buys at a bulk sale by auction or conducted by a liquidator need not comply with the requirements of § 28:6-104(a) and is not liable for the failure of an auctioneer or liquidator to comply with the requirements of this section.

(Dec. 30, 1963, 77 Stat. 716, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Prior Codifications. — 1981 Ed., § 28:6-108.

1973 Ed., § 28:6-108.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6-108.

Changes: Revised, expanded to include sales conducted by a liquidator on the seller's behalf, and form of notice added.

Purposes of Changes and New Matter:

1. This section applies only to bulk sales by auction or conducted by a liquidator on the seller's behalf, as defined in Section 6-102(1)(c). Bulk sales conducted by an auctioneer or liquidator on its own behalf are treated as ordinary bulk sales and are not subject to this section.

2. Regardless of whether the assets are sold directly from the seller to the buyer, are sold to a variety of buyers at auction, or are sold on the seller's behalf by a liquidator to one or more buyers, a going-out-of-business sale of inventory presents similar risks to claimants. Auctioneers and liquidators are likely to be in a better position to ascertain whether the sale they are conducting is, or is part of, a bulk sale than are their customers. Accordingly, buyers at auctions and from liquidators selling assets of others need not be concerned with complying with this Article. Instead, this Section imposes upon auctioneers and liquidators duties and liabilities that are similar, but not always identical, to those of a buyer under Sections 6-104(1) and 6-107. Except to the extent that this section treats bulk sales by auctioneers and liquidators differently from those conducted by the seller on its own behalf, the Official Comments to Sections 6-105(1) and 6-107, as well as the Comments to Sections 6-105 and 6-106, which those sections incorporate by reference, are applicable to sales to which this section applies.

3. Subsection (1)(d) sets forth the maximum cumulative liability for auctioneers and liquidators "in any one bulk sale," which term includes a series of sales by a liquidator. This liability is to be calculated in a manner similar to that set forth in Sections 6-107(4) and 6-107(5). The term "net proceeds of the auction or sale allocable to inventory and equipment" is analogous to the term "net value of the inventory and equipment"; however, the former takes into account the reasonable expenses of the auction or sale whereas the latter does not. Also, the latter is doubled whereas the former is not. The "amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor which is allocable to inventory and equipment" is determined by multiplying the part of the net proceeds paid to or applied for the benefit of a creditor by a fraction whose numerator is the net proceeds of the sale allocable to inventory and equipment and whose denominator is the total net proceeds of the auction or sale. Because the amount of the net proceeds allocable to inventory and equipment is not doubled, the auctioneer or liquidator is not entitled to credit for payments made to the seller.

4. Section 6-107(3) applies to all bulk sales. Accordingly, an auctioneer or liquidator who makes a good faith effort to comply with the requirements of this Article or to exclude the sale from this Article or who acts under a good faith belief that this Article does not apply to the sale faces no liability whatsoever.

Cross-References:

Point 1: Section 6-102.

Point 2: Sections 6-102, 6-104, 6-105, 6-106, and 6-107.

Point 3: Sections 6-102 and 6-107.

Point 4: Section 6-107.

Definitional Cross-References:

"Assets". Section 6-102.

"Auctioneer". Section 6-102.

"Bulk sale". Section 6-102.
"Claimants". Section 6-102.
"Creditor". Section 6-102.
"Debt". Section 6-102.
"Equipment". Section 9-109.
"Inventory". Section 9-109.
"Liquidator". Section 6-102.
"Net proceeds". Section 6-102.
"Person". Section 1-201.
"Seller". Section 2-103.
"Written". Section 1-201.

§ 28:6-109. What constitutes filing; duties of filing officer; information from filing officer.

(a) Presentation of a notice or list of claimants for filing and tender of the filing fee or acceptance of the notice or list by the filing officer constitutes filing under this article.

(b) The filing officer shall:

(1) Mark each notice or list with a file number and with the date and hour of filing;

(2) Hold the notice or list or a copy for public inspection;

(3) Index the notice or list according to each name given for the seller and for the buyer; and

(4) Note in the index the file number and the addresses of the seller and buyer given in the notice or list.

(c) If the person filing a notice or list furnishes the filing officer with a copy, the filing officer upon request shall note upon the copy the file number and date and hour of the filing of the original and send or deliver the copy to the person.

(d) The fee for filing and indexing and for stamping a copy furnished by the person filing to show the date and place of filing, and the fee for indexing each name more than 2 shall be established by the Mayor by rulemaking adopted pursuant to the District of Columbia Administrative Procedure Act (D.C. Official Code § 2-501 et seq.).

(e) Upon request of any person, the filing officer shall issue a certificate showing whether any notice or list with respect to a particular seller or buyer is on file on the date and hour stated in the certificate. If a notice or list is on file, the certificate must give the date and hour of filing of each notice or list and the name and address of each seller, buyer, auctioneer, or liquidator. Upon request of any person, and payment of the required fee, the filing officer shall furnish a copy of any filed notice or list. The fee for a certificate in the standard form prescribed by the Mayor, the fee for a certificate not in the standard form, and the fee for a copy of a filed notice or list shall be established by the Mayor by rulemaking adopted pursuant to the District of Columbia Administrative Procedure Act (D.C. Official Code § 2-501 et seq.).

(f) The filing officer shall keep each notice or list for 2 years after it is filed.

(Dec. 30, 1963, 77 Stat. 716, Pub. L. 88-243, § 1; renumbered and amended, Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Prior Codifications. — 1981 Ed., § 28:6-109.

1973 Ed., § 28:6-109.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None
Purposes of New Matter:

This Article contemplates public filing of bulk sale notices and lists of claimants in a single filing office in each state. This section, which derives substantially from Sections 9-403 and 9-407, governs filing. The filing system is designed to enable one seeking information about a sale to discover any filed notices or lists by searching under either the seller's or the buyer's (but not the auctioneer's or liquidator's) individual, partnership, or corporate name.

Cross-References:
Sections 6-103, 6-105, 9-403, and 9-407.

Definitional Cross-References:
"Auctioneer". Section 6-102.
"Buyer". Section 2-103.
"Liquidator". Section 6-102.
"Person". Section 1-201.
"Seller". Section 2-103.
"Send". Section 1-201.

§ 28:6-110. Limitation of actions.

(a) Except as provided in subsection (b) of this section, an action under this article against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale.

(b) If the buyer, auctioneer, or liquidator conceals the fact that the sale has occurred, the limitation is tolled and an action under this article may be commenced within the earlier of (i) one year after the person bringing the action discovers that the sale has occurred, or (ii) one year after the person bringing the action should have discovered that the sale has occurred, but no later than 2 years after the date of the bulk sale. Complete noncompliance with the requirements of this article does not of itself constitute concealment.

(c) An action under § 28:6-107(k) must be commenced within one year after the alleged violation occurs.

(Dec. 30, 1963, 77 Stat. 717, Pub. L. 88-243, § 1; renumbered and amended, Apr. 9, 1997, D.C. Law 11-239, § 2, 44 DCR 936.)

Prior Codifications. — 1981 Ed., § 28:6-110.

1973 Ed., § 28:6-110.

Legislative history of Law 11-239. — For legislative history of D.C. Law 11-239, see Historical and Statutory Notes following § 28:6-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6-111 (1987 Official Text).

Changes: Statute of limitations extended and clarified.

Purposes of Changes and New Matter:

1. This Article imposes liability upon only those who do not make a good faith and commercially reasonable effort to comply with the requirements of the Article or to exclude the sale from the application of the Article and who do not hold a good faith and commercially reasonable belief that the Article is inapplicable to the sale. Consequently, it extends the six-month limitation period of the 1987 Official Text, which applies to good faith transferees as well as those not in good faith, to one year. The period commences with the date of the bulk sale.

2. Cases decided under the 1987 Official Text of Article 6 disagree over whether the complete failure to comply with the requirements of that Article constitutes a concealment that tolls the limitation. This Article adopts the view that noncompliance does not of itself constitute concealment.

3. This Article does not contemplate tolling the limitation for actions against a person in control of the seller who fails to distribute the net contract price in accordance with the schedule of distribution. Those actions must be commenced within one year after the alleged violation occurs.

Cross-References:
Point 1: Sections 1-201, 6-102, 6-107 and 6-108.
Point 3: Section 6-107.
Definitional Cross-References:
"Action". Section 1-201.
"Auctioneer". Section 6-102.
"Buyer". Section 2-103.
"Date of the bulk sale". Section 6-102.
"Liquidator". Section 6-102.

CASE NOTES

In general.
Failure to comply with the District of Columbia Bulk Sales Act does not provide a defense to a claim of conversion against a defendant with actual notice of the plaintiff's claim. Cooper v. McKenzie, 115 WLR 1813 (Super. Ct. 1987).

§ 28:6-111. Limitation of actions and levies.

No action under this article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.

(Dec. 30, 1963, 77 Stat. 717, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:6-111. 1973 Ed., § 28:6-111.

§ 28:6-112. Compliance with section 47-4461.

In addition to the requirements of this article, all transferees shall comply with § 47-4461.

(June 9, 2001, D.C. Law 13-305, § 407(b), 48 DCR 334.)

Cross references. — Notice of bulk sale, § 47-4461.

Legislative history of Law 13-305. — Law 13-305, the "Tax Clarity Act of 2000", was introduced in Council and assigned Bill No. 13-586, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on October 3, 2000, and November 8, 2000, respectively. Signed by the Mayor on December 13, 2000, it was assigned Act No. 13-501 and transmitted to both Houses of Congress for its review. D.C. Law 13-305 became effective on June 9, 2001.

Editor's notes. — Section 410 (f) of D.C. Law 13-305 provided: "Section 407 shall apply as of January 1, 2001."

ARTICLE 7. DOCUMENTS OF TITLE.

Part 1. General.

§ 28:7-101. Short title.

This article may be cited as the "Uniform Commercial Code — Documents of Title".

(Dec. 30, 1963, 77 Stat. 718, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-101.

1973 Ed., § 28:7-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

This Article is a consolidation and revision of the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, and embraces also the provisions of the Uniform Sales Act relating to negotiation of documents of title.

The only substantial omissions of material covered in the previous uniform acts are the criminal provisions found in the Warehouse Receipts and Bills of Lading acts. These criminal provisions are inappropriate to a Commercial Code, and for the most part duplicate portions of the ordinary criminal law relating to frauds.

The Article does not attempt to define the tort liability of bailees, except to hold certain classes of bailees to a minimum standard of reasonable care. For important classes of bailees, liabilities in case of loss, damage or destruction, as well as other legal questions associated with particular documents of title, are governed by federal statutes, international treaties, and in some cases regulatory state laws, which supersede the provisions of this Article in case of inconsistency. See Section 7-103.

Prior Uniform Statutory Provision: Former Section 7-101.

Changes: Revised for style only.

This Article is a revision of the 1962 Official Text with Comments as amended since 1962. The 1962 Official Text was a consolidation and revision of the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, and embraced the provisions of the Uniform Sales Act relating to negotiation of documents of title.

This Article does not contain the substantive criminal provisions found in the Uniform Warehouse Receipts and Bills of Lading Acts. These criminal provisions are inappropriate to a Commercial Code, and for the most part duplicate portions of the ordinary criminal law relating to frauds. This revision deletes the former Section 7-105 that provided that courts could apply a rule from Parts 2 and 3 by analogy to a situation not explicitly covered in the provisions on warehouse receipts or bills of lading when it was appropriate. This is, of course, an unexceptional proposition and need not be stated explicitly in the statute. Thus former Section 7-105 has been deleted. Whether applying a rule by analogy to a situation is appropriate depends upon the facts of each case.

The Article does not attempt to define the tort liability of bailees, except to hold certain classes of bailees to a minimum standard of reasonable care. For important classes of bailees, liabilities in case of loss, damages or destruction, as well as other legal questions associated with particular documents of title, are governed by federal statutes, international treaties, and in some cases regulatory state laws, which supersede the provisions of this Article in case of inconsistency. See Section 7-103.

§ 28:7-102. Definitions and index of definitions.

(a) In this article, unless the context otherwise requires, the term:

(1) "Bailee" means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(2) "Carrier" means a person that issues a bill of lading.

(3) "Consignee" means a person named in a bill of lading to which or to whose order the bill promises delivery.

(4) "Consignor" means a person named in a bill of lading as the person from which the goods have been received for shipment.

(5) "Delivery order" means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.

(6) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) "Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.

(8) "Issuer" means a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term "issuer" includes a person for which an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.

(9) "Person entitled under the document" means the holder, in the case of a negotiable document of title or the person to which delivery of the goods is to be made by the terms of or pursuant to instructions in a record under a nonnegotiable document of title.

(10) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) "Shipper" means a person that enters into a contract of transportation with a carrier.

(12) "Sign" means with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic sound, symbol, or process.

(13) "Warehouse" means a person engaged in the business of storing goods for hire.

(b) Definitions in other articles applying to this article and the sections in which they appear include:

(1) "Contract for sale", § 28:2-106.

(2) "Lessee in the ordinary course of business", § 28:2A-103.

(3) "Receipt" of goods, § 28:2-103.

(c) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 718, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(vv), 44 DCR 1271; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:2-103 and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:7-102.

1973 Ed., § 28:7-102.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 19-299. — See note to § 28:7-101.

Editor's notes. — The National Conference of Commissioners on Uniform State Laws has noted that if a state has enacted Revised Article 1, as the District of Columbia did in 2013, the definitions of "good faith" in subsection (a)(6) and "record" in (a)(10) need not be enacted in this section as they are contained in Article 1, Section 1-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Sections 1 and 53, Uniform Bills of Lading Act.

Changes: Applicable definitions from the uniform acts have been consolidated and revised; definition of delivery order is new.

Purposes of Changes and New Matter:

1. "Bailee" was not defined in the old uniform acts. It is used in this Article as a blanket term to designate carriers, warehousemen and others who normally issue documents of title on the basis of goods which they have received. The definition does not, however, require actual possession of the goods. If a bailee acknowledges possession when he does not have it he is bound by sections of this Article which declare the "bailee's" obligations. (See definition of "Issuer" in this section and Sections 7-203 and 7-301 on liability in case of non-receipt.)

2. The definition of warehouse receipt contained in the general definitions section of this Act (Section 1-201) eliminates the requirement of the Uniform Warehouse Receipts Act that the issuing warehouseman be "lawfully engaged" in business. The warehouseman's compliance with applicable state regulations such as the filing of a bond has no bearing on the substantive issues dealt with in this Article. Certainly the issuer's violations of law should not diminish his responsibility on documents he has put in commercial circulation. The Uniform Warehouse Receipts Act requirement that the warehouseman be engaged "for profit" has also been eliminated in view of the existence of state operated and co-operative warehouses. But it is still essential that the business be storing goods "for hire" (Section 1-201 and this section). A person does not become a warehouseman by storing his own goods.

3. Delivery orders, which were included without qualification in the Uniform Sales Act definition of document of title, must be treated differently in this consolidation of provisions from the three uniform acts. When a delivery order has been accepted by the bailee it is for practical purposes indistinguishable from a warehouse receipt. Prior to such acceptance there is no basis for imposing obligations on the bailee other than the ordinary obligation of contract which the bailee may have assumed to the depositor of the goods.

Cross References:

Point 1: Sections 7-203 and 7-301.

Point 2: Sections 1-201 and 7-203.

See general comment to document of title in Section 1-201.

Definitional Cross References:

"Bill of lading". Section 1-201.
"Contract". Section 1-201.
"Contract for sale". Section 2-106.
"Delivery". Section 1-201.
"Document of title". Section 1-201.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Receipt of goods". Section 2-103.
"Right". Section 1-201.
"Warehouse receipt". Section 1-201.
"Written". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-102.

Changes: New definitions of "carrier," "good faith," "record," "sign," and "shipper." Other definitions revised to accommodate electronic mediums.

Purposes: 1. "Bailee" is used in this Article as a blanket term to designate carriers, warehousemen and others who normally issue documents of title on the basis of goods which they have received. The definition does not, however, require actual possession of the goods. If a bailee acknowledges possession when it does not have possession, the bailee is bound by sections of this Article which declare the "bailee's" obligations. (See definition of "Issuer" in this section and Sections 7-203 and 7-301 on liability in case of non-receipt.) A "carrier" is one type of bailee and is defined as a person that issues a bill of lading. A "shipper" is a person who enters into the contract of transportation with the carrier. The definitions of "bailee," "consignee," "consignor," "goods", and "issuer", are unchanged in substance from prior law. "Document of title" is defined in Article 1, and may be in either tangible or electronic form.

2. The definition of warehouse receipt contained in the general definitions section of this Act (Section 1-201) does not require that the issuing warehouse be "lawfully engaged" in business or for profit. The warehouse's compliance with applicable state regulations such as the filing of a bond has no bearing on the substantive issues dealt with in this Article. Certainly the issuer's violations of law should not diminish its responsibility on documents the issuer has put in commercial circulation. But it is still essential that the business be storing goods "for hire" (Section 1-201 and this section). A person does not become a warehouse by storing its own goods.

3. When a delivery order has been accepted by the bailee it is for practical purposes indistinguishable from a warehouse receipt. Prior to such acceptance there is no basis for imposing obligations on the bailee other than the ordinary obligation of contract which the bailee may have assumed to the depositor of the goods. Delivery orders may be either electronic or tangible documents of title. See definition of "document of title" in Section 1-201.

4. The obligation of good faith imposed by this Article and by Article 1, Section 1-304 includes the observance of reasonable commercial standards of fair dealing.

5. The definitions of "record" and "sign" are included to facilitate electronic mediums. See comment 9 to Section 9-102 discussing "record" and the comment to amended Section 2-103 discussing "sign."

6. "Person entitled under the document" is moved from former Section 7-403.

7. These definitions apply in this Article unless the context otherwise requires. The "context" is intended to refer to the context in which the defined term is used in the Uniform Commercial Code. The definition applies whenever the defined term is used unless the context in which the defined term is used in the statute indicates that the term was not used in its defined sense. See comment to Section 1-201.

Cross References: Point 1: Sections 1-201, 7-203 and 7-301.

Point 2: Sections 1-201 and 7-203.

Point 3: Section 1-201.

Point 4: Section 1-304.

Point 5: Section 9-102 and 2-103.

See general comment to document of title in Section 1-201.

Definitional Cross References: "Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Receipt of goods". Section 2-103.

"Right". Section 1-201.

"Warehouse receipt". Section 1-201.

CASE NOTES

ANALYSIS

Warehouse receipts.
Warehouseman.

Warehouse receipts.

Household goods descriptive inventory which listed and described items stored by warehouseman, which stated no value for items, and which was signed by apparent officer of warehouseman, but not property owner, was "receipt issued by person engaged in business of storing goods for hire," and, therefore, "warehouse receipt" and "document of title." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g), 28:7-202, 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Warehouseman.

Warehouseman which was engaged in business of storing goods for hire was "warehouseman" required to exercise care of reasonably careful person without regard to whether document issued by warehouseman, household goods descriptive inventory, was "warehouse receipt." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g, h), 28:7-202, 28:7-202(2), 28:7-204(1, 2), 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

§ 28:7-103. Relation of article to treaty or statute.

(a) This article is subject to any treaty or statute of the United States or regulatory statute of the District of Columbia to the extent the treaty, statute, or regulatory statute is applicable.

(b) This article does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee, or otherwise regulating a bailee's business in respects not specifically treated in this article. However, violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title.

(c) This article modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, approved June 30, 2000 (114 Stat. 464; 15 U.S.C. § 7001, et seq.), but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that act (15 U.S.C. § 7003(b)).

(d) To the extent there is a conflict between Chapter 49 of Subtitle II of this

title, the Uniform Electronic Transactions Act, and this article, this article governs.

(Dec. 30, 1963, 77 Stat. 719, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-103.

1973 Ed., § 28:7-103.

Legislative history of Law 19-299. — See note to § 28:7-101.

Editor's notes. — The National Conference of Commissioners on Uniform State Laws has noted that in states that have not enacted the Uniform Electronic Transactions Act in some form, states should consider their own state laws to determine whether there is a conflict between the provisions of this article and those laws particularly as those other laws may affect electronic documents of title.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. To make clear what would of course be true without the Section, that applicable Federal law is paramount.

2. To make clear also that regulatory state statutes (such as those fixing or authorizing a commission to fix rates and prescribe services, authorizing different charges for goods of different values, and limiting liability for loss to the declared value on which the charge was based) are not affected by the Article and are controlling on the matters which they cover. Notice that the reference is not only to such statutes, but to tariffs, classifications and regulations filed or issued pursuant to them.

Cross References:

Sections 7-201, 7-202, 7-204, 7-206, 7-309, 7-401, 7-403.

Definitional Cross Reference:

"Bill of lading". Section 1-201.

Prior Uniform Statutory Provision: Former Sections 7-103 and 10-104.

Changes: Deletion of references to tariffs and classifications; incorporation of former Section 10-104 into subsection (b), provide for intersection with federal and state law governing electronic transactions.

Purposes: 1. To make clear what would of course be true without the Section, that applicable Federal law is paramount.

2. To make clear also that regulatory state statutes (such as those fixing or authorizing a commission to fix rates and prescribe services, authorizing different charges for goods of different values, and limiting liability for loss to the declared value on which the charge was based) are not affected by the Article and are controlling on the matters which they cover unless preempted by federal law. The reference in former Section 7-103 to tariffs, classifications, and regulations filed or issued pursuant to regulatory state statutes has been deleted as inappropriate in the modern era of diminished regulation of carriers and warehouses. If a regulatory scheme requires a carrier or warehouse to issue a tariff or classification, that tariff or classification would be given effect via the state regulatory scheme that this Article recognizes as controlling. Permissive tariffs or classifications would not displace the provisions of this act, pursuant to this section, but may be given effect through the ability of parties to incorporate those terms by reference into their agreement.

3. The document of title provisions of this act supplement the federal law and regulatory state law governing bailees. This Article focuses on the commercial importance and usage of documents of title. State ex. rel Public Service Commission v. Gunkelman & Sons, Inc., 219 N.W.2d 853 (N.D. 1974).

4. Subsection (c) is included to make clear the interrelationship between the federal Electronic Signatures in Global and National Commerce Act and this article and the conforming amendments to other articles of the Uniform Commercial Code promulgated as part of the revision of this article. Section 102 of the federal act allows a State statute to modify, limit, or supersede the provisions of Section 101 of the federal act. See the comments to Revised Article 1, Section 1-108.

5. Subsection (d) makes clear that once this article is in effect, its provisions regarding electronic commerce and regarding electronic documents of title control in the event there is a conflict with the provisions of the Uniform Electronic Transactions Act or other applicable state law governing electronic transactions.

Cross References: Sections 1-108, 7-201, 7-202, 7-204, 7-206, 7-309, 7-401, 7-403.

Definitional Cross Reference: "Bill of lading". Section 1-201.

§ 28:7-104. Negotiable and nonnegotiable document of title.

(a) Except as otherwise provided in subsection (c) of this section, a document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) of this section is nonnegotiable. A bill of lading that states that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable.

(Dec. 30, 1963, 77 Stat. 719, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-104.

1973 Ed., § 28:7-104.

Legislative history of Law 19-299. — See note to § 28:7-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 27 and 76, Uniform Sales Act; Sections 2, 3, 4, 5 and 59, Uniform Warehouse Receipts Act; Sections 2, 3, 4, 5 and 53, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

This Article deals with a class of commercial paper representing commodities in storage or transportation. This "commodity paper" is to be distinguished from what might be called "money paper" dealt with in the Article of this Act on Commercial Paper (Article 3) and "investment paper" dealt with in the Article of this Act on Investment Securities (Article 8). The class of "commodity paper" is designated "document of title" following the terminology of the Uniform Sales Act Section 76. Section 1-201.

The distinctions between negotiable and nonnegotiable documents in this section makes the most important subclassification employed in the Article, in that the holder of negotiable documents may acquire more rights than his transferor had (See Section 7-502).

A document of title is negotiable only if it satisfies this section. "Deliverable on proper indorsement and surrender of this receipt" will not render a document negotiable. Bailees often include such provisions as a means of insuring return of non-negotiable receipts for record purposes. Such language may be regarded as insistence by the bailee upon a particular kind of receipt in connection with delivery of the goods. Subsections (1)(a) and (2) make it clear that a document is not negotiable which provides for delivery to order or bearer only if written instructions to that effect are given by a named person.

Cross Reference:

Section 7-502.

Definitional Cross References:

"Bearer". Section 1-201.

"Bill of lading". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Overseas". Section 2-323.

"Person". Section 1-201.

"Warehouse receipt". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-104.

Changes: Subsection (a) is revised to reflect modern style and trade practice. Subsection (b) is revised for style and medium neutrality. Subsection (c) is new.

Purposes: 1. This Article deals with a class of commercial paper representing commodities in storage or transportation. This "commodity paper" is to be distinguished from what might be called "money paper" dealt with in the Article of this Act on Commercial Paper (Article 3) and "investment paper" dealt with in the Article of this Act on Investment Securities (Article 8). The class of "commodity paper" is designated "document of title" following the terminology of the Uniform Sales Act Section 76. Section 1-201. The distinctions between nego-

tiable and nonnegotiable documents in this section makes the most important subclassification employed in the Article, in that the holder of negotiable documents may acquire more rights than its transferor had (See Section 7-502). The former Section 7-104, which provided that a document of title was negotiable if it runs to a named person or assigns if such designation was recognized in overseas trade, has been deleted as not necessary in light of current commercial practice.

A document of title is negotiable only if it satisfies this section. "Deliverable on proper indorsement and surrender of this receipt" will not render a document negotiable. Bailees often include such provisions as a means of insuring return of nonnegotiable receipts for record purposes. Such language may be regarded as insistence by the bailee upon a particular kind of receipt in connection with delivery of the goods. Subsection (a) makes it clear that a document is not negotiable which provides for delivery to order or bearer only if written instructions to that effect are given by a named person. Either tangible or electronic documents of title may be negotiable if the document meets the requirement of this section.

2. Subsection (c) is derived from Section 3-104(d). Prior to issuance of the document of title, an issuer may stamp or otherwise provide by a notation on the document that it is nonnegotiable even if the document would otherwise comply with the requirement of subsection (a). Once issued as a negotiable document of title, the document cannot be changed from a negotiable document to a nonnegotiable document. A document of title that is nonnegotiable cannot be made negotiable by stamping or providing a notation that the document is negotiable. The only way to make a document of title negotiable is to comply with subsection (a). A negotiable document of title may fail to be duly negotiated if the negotiation does not comply with the requirements for "due negotiation" stated in Section 7-501.

Cross Reference: Sections 7-501 and 7-502.

Definitional Cross References: "Bearer". Section 1-201.

"Bill of lading". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Person". Section 1-201.

"Sign". Section 7-102

"Warehouse receipt". Section 1-201.

CASE NOTES

Security interests.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

§ 28:7-105. Reissuance in alternative medium.

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

(1) The person entitled under the electronic document surrenders control of the document to the issuer; and

(2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a) of this section:

(1) The electronic document ceases to have any effect or validity; and

(2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

(1) The person entitled under the tangible document surrenders possession of the document to the issuer; and

(2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c) of this section:

(1) The tangible document ceases to have any effect or validity; and

(2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

(Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-305 and § 28:7-402.

Prior Codifications. — 1981 Ed., § 28:7-105.

1973 Ed., § 28:7-105.

Legislative history of Law 19-299. — See note to § 28:7-101.

Editor's notes. — Former § 28:7-105, concerning construction against negative implication, was derived from Dec. 30, 1963, 77 Stat. 719, Pub. L. 88-243, § 1. The 2013 revision of this article deleted former § 28:7-105, a statute that provided that courts could apply a rule from Parts 2 and 3 by analogy to a situation not explicitly covered in the provisions on warehouse receipts or bills of lading when it was appropriate. Per the official commentary appearing under § 28:7-101: "this is, of course, an unexceptional proposition and need not be stated explicitly in the statute. Thus former Section 7-105 has been deleted. Whether applying a rule by analogy to a situation is appropriate depends upon the facts of each case."

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

To avoid any impairment, for example, of any common-law right of indemnity a warehouseman may have corresponding to Section 7-301(5), or of any contractual security interest a carrier might have corresponding to Section 7-209(2).

Cross References:

Parts 2 and 3 of Article 7.

Prior Uniform Statutory Provisions: None.

Other relevant law: UNCITRAL Draft Instrument on the Carriage of Goods by SeaTransport Law.

Purpose: 1. This section allows for documents of title issued in one medium to be reissued in another medium. This section applies to both negotiable and nonnegotiable documents. This section sets forth minimum requirements for giving the reissued document effect and validity. The issuer is not required to issue a document in an alternative medium and if the issuer chooses to do so, it may impose additional requirements. Because a document of title imposes obligations on the issuer of the document, it is imperative for the issuer to be the one who issues the substitute document in order for the substitute document to be effective and valid.

2. The request must be made to the issuer by the person entitled to enforce the document of title (Section 7-102(a)(9)) and that person must surrender possession or control of the original document to the issuer. The reissued document must have a notation that it has been issued as a substitute for the original document. These minimum requirements must be met in order to give the substitute document effect and validity. If these minimum requirements are not met for issuance of a substitute document of title, the original document of title continues to be effective and valid. Section 7-402. However, if the minimum requirements imposed by this section are met, in addition to any other requirements that the issuer may impose, the substitute document will be the document that is effective and valid.

3. To protect parties who subsequently take the substitute document of title, the person who procured issuance of the substitute document warrants that it was a person entitled under the original document at the time it surrendered possession or control of the original document to the issuer. This warranty is modeled after the warranty found in Section 4-209.

Cross Reference: Sections 7-106, 7-402 and 7-601.

Definitional Cross Reference: "Person entitled to enforce," Section 7-102.

§ 28:7-106. Control of electronic document of title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a) of this section, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the document was issued; or

(B) If the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

(Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:2-103, § 28:4-104, § 28:9-102, § 28:9-203, § 28:9-207, § 28:9-314, and § 28:9-601.

Legislative history of Law 19-299. — See note to § 28:7-101.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Uniform Electronic Transactions Act Section 16.

Purpose: 1. The section defines "control" for electronic documents of title and derives its rules from the Uniform Electronic Transactions Act § 16 on transferrable records. Unlike UETA § 16, however, a document of title may be reissued in an alternative medium pursuant to Section 7-105. At any point in time in which a document of title is in electronic form, the control concept of this section is relevant. As under UETA § 16, the control concept embodied in this section provides the legal framework for developing systems for electronic documents of title.

2. Control of an electronic document of title substitutes for the concept of indorsement and possession in the tangible document of title context. See Section 7-501. A person with a tangible document of title delivers the document by voluntarily transferring possession and a person with an electronic document of title delivers the document by voluntarily transferring control. (Delivery is defined in Section 1-201).

3. Subsection (a) sets forth the general rule that the "system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred." The key to having a system that satisfies this test is that identity of the person

to which the document was issued or transferred must be reliably established. Of great importance to the functioning of the control concept is to be able to demonstrate, at any point in time, *the person* entitled under the electronic document. For example, a carrier may issue an electronic bill of lading by having the required information in a database that is encrypted and accessible by virtue of a password. If the computer system in which the required information is maintained identifies the person as the person to which the electronic bill of lading was issued or transferred, that person has control of the electronic document of title. That identification may be by virtue of passwords or other encryption methods. Registry systems may satisfy this test. For example, see the electronic warehouse receipt system established pursuant to 7 C.F.R. Part 735. This Article leaves to the market place the development of sufficient technologies and business practices that will meet the test.

An electronic document of title is evidenced by a record consisting of information stored in an electronic medium. Section 1-201. For example, a record in a computer database could be an electronic document of title assuming that it otherwise meets the definition of document of title. To the extent that third parties wish to deal in paper mediums, Section 7-105 provides a mechanism for exiting the electronic environment by having the issuer reissue the document of title in a tangible medium. Thus if a person entitled to enforce an electronic document of title causes the information in the record to be printed onto paper without the issuer's involvement in issuing the document of title pursuant to Section 7-105, that paper is not a document of title.

4. Subsection (a) sets forth the general test for control. Subsection (b) sets forth a safe harbor test that if satisfied, results in control under the general test in subsection (a). The test in subsection (b) is also used in Section 9-105 although Section 9-105 does not include the general test of subsection (a). Under subsection (b), at any point in time, a party should be able to identify the single authoritative copy which is unique and identifiable as the authoritative copy. This does not mean that once created that the authoritative copy need be static and never moved or copied from its original location. To the extent that backup systems exist which result in multiple copies, the key to this idea is that at any point in time, the one authoritative copy needs to be unique and identifiable.

Parties may not by contract provide that control exists. The test for control is a factual test that depends upon whether the general test in subsection (a) or the safe harbor in subsection (b) is satisfied.

5. Article 7 has historically provided for rights under documents of title and rights of transferees of documents of title as those rights relate to the goods covered by the document. Third parties may possess or have control of documents of title. While misfeasance or negligence in failure to transfer or misdelivery of the document by those third parties may create serious issues, this Article has never dealt with those issues as it relates to tangible documents of title, preferring to leave those issues to the law of contracts, agency and tort law. In the electronic document of title regime, third party registry systems are just beginning to develop. It is very difficult to write rules regulating those third parties without some definitive sense of how the third party registry systems will be structured. Systems that are evolving to date tend to be "closed" systems in which all participants must sign on to the master agreement which provides for rights as against the registry system as well as rights among the members. In those closed systems, the document of title never leaves the system so the parties rely upon the master agreement as to rights against the registry for its failures in dealing with the document. This article contemplates that those "closed" systems will continue to evolve and that the control mechanism in this statute provides a method for the participants in the closed system to achieve the benefits of obtaining control allowed by this article.

This article also contemplates that parties will evolve open systems where parties need not be subject to a master agreement. In an open system a party that is expecting to obtain rights through an electronic document may not be a party to the master agreement. To the extent that open systems evolve by use of the control concept contained in this section, the law of contracts, agency, and torts as it applies to the registry's misfeasance or negligence concerning the transfer of control of the electronic document will allocate the risks and liabilities of the parties as that other law now does so for third parties who hold tangible documents and fail to deliver the documents.

Cross Reference: Sections 7-105 and 7-501.

Definitional Cross-References:

"Delivery", 1-201.

"Document of title", 1-201.

Part 2. Warehouse Receipts: Special Provisions.

§ 28:7-201. Person that may issue a warehouse receipt; storage under bond.

(a) A warehouse receipt may be issued by any warehouse.

(b) If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse.

(Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:7-201.

1973 Ed., § 28:7-201.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 1, Uniform Warehouse Receipts Act.

Changes: Provision added to cover storage under government bond or under licensing statute.

Purposes:

It is not intended by reenactment of subsection (1) to repeal any provisions of special licensing or other statutes regulating who may become a warehouseman. See Section 10-103. Subsection (2) covers receipts issued by the owner for whiskey or other goods stored in bonded warehouses under such statutes as 26 U.S.C. Chapter 26. Limitations on the transfer of the receipts and criminal sanctions for violation of such limitations are not impaired. Section 7-103. Compare Section 7-401(d) on the liability of the issuer in such cases.

Cross References:

Sections 7-103, 7-401, 10-103.

Definitional Cross References:

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-201.

Changes: Update for style only.

Purposes: It is not intended by re-enactment of subsection (a) to repeal any provisions of special licensing or other statutes regulating who may become a warehouse. Limitations on the transfer of the receipts and criminal sanctions for violation of such limitations are not impaired. Section 7-103. Compare Section 7-401(4) on the liability of the issuer in such cases. Subsection (b) covers receipts issued by the owner for whiskey or other goods stored in bonded warehouses under such statutes as 26 U.S.C. Chapter 51.

Cross References: Sections 7-103, 7-401.

Definitional Cross References: "Warehouse receipt". Section 1-201.

"Warehouse". Section 7-102.

§ 28:7-202. Form of warehouse receipt; effect of omission.

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) A statement of the location of the warehouse facility where the goods are stored;

(2) The date of issue of the receipt;

(3) The unique identification code of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a named person, or to its order;

(5) The rate of storage and handling charges, unless goods are stored under a field warehousing arrangement, in which case a statement of that fact is sufficient on a nonnegotiable receipt;

(6) A description of the goods or the packages containing them;

(7) The signature of the warehouse or its agent;

(8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership; and

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, unless the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, in which case a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to this subtitle and do not impair its obligation of delivery under § 28:7-403 or its duty of care under § 28:7-204. Any contrary provision is ineffective.

(Dec. 30, 1963, 77 Stat. 719, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-202.
1973 Ed., § 28:7-202.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 2, Uniform Warehouse Receipts Act.

Changes: Exemption for field warehouse receipts added in subsection (2)(e).

Purposes:

To make clear that the formal requirements of the Uniform Warehouse Receipts Act are continued but not to displace particular legislation requiring other or different specifications of form. See Sections 7-103 and 10-103. This section does not require that a receipt be issued but states formal requirements for those which are issued.

Cross References:

Sections 7-103 and 10-103.

Definitional Cross References:

"Bearer". Section 1-201.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Person". Section 1-201.
"Security interest". Section 1-201.
"Term". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouseman". Section 7-102.
"Written". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-202.

Changes: Language is updated to accommodate electronic commerce and to reflect modern style.

Purposes: 1. This section does not displace any particular legislation that requires other terms in a warehouse receipt or that may require a particular form of a warehouse receipt. This section does not require that a warehouse receipt be issued. A warehouse receipt that is issued need not contain any of the terms listed in subsection (b) in order to qualify as a warehouse receipt as long as the receipt falls within the definition of "warehouse receipt" in Article 1. Thus the title has been changed to eliminate the phrase "essential terms" as provided in prior law. The only consequence of a warehouse receipt not containing any term listed in subsection (b) is that a person injured by a term's omission has a right as against the warehouse for harm caused by the omission. Cases, such as In re Celotex Corp., 134 B. R. 993 (Bankr. M.D. Fla. 1991), that held that in order to have a valid warehouse receipt all of the terms listed in this section must be contained in the receipt, are disapproved.

2. The unique identification code referred to in subsection (b)(3) can include any combination of letters, number, signs, and/or symbols that provide a unique identification. Whether an electronic or tangible warehouse receipt contains a signature will be resolved with the definition of sign in Section 7-102.

Cross References: Sections 7-103 and 7-401.

Definitional Cross References: "Bearer". Section 1-201.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Person". Section 1-201.
"Security interest". Section 1-201.
"Sign". Section 7-102.
"Term". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouse". Section 7-102.

CASE NOTES

In general.

Loss of bailor's fur coat by theft was not "caused" by omission of place of storage from warehouse receipt as required, under Uniform Commercial Code, to impose liability on bailee; at most, theft was caused by goods' change of location from that listed on the receipt. D.C. Code 1981, § 28:7-202. Fotos v. Firemen's Ins. Co., 533 A.2d 1264, 1987 D.C. App. LEXIS 487 (1987).

Household goods descriptive inventory which listed and described items stored by warehouseman, which stated no value for items, and which was signed by apparent officer of warehouseman, but not property owner, was "receipt issued by person engaged in business of storing goods for hire," and, therefore, "warehouse receipt" and "document of title." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g), 28:7-202, 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Warehouseman which was engaged in business of storing goods for hire was "warehouseman" required to exercise care of reasonably careful person without regard to whether document issued by warehouseman, household goods descriptive inventory, was "warehouse receipt." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g, h), 28:7-202, 28:7-202(2), 28:7-204(1, 2), 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

§ 28:7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title, other than a bill of lading, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

(1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown", "said to contain", or words of similar import, if the indication is true; or

(2) The party or purchaser otherwise has notice of the nonreceipt or misdescription.

(Dec. 30, 1963, 77 Stat. 720, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-203.
1973 Ed., § 28:7-203.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 20, Uniform Warehouse Receipts Act.
Changes: New section confined to problem of non-receipt and misdescription.
Purposes of Changes and New Matter: This section is a simplified restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor. The issuer is liable on documents issued by an agent, contrary to instructions of his principal, without receiving goods. No disclaimer of the latter liability is permitted.
Cross References:
Sections 7-301 and 7-203.
Definitional Cross References:
"Conspicuous". Section 1-201.
"Document". Section 7-102.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Notice". Section 1-201.
"Party". Section 1-201.
"Purchaser". Section 1-201.
"Receipt of goods". Section 2-103.
"Value". Section 1-201.
Prior Uniform Statutory Provision: Former Section 7-203.
Changes: Changes to this section are for style only.
Purpose: This section is a simplified restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor. The issuer is liable on documents issued by an agent, contrary to instructions of its principal, without receiving goods. No disclaimer of the latter liability is permitted.
Cross Reference: Section 7-301.
Definitional Cross References: "Conspicuous". Section 1-201.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Good Faith". Section 1-201 [7-102].
"Issuer". Section 7-102.
"Notice". Section 1-202.
"Party". Section 1-201.
"Purchaser". Section 1-201.
"Receipt of goods". Section 2-103.
"Value". Section 1-204.

§ 28:7-204. Duty of care; contractual limitation of warehouse's liability.

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. On request of the bailor in a record at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse's liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.

(Dec. 30, 1963, 77 Stat. 720, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-202.

Prior Codifications. — 1981 Ed., § 28:7-204.

1973 Ed., § 28:7-204.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 3 and 21, Uniform Warehouse Receipts Act.

Changes: Consolidated and rewritten; material on limitation of remedy is new.

Purposes of Changes:

The old uniform acts provided that receipts could not contain terms impairing the obligation of reasonable care. Whether this is violated by a stipulation that in case of loss the bailee's liability is limited to stated amounts has been much controverted. The section is intended to eliminate that controversy by setting forth the conditions under which liability is so limited. However, as subsection (4) [Not adopted in Minnesota, see Minnesota Code Comment, supra] makes clear, the states as well as the federal government may supplement this section with more rigid standards of responsibility for some or all bailees.

Cross References:

Sections 7-103 and 10-103.

Definitional Cross References:

"Action". Section 1-201.

"Agreed". Section 1-201.

"Goods". Section 7-102.

"Reasonable time". Section 1-204.

"Sign". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

"Written". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-204.

Changes: Updated to reflect modern, standard commercial practices.

Purposes of Changes: 1. Subsection (a) continues the rule without change from former Section 7-204 on the warehouse's obligation to exercise reasonable care.

2. Former Section 7-204(2) required that the term limiting damages do so by setting forth a specific liability per article or item or of a value per unit of weight. This requirement has been deleted as out of step with modern industry practice. Under subsection (b) a warehouse may limit its liability for damages for loss of or damage to the goods by a term in the warehouse receipt or storage agreement without the term constituting an impermissible disclaimer of the obligation of reasonable care. The parties cannot disclaim by contract the warehouse's obligation of care. Section 1-302. For example, limitations based upon per unit of weight, per package, per occurrence, or per receipt as well as limitations based upon a multiple of the storage rate may be commercially appropriate. As subsection (d) makes clear, the states or the federal government may supplement this section with more rigid standards of responsibility for some or all bailees.

3. Former Section 7-204(2) also provided that an increased rate can not be charged if contrary to a tariff. That language has been deleted. If a tariff is required under state or federal law, pursuant to Section 7-103(a), the tariff would control over the rule of this section allowing an increased rate. The provisions of a non-mandatory tariff may be incorporated by reference in the parties' agreement. See Comment 2 to Section 7-103. Subsection (c) deletes the reference to tariffs for the same reason that the reference has been omitted in subsection (b).

4. As under former Section 7-204(2), subsection (b) provides that a limitation of damages is ineffective if the warehouse has converted the goods to its own use. A mere failure to redeliver the goods is not conversion to the warehouse's own use. See Adams v. Ryan & Christie Storage, Inc., 563 F. Supp. 409 (E.D. Pa. 1983) aff'd 725 F.2d 666 (3rd Cir. 1983). Cases such as I.C.C. Metals Inc. v. Municipal Warehouse Co., 409 N.E. 2d 849 (N.Y. Ct. App. 1980) holding that mere failure to redeliver results in a presumption of conversion to the warehouse's own use are disapproved. "Conversion to its own use" is narrower than the idea of conversion generally. Cases such as Lipman v. Peterson, 575 P.2d 19 (Kan. 1978) holding to the contrary are disapproved.

5. Storage agreements commonly establish the contractual relationship between warehouses and depositors who have an on-going relationship. The storage agreement may allow for the movement of goods into and out of a warehouse without the necessity of issuing or amending a warehouse receipt upon each entry or exit of goods from the warehouse.

Cross References: Sections 1-302, 7-103, 7-309 and 7-403.

Definitional Cross References: "Goods". Section 7-102.

"Reasonable time". Section 1-204.

"Sign". Section 7-102.

"Term". Section 1-201.

"Value". Section 1-204.

"Warehouse receipt". Section 1-201.

"Warehouse". Section 7-102.

CASE NOTES

ANALYSIS

Burden of proof.

Warehouseman that is sued for conversion of goods stored in warehouse has burden to prove valid foreclosure of lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210. Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Limitation of liability.

Bailee's liability for negligent loss of fur coat would be limited to $200 as stated on warehouse receipt. D.C. Code 1981, § 28:7-204(1, 2). Fotos v. Firemen's Ins. Co., 533 A.2d 1264, 1987 D.C. App. LEXIS 487 (1987).

Provision in bailment contract limiting bailee's liability will be upheld in absence of gross negligence, willful act, or fraud. D.C. Code 1981, § 28:7-204(2). Houston v. Security Storage Co., 474 A.2d 143, 1984 D.C. App. LEXIS 364 (1984).

Where driver's receipt signed by bailor who left silver items in possession of bailee contained clause which, in absence of other agreement, limited bailee's liability to $1,000, and bailor did not seek further bailment insurance, bailee which failed to redeliver items could be held liable to bailor and his insurer only in stipulated sum of $1,000. D.C. Code 1981, § 28:7-204(2). Houston v. Security Storage Co., 474 A.2d 143, 1984 D.C. App. LEXIS 364 (1984).

Notice of sale.

Warehouseman's letter to property owner which notified owner of possible sale of goods to satisfy overdue account, which did not contain itemized statement of claims, and which did not contain description of goods subject to warehouseman's lien was legally insufficient to give property owner notice of sale to satisfy lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Reasonable care.

Where warehouseman compensates owner fully for all damages to stored goods and obtains release of liability therefor, it is equivalent to proper delivery, and property owner is not entitled to return of storage charges. Derzavis v. Security Storage Co., 703 A.2d 839, 1997 D.C. App. LEXIS 274 (1997).

If bailee breached his contract with bailor when he moved fur coat to location other than address listed on storage receipt, he was liable in conversion for its subsequent loss due to theft and could not rely on warehouse receipt's stated limitation of liability. D.C. Code 1981, § 28:7-204(2). Fotos v. Firemen's Ins. Co., 533 A.2d 1264, 1987 D.C. App. LEXIS 487 (1987).

Warehouseman which was engaged in business of storing goods for hire was "warehouseman" required to exercise care of reasonably careful person without regard to whether document issued by warehouseman, household goods descriptive inventory, was "warehouse receipt." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g, h), 28:7-202, 28:7-202(2), 28:7-204(1, 2), 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Evidence that warehouseman could not account for some of property owner's goods established prima facie case of breach of warehouseman's duty to exercise care of reasonably careful person in like circumstances. D.C. Code 1981, § 28:7-204(1, 2). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Where warehouse was of fire resistant construction, fire alarm system was effectively operating, warehouse was patrolled at fixed intervals by outside guard and wiremesh screening on windows was not inadequate or attached in insecure manner, warehouseman was not negligent in failing to provide 24-hour inside guard service or in failing to adequately secure windows and was not liable for damage to stored furniture from fire set by demented policeman after policeman removed wire-mesh screen, but, in any event, arson under the circumstances was not a foreseeable result of any failure on part of warehouseman. D.C. Code § 28:7-204(1). Union Storage Co. v. McIntyre, 256 A.2d 787, 1969 D.C. App. LEXIS 308 (App. 1969).

Release of liability.

"Release" is a form of contract, by which the parties to it are bound by its terms unless it is invalid for some reason. Derzavis v. Security Storage Co., 703 A.2d 839, 1997 D.C. App. LEXIS 274 (1997).

Property owner, by executing two releases discharging warehouseman from all liability for damages to stored property, relinquished her right to sue on any claim for damages to such property. Derzavis v. Security Storage Co., 703 A.2d 839, 1997 D.C. App. LEXIS 274 (1997).

Property owner's claims for attorney fees and "legal research" in action for damage to stored items was precluded by release barring all

claims and by release barring claims with respect to the "goods." Derzavis v. Security Storage Co., 703 A.2d 839, 1997 D.C. App. LEXIS 274 (1997).

§ 28:7-205. Title under warehouse receipt defeated in certain cases.

A buyer in ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling such goods takes the goods free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated.

(Dec. 30, 1963, 77 Stat. 721, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-502.

Prior Codifications. — 1981 Ed., § 28:7-205.

1973 Ed., § 28:7-205.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

The typical case covered by this section is that of the warehouseman-dealer in grain, and the substantive question at issue is whether in case the warehouseman becomes insolvent the receipt holders shall be able to trace and recover grain shipped to farmers and other purchasers from the elevator. This was possible under the old acts, although courts were eager to find estoppels to prevent it. The practical difficulty of tracing fungible grain means that the preservation of this theoretical right adds little to the commercial acceptability of negotiable grain receipts, which really circulate on the credit of the warehouseman. Moreover, on default of the warehouseman, the receipt holders at least share in what grain remains, whereas retaking the grain from a good faith cash purchaser reduces him completely to the status of general creditor in a situation where there was very little he could do to guard against the loss. Compare 15 U.S.C. Section 714p, enacted in 1955.

Cross References:

Sections 2-403 and 9-307.

Definitional Cross References:

"Buyer in ordinary course of business". Section 1-201.

"Delivery". Section 1-201.

"Duly negotiate". Section 7-501.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-205.

Changes: Changes for style only.

Purposes: 1. The typical case covered by this section is that of the warehouse-dealer in grain, and the substantive question at issue is whether in case the warehouse becomes insolvent the receipt holders shall be able to trace and recover grain shipped to farmers and other purchasers from the elevator. This was possible under the old acts, although courts were eager to find estoppels to prevent it. The practical difficulty of tracing fungible grain means that the preservation of this theoretical right adds little to the commercial acceptability of negotiable grain receipts, which really circulate on the credit of the warehouse. Moreover, on default of the warehouse, the receipt holders at least share in what grain remains, whereas retaking the grain from a good faith cash purchaser reduces the purchaser completely to the status of general creditor in a situation where there was very little the purchaser could do to guard against the loss. Compare 15 U.S.C. Section 714p enacted in 1955.

2. This provision applies to both negotiable and nonnegotiable warehouse receipts. The concept of due negotiation is provided for in 7-501. The definition of "buyer in ordinary course" is in Article 1 and provides, among other things, that a buyer must either have possession or a right to obtain the goods under Article 2 in order to be a buyer in ordinary course. This section requires actual delivery of the fungible goods to the buyer in ordinary course. Delivery requires voluntary transfer of possession of the fungible goods to the buyer. See amended Section 2-103. This section is not satisfied by the delivery of the document of title to the buyer in ordinary course.

Cross References: Sections 2-403 and 9-320.

Definitional Cross References: "Buyer in ordinary course of business". Section 1-201.

"Delivery". Section 1-201.

"Duly negotiate". Section 7-501.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Value". Section 1-204.

"Warehouse receipt". Section 1-201.

"Warehouse". Section 7-102.

§ 28:7-206. Termination of storage at warehouse's option.

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document of title or, if a period is not fixed, within a stated period not less than 30 days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to § 28:7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) of this section and § 28:7-210, the warehouse may specify in the notice given under subsection (a) of this section any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this article upon due demand made at any time before sale or other disposition under this section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this section but shall hold the balance for delivery on the demand of any person to which the warehouse would have been bound to deliver the goods.

(Dec. 30, 1963, 77 Stat. 721, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-206.

1973 Ed., § 28:7-206.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 34, Uniform Warehouse Receipts Act.

Changes: Rewritten and expanded to define the warehouseman's right to terminate the storage not only where the goods are perishable or hazardous as in Uniform Warehouse Re-

ceipts Act, Section 34, but also for any other reason including decline in value of the goods imperilling the warehouseman's security for charges.

Purposes of Changes:

1. Most warehousing is for an indefinite term, the bailor being entitled to delivery on reasonable demand. It is necessary to define the warehouseman's power to terminate the bailment, since it would be commercially intolerable to allow warehousemen to order removal of the goods on short notice. The thirty day period provided where the document does not carry its own period of termination corresponds to commercial practice of computing rates on a monthly basis. The right to terminate under subsection (1) includes a right to require payment of "any charges", but does not depend on the existence of unpaid charges.

2. In permitting expeditions disposition of perishable and hazardous goods Uniform Warehouse Receipts Act, Section 34, made no distinction between cases where the warehouseman knowingly undertook to store such goods and cases where the goods were discovered to be of that character subsequent to storage. The former situation presents no such emergency as justifies the summary power of removal and sale. Subsections (2) and (3) distinguish between the two situations.

3. Protection of his lien is the only interest which the warehouseman has to justify summary sale of perishable goods which are not hazardous. This same interest must be recognized when the stored goods, although not perishable, decline in market value to a point which threatens the warehouseman's security.

4. The right to order removal of stored goods is subject to provisions of the public warehousing laws of some states forbidding warehousemen from discriminating among customers. Nor does the section relieve the warehouseman of any obligation under the state laws to secure the approval of a public official before disposing of deteriorating goods. Such regulatory statutes and the regulations under them remain in force and operative. Sections 7-103, 10-103.

Cross References:

Sections 7-103, 7-403, 10-103.

Definitional Cross Reference:

"Delivery". Section 1-201.
"Document". Section 7-102.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Notice". Section 1-201.
"Notification". Section 1-201.
"Person". Section 1-201.
"Reasonable time". Section 1-204.
"Value". Section 1-201.
"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-206.

Changes: Changes for style.

Purposes: 1. This section provides for three situations in which the warehouse may terminate storage for reasons other than enforcement of its lien as permitted by Section 7-210. Most warehousing is for an indefinite term, the bailor being entitled to delivery on reasonable demand. It is necessary to define the warehouse's power to terminate the bailment, since it would be commercially intolerable to allow warehouses to order removal of the goods on short notice. The thirty day period provided where the document does not carry its own period of termination corresponds to commercial practice of computing rates on a monthly basis. The right to terminate under subsection (a) includes a right to require payment of "any charges", but does not depend on the existence of unpaid charges.

2. In permitting expeditious disposition of perishable and hazardous goods the pre-Code Uniform Warehouse Receipts Act, Section 34, made no distinction between cases where the warehouse knowingly undertook to store such goods and cases where the goods were discovered to be of that character subsequent to storage. The former situation presents no such emergency as justifies the summary power of removal and sale. Subsections (b) and (c) distinguish between the two situations. The reason of this section should apply if the goods become hazardous during the course of storage. The process for selling the goods described in Section 7-210 governs the sale of goods under this section except as provided in subsections (b) and (c) for the situations described in those subsections respectively.

3. Protection of its lien is the only interest which the warehouse has to justify summary sale of perishable goods which are not hazardous. This same interest must be recognized when the stored goods, although not perishable, decline in market value to a point which threatens the warehouse's security.

4. The right to order removal of stored goods is subject to provisions of the public warehousing laws of some states forbidding warehouses from discriminating among customers. Nor does the section relieve the warehouse of any obligation under the state laws to secure the approval of a public official before disposing of deteriorating goods. Such regulatory statutes and the regulations under them remain in force and operative. Section 7-103.

Cross References: Sections 7-103 and 7-403.

Definitional Cross References: "Delivery". Section 1-201.
"Document of title". Section 1-102.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Notice". Section 1-202.
"Notification". Section 1-202.
"Person". Section 1-201.

"Reasonable time". Section 1-205.
"Value". Section 1-204.
"Warehouse". Section 7-102.

§ 28:7-207. Goods must be kept separate; fungible goods.

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled to the fungible goods include all holders to which overissued receipts have been duly negotiated.

(Dec. 30, 1963, 77 Stat. 721, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-207.
1973 Ed., § 28:7-207.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 22, 23 and 24, Uniform Warehouse Receipts Act.

Changes: Consolidated and revised; holders of overissued receipts permitted to share in mass of fungible goods.

Purposes of Changes:
No change of substance is made other than the explicit statement that holders to whom overissued receipts have been duly negotiated shall share in a mass of fungible goods. Where individual ownership interests are merged into claims on a common fund, as is necessarily the case with fungible goods, there is no policy reason for discriminating between successive purchasers of similar claims.

Definitional Cross References:
"Delivery". Section 1-201.
"Duly negotiate". Section 7-501.
"Fungible" goods. Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Person". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-207.

Changes: Changes for style only.

Purposes: No change of substance is made from former Section 7-207. Holders to whom overissued receipts have been duly negotiated shall share in a mass of fungible goods. Where individual ownership interests are merged into claims on a common fund, as is necessarily the case with fungible goods, there is no policy reason for discriminating between successive purchasers of similar claims.

Definitional Cross References: "Delivery". Section 1-201.
"Duly negotiate". Section 7-501.
"Fungible goods". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Person". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouse". Section 7-102.

§ 28:7-208. Altered warehouse receipts.

If a blank in a negotiable tangible warehouse receipt has been filled in without authority, a good-faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor.

(Dec. 30, 1963, 77 Stat. 721, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-208.
1973 Ed., § 28:7-208.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 13, Uniform Warehouse Receipts Act.

Changes: Generally revised and simplified; explicit treatment of the situation where a blank in an executed document is filled without authority.

Purposes of Changes:

1. The execution of warehouse receipts in blank is a dangerous practice. As between the issuer and an innocent purchaser the risks should clearly fall on the former.

2. An unauthorized alteration whether made with or without fraudulent intent does not relieve the issuer of his liability on the warehouse receipt as originally executed. The unauthorized alteration itself is of course ineffective against the warehouseman.

Definitional Cross References:

"Issuer". Section 7-102.
"Notice". Section 1-201.
"Purchaser". Section 1-201.
"Value". Section 1-201.
"Warehouse receipt". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-208.

Changes: To accommodate electronic documents of title.

Purpose: 1. The execution of tangible warehouse receipts in blank is a dangerous practice. As between the issuer and an innocent purchaser the risks should clearly fall on the former. The purchaser must have purchased the tangible negotiable warehouse receipt in good faith and for value to be protected under the rule of the first sentence which is a limited exception to the general rule in the second sentence. Electronic document of title systems should have protection against unauthorized access and unauthorized changes. See 7-106. Thus the protection for good faith purchasers found in the first sentence is not necessary in the context of electronic documents.

2. Under the second sentence of this section, an unauthorized alteration whether made with or without fraudulent intent does not relieve the issuer of its liability on the warehouse receipt as originally executed. The unauthorized alteration itself is of course ineffective against the warehouse. The rule stated in the second sentence applies to both tangible and electronic warehouse receipts.

Definitional Cross References: "Good faith". Section 1-201 [7-102].
"Issuer". Section 7-102.
"Notice". Section 1-202.
"Purchaser". Section 1-201.
"Value". Section 1-204.
"Warehouse receipt". Section 1-201.

§ 28:7-209. Lien of warehouse.

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no

charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) A warehouse may also reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a) of this section, such as for money advanced and interest. The security interest is governed by Article 9.

(c) A warehouse's lien for charges and expenses under subsection (a) of this section or a security interest under subsection (b) of this section is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under § 28:7-403; or

(C) Power of disposition under § 28:2-403, 28:2A-304, 28:2A-305 28:9-320, or 28:9-321(c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) of this section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection, the term "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.

(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

(Dec. 30, 1963, 77 Stat. 722, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 8, 29 DCR 309; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-209.

1973 Ed., § 28:7-209.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 27 through 32, Uniform Warehouse Receipts Act.

Changes: Rewritten.

Purposes of Changes:

1. Subsection (1) defines the warehouseman's statutory lien. A specific lien attaches automatically, without express notation on the receipt, to goods stored under a non-negotiable receipt. That lien is limited to the usual charges arising out of a storage transaction; by notation on the receipt it can be made a general lien extending to like charges in relation to other goods. The same rules apply where the receipt is negotiable, except that as against a holder by due negotiation the lien is limited to the amount or

rate specified on the receipt, or, if none is specified, to a reasonable charge for storage of the specific goods after the date of the receipt.

2. Subsection (2) provides for a security interest based upon agreement. Such a security interest arises out of relations between the parties other than bailment for storage or transportation, as where the bailee assumes the role of financer or performs a manufacturing operation, extending credit in reliance upon the goods covered by the receipt. Such a security interest is not a statutory lien. Compare Sections 9-102(2) and 9-310. It is governed in all respects by Article 9, except that subsection (2) requires that the receipt specify a maximum amount and limits the security interest to the amount specified.

3. Subsections (1) and (2) validate the lien and security interest "against the bailor." As against third parties, subsection (3)(a) continues the rule under the prior uniform statutory provision that to validate the lien the owner must have entrusted the goods to the depositor, and that the circumstances must be such that a pledge by the depositor to a good faith purchaser for value would have been valid. Thus the owner's interest will not be subjected to a lien or security interest arising out of a deposit of his goods by a thief. The warehouseman may be protected because of the actual, implied or apparent authority of the depositor, because of a Factor's Act, or because of other circumstances which would protect a bona fide pledgee, unless those circumstances are denied effect under Section 7-503. Where the third party is the holder of a security interest, the rights of the warehouseman depend on the priority given to a hypothetical bona fide pledgee by Article 9, particularly Section 9-312. Thus the special priority granted to statutory liens by Section 9-310 does not apply to liens under subsection (1) of this section, since subsection (3) "expressly provides otherwise" within the meaning of Section 9-310. As to household goods, however, subsection (3)(b) makes the warehouseman's lien "for charges and expenses in relation to the goods" effective against all persons if the depositor was the legal possessor. The purpose of the exception is to permit the warehouseman to accept household goods for storage in sole reliance on the value of the goods themselves, especially in situations of family emergency. [This paragraph was amended in 1966].

4. It is unnecessary to state here, as in Uniform Warehouse Receipts Act 31, that a bailee with a valid lien need not deliver until the lien is satisfied. Section 7-403 provides that a person demanding delivery under a document must be prepared to satisfy the bailee's lien.

5. Where goods have been stored under a non-negotiable warehouse receipt and are sold by the person to whom the receipt has been issued, frequently the goods are not withdrawn by the new owner. The obligations of the seller of the goods in this situation are set forth in Section 2-503(4) on tender of delivery and include procurement of an acknowledgment by the bailee of the buyer's right to possession of the goods. If a new receipt is requested, such an acknowledgment can be withheld until storage charges have been paid or provided for. The statutory lien for charges on the goods sold, granted by the first sentence of subsection (1), continues valid unless the bailee gives it up. But once a new receipt is issued to the buyer, the buyer becomes "the person on whose account the goods are held" under the second sentence of subsection (1); unless he undertakes liability for charges in relation to other goods stored by the seller, there is no general lien against the buyer for such charges. Of course, the bailee may preserve the general lien in such a case either by an arrangement by which the buyer "is liable for" such charges, or by reserving a security interest under subsection (2).

Cross References:

Point 2: Sections 9-102(2) and 9-310.

Point 3: Sections 7-503, 9-310 and 9-312.

Point 4: Section 7-403.

Point 5: Section 2-503.

Definitional Cross References:

"Deliver". Section 1-201.

"Document". Section 7-102.

"Goods". Section 7-102.

"Money". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Right". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Warehouse receipt". Section 1-201.

"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Sections 7-209 and 7-503.

Changes: Expanded to recognize warehouse lien when a warehouse receipt is not issued but goods are covered by a storage agreement.

Purposes: 1. Subsection (a) defines the warehouse's statutory lien. Other than allowing a warehouse to claim a lien under this section when there is a storage agreement and not a warehouse receipt, this section remains unchanged in substance from former Section 7-209(1). Under the first sentence, a specific lien attaches automatically without express notation on the receipt or storage agreement with regard to goods stored under the receipt or the storage agreement. That lien is limited to the usual charges arising out of a storage transaction.

Example 1: Bailor stored goods with a warehouse and the warehouse issued a warehouse receipt. A lien against those goods arose as set forth in subsection (a), the first sentence, for

the charges for storage and the other expenses of those goods. The warehouse may enforce its lien under Section 7-210 as against the bailor. Whether the warehouse receipt is negotiable or nonnegotiable is not important to the warehouse's rights as against the bailor.

Under the second sentence, by notation on the receipt or storage agreement, the lien can be made a general lien extending to like charges in relation to other goods. Both the specific lien and general lien are as to goods in the possession of the warehouse and extend to proceeds from the goods as long as the proceeds are in the possession of the warehouse. The same rules apply whether the receipt is negotiable or non-negotiable.

Example 2: Bailor stored goods (lot A) with a warehouse and the warehouse issued a warehouse receipt for those goods. In the warehouse receipt it is stated that the warehouse will also have a lien on goods covered by the warehouse receipt for storage charges and the other expenses for any other goods that are stored with the warehouse by the bailor. The statement about the lien on other goods does not specify an amount or a rate. Bailor then stored other goods (lot B) with the warehouse. Under subsection (a), first sentence, the warehouse has a lien on the specific goods (lot A) covered by the warehouse receipt. Under subsection (a), second sentence, the warehouse has a lien on the goods in lot A for the storage charges and the other expenses arising from the goods in lot B. That lien is enforceable as against the bailor regardless of whether the receipt is negotiable or nonnegotiable.

Under the third sentence, if the warehouse receipt is negotiable, the lien as against a holder of that receipt by due negotiation is limited to the amount or rate specified on the receipt for the specific lien or the general lien, or, if none is specified, to a reasonable charge for storage of the specific goods covered by the receipt for storage after the date of the receipt.

Example 3: Same facts as Example 1 except that the warehouse receipt is negotiable and has been duly negotiated (Section 7-501) to a person other than the bailor. Under the last sentence of subsection (a), the warehouse may enforce its lien against the bailor's goods stored in the warehouse as against the person to whom the negotiable warehouse receipt has been duly negotiated. Section 7-502. That lien is limited to the charges or rates specified in the receipt or a reasonable charge for storage as stated in the last sentence of subsection (a).

Example 4: Same facts as Example 2 except that the warehouse receipt is negotiable and has been duly negotiated (Section 7-501) to a person other than the bailor. Under the last sentence of subsection (a), the lien on lot A goods for the storage charges and the other expenses arising from storage of lot B goods is not enforceable as against the person to whom the receipt has been duly negotiated. Without a statement of a specified amount or rate for the general lien, the warehouse's general lien is not enforceable as against the person to whom the negotiable document has been duly negotiated. However, the warehouse lien for charges and expenses related to storage of lot A goods is still enforceable as against the person to whom the receipt was duly negotiated.

Example 5. Same facts as Examples 2 and 4 except the warehouse had stated on the negotiable warehouse receipt a specified amount or rate for the general lien on other goods (lot B). Under the last sentence of subsection (a), the general lien on lot A goods for the storage charges and the other expenses arising from storage of lot B goods is enforceable as against the person to whom the receipt has been duly negotiated.

2. Subsection (b) provides for a security interest based upon agreement. Such a security interest arises out of relations between the parties other than bailment for storage or transportation, as where the bailee assumes the role of financier or performs a manufacturing operation, extending credit in reliance upon the goods covered by the receipt. Such a security interest is not a statutory lien. Compare Sections 9-109 and 9-333. It is governed in all respects by Article 9, except that subsection (b) requires that the receipt specify a maximum amount and limits the security interest to the amount specified. A warehouse could also take a security interest to secure its charges for storage and the other expenses listed in subsection (a) to protect these claims upon the loss of the statutory possessory warehouse lien if the warehouse loses possession of the goods as provided in subsection (e).

Example 6: Bailor stores goods with a warehouse and the warehouse issues a warehouse receipt that states that the warehouse is taking a security interest in the bailed goods for charges of storage, expenses, for money advanced, for manufacturing services rendered, and all other obligations that the bailor may owe the warehouse. That is a security interest covered in all respects by Article 9. Subsection (b). As allowed by this section, a warehouse may rely upon its statutory possessory lien to protect its charges for storage and the other expenses related to storage. For those storage charges covered by the statutory possessory lien, the warehouse is not required to use a security interest under subsection (b).

3. Subsections (a) and (b) validate the lien and security interest "against the bailor." Under basic principles of derivative rights as provided in Section 7-504, the warehouse lien is also valid as against parties who obtain their rights from the bailor except as otherwise pro-

vided in subsection (a), third sentence, or subsection (c).

Example 7: Bailor stores goods with a warehouse and the warehouse issues a nonnegotiable warehouse receipt that also claims a general lien in other goods stored with the warehouse. A lien on the bailed goods for the charges for storage and the other expenses arises under subsection (a). Bailor notifies the warehouse that the goods have been sold to Buyer and the bailee acknowledges that fact to the Buyer. Section 2-503. The warehouse lien for storage of those goods is effective against Buyer for both the specific lien and the general lien. Section 7-504.

Example 8: Bailor stores goods with a warehouse and the warehouse issues a nonnegotiable warehouse receipt. A lien on the bailed goods for the charges for storage and the other expenses arises under subsection (a). Bailor grants a security interest in the goods while the goods are in the warehouse's possession to Secured Party (SP) who properly perfects a security interest in the goods. See Revised 9-312(d). The warehouse lien is superior in priority over SP's security interest. See Revised 9-203(b)(2) (debtor can grant a security interest to the extent of debtor's rights in the collateral).

Example 9: Bailor stores goods with a warehouse and the warehouse issues a negotiable warehouse receipt. A lien on the bailed goods for the charges for storage and the other expenses arises under subsection (a). Bailor grants a security interest in the negotiable document to SP. SP properly perfects its interest in the negotiable document by taking possession through a 'due negotiation.' Revised 9-312(c). SP's security interest is subordinate to the warehouse lien. Section 7-209(a), third sentence. Given that bailor's rights are subject to the warehouse lien, the bailor cannot grant to the SP greater rights than the bailor has under Section 9-203(b)(2), perfection of the security interest in the negotiable document and the goods covered by the document through SP's filing of a financing statement should not give a different result.

As against third parties who have interests in the goods prior to the storage with the warehouse, subsection (c) continues the rule under the prior uniform statutory provision that to validate the lien or security interest of the warehouse, the owner must have entrusted the goods to the depositor, and that the circumstances must be such that a pledge by the depositor to a good faith purchaser for value would have been valid. Thus the owner's interest will not be subjected to a lien or security interest arising out of a deposit of its goods by a thief. The warehouse may be protected because of the actual, implied or apparent authority of the depositor, because of a Factor's Act, or because of other circumstances which would protect a bona fide pledgee, unless those circumstances are denied effect under the second sentence of subsection (c). The language of Section 7-503 is brought into subsection (c) for purposes of clarity. The comments to Section 7-503 are helpful in interpreting delivery, entrustment or acquiescence.

Where the third party is the holder of a security interest, obtained prior to the issuance of a negotiable warehouse receipt, the rights of the warehouse depend on the priority given to a hypothetical bona fide pledgee by Article 9, particularly Section 9-322. Thus the special priority granted to statutory liens by Section 9-333 does not apply to liens under subsection (a) of this section, since subsection (c), second sentence, "expressly provides otherwise" within the meaning of Section 9-333.

As to household goods, however, subsection (d) makes the warehouse's lien "for charges and expenses in relation to the goods" effective against all persons if the depositor was the legal possessor. The purpose of the exception is to permit the warehouse to accept household goods for storage in sole reliance on the value of the goods themselves, especially in situations of family emergency.

Example 10: Bailor grants a perfected security interest in the goods to SP prior to storage of the goods with the warehouse. Bailor then stores goods with the warehouse and the warehouse issues a warehouse receipt for the goods. A warehouse lien on the bailed goods for the charges for storage or other expenses arises under subsection (a). The warehouse lien is not effective as against SP unless SP entrusted the goods to the bailor with actual or apparent authority to ship store, or sell the goods or with power of disposition under subsection (c)(1) or acquiesced in the bailor's procurement of a document of title under subsection (c)(2). This result obtains whether the receipt is negotiable or nonnegotiable.

Example 11: Sheriff who had lawfully repossessed household goods in an eviction action stored the goods with a warehouse. A lien on the bailed goods arises under subsection (a). The lien is effective as against the owner of the goods. Subsection (d).

4. As under previous law, this section creates a statutory possessory lien in favor of the warehouse on the goods stored with the warehouse or on the proceeds of the goods. The warehouse loses its lien if it loses possession of the goods or the proceeds. Subsection (e).

5. Where goods have been stored under a non-negotiable warehouse receipt and are sold by the person to whom the receipt has been issued, frequently the goods are not withdrawn by the new owner. The obligations of the seller of the goods in this situation are set forth in Section 2-503(4) on tender of delivery and include procurement of an acknowledgment by

the bailee of the buyer's right to possession of the goods. If a new receipt is requested, such an acknowledgment can be withheld until storage charges have been paid or provided for. The statutory lien for charges on the goods sold, granted by the first sentence of subsection (a), continues valid unless the bailee gives it up. See Section 7-403. But once a new receipt is issued to the buyer, the buyer becomes "the person on whose account the goods are held" under the second sentence of subsection (a); unless the buyer undertakes liability for charges in relation to other goods stored by the seller, there is no general lien against the buyer for such charges. Of course, the bailee may preserve the general lien in such a case either by an arrangement by which the buyer "is liable for" such charges, or by reserving a security interest under subsection (b).

6. A possessory warehouse lien arises as provided under subsection (a) if the parties to the bailment have a storage agreement or a warehouse receipt is issued. In the modern warehouse, the bailor and the bailee may enter into a master contract governing the bailment with the bailee and bailor keeping track of the goods stored pursuant to the master contract by notation on their respective books and records and the parties send notification via electronic communication as to what goods are covered by the master contract. Warehouse receipts are not issued. See Comment 4 to Section 7-204. There is no particular form for a warehouse receipt and failure to contain any of the terms listed in Section 7-202 does not deprive the warehouse of its lien that arises under subsection (a). See the comment to Section 7-202.

Cross References: Point 1: Sections 7-501 and 7-502.

Point 2: Sections 9-109 and 9-333.

Point 3: Sections 2-503, 7-503, 7-504, 9-203, 9-312, and 9-322.

Point 4: Sections 2-503, 7-501, 7-502, 7-504, 9-312, 9-331, 9-333, 9-401.

Point 5: Sections 2-503 and 7-403.

Point 6: Sections 7-202 and 7-204.

Definitional Cross References: "Delivery". Section 1-201.

"Document of Title". Section 1-201

"Goods". Section 7-102.

"Money". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Right". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-204.

"Warehouse receipt". Section 1-201.

"Warehouse". Section 7-102.

CASE NOTES

ANALYSIS

Actions and proceedings.
Description of goods.
Foreclosure.

Actions and proceedings.

Warehouseman that is sued for conversion of goods stored in warehouse has burden to prove valid foreclosure of lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210. Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Description of goods.

Warehouseman's letter to property owner which notified owner of possible sale of goods to satisfy overdue account, which did not contain itemized statement of claims, and which did not contain description of goods subject to warehouseman's lien was legally insufficient to give property owner notice of sale to satisfy lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Foreclosure.

Public advertisement of auction sale of goods allegedly subject to warehouseman's lien which did not include name of person on whose account sale was being held failed to comply with requirement to foreclose warehouseman's lien and, therefore, was prima facie evidence of warehouseman's liability. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

§ 28:7-210. Enforcement of warehouse's lien.

(a)(1) Except as otherwise provided in subsection (b) of this section, a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better

price could have been obtained by a sale at a different time or in a method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.

(2) The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold.

(3) A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by paragraph (2) of this subsection.

(b) A warehouse may enforce its lien on goods, other than goods stored by a merchant in the course of its business, only if the following requirements are satisfied:

(1) All persons known to claim an interest in the goods must be notified.

(2) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 10 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(3) The sale must conform to the terms of the notification.

(4) The sale must be held at the nearest suitable place to where the goods are held or stored.

(5) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for 2 weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account the goods are being held, and the time and place of the sale. The sale must take place at least 15 days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least 10 days before the sale in not fewer than 6 conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold and must be retained by the warehouse subject to the terms of the receipt and this article.

(d) A warehouse may buy at any public sale held pursuant to this section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against which the lien was valid, despite the warehouse's noncompliance with this section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the warehouse would have been bound to deliver the goods.

(g) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b) of this section.

(i) A warehouse is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

(Dec. 30, 1963, 77 Stat. 722, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-206 and § 28:7-308.

Prior Codifications. — 1981 Ed., § 28:7-210.

1973 Ed., § 28:7-210.

Legislative history of Law 19-299. — See note to § 28:7-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 33, Uniform Warehouse Receipts Act.

Changes: Rewritten; simplified foreclosure proceeding provided for all liens other than warehousemen's lien in non-commercial storage.

Purposes of Changes:

1. Subsection (1) makes "commercial reasonableness" the standard for foreclosure proceedings in all cases except noncommercial storage with a warehouseman. The latter category embraces principally storage of household goods by private owners; and for such cases the detailed provisions as to notification, publication and public sale, found in Section 33 of the Uniform Warehouse Receipts Act, are retained in subsection (2). The swifter, more flexible procedure of subsection (1) is appropriate to commercial storage. Compare seller's power of resale on breach by buyer under the provisions of the Article on Sales (Section 2-706).

2. The provisions of subsections (4) and (5) permitting the bailee to bid at public sales and confirming the title of purchasers at foreclosure sales are designed to secure more bidding and better prices.

Cross Reference:

Section 7-403.

Definitional Cross References:

"Bill of lading". Section 1-201.
"Conspicuous". Section 1-201.
"Creditor". Section 1-201.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Notification". Section 1-201.
"Notifies". Section 1-201.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.
"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-210.

Changes: Update to accommodate electronic commerce and for style.

Purposes: 1. Subsection (a) makes "commercial reasonableness" the standard for foreclosure proceedings in all cases except non-commercial storage with a warehouse. The latter category embraces principally storage of household goods by private owners; and for such cases the detailed provisions as to notification, publication and public sale are retained in subsection (b) with one change. The requirement in former Section 7-210(2)(b) that the notification must be sent in person or by registered or certified mail has been deleted. Notification may be sent by any reasonable means as provided in Section 1-202. The swifter, more flexible procedure of subsection (a) is appropriate to commercial storage. Compare seller's power of resale on breach by buyer under the provisions of the Article on Sales (Section 2-706). Commercial reasonableness is a flexible concept that allows for a wide variety of actions to satisfy the rule of this section, including electronic means of posting and sale.

2. The provisions of subsections (d) and (e) permitting the bailee to bid at public sales and confirming the title of purchasers at foreclosure sales are designed to secure more bidding and better prices and remain unchanged from former Section 7-210.

3. A warehouses may have recourse to an interpleader action in appropriate circumstances. See Section 7-603.

4. If a warehouse has both a warehouse lien and a security interest, the warehouse may enforce both the lien and the security interest simultaneously by using the procedures of Article 9. Section 7-210 adopts as its touchstone "commercial reasonableness" for the enforcement of a warehouse lien. Following the procedures of Article 9 satisfies "commercial reasonableness."

Cross Reference: Sections 2-706, 7-403, 7-603 and Part 6 of Article 9.

Definitional Cross References: "Bill of lading". Section 1-201.
"Conspicuous". Section 1-201.
"Creditor". Section 1-201.
"Delivery". Section 1-201.

"Document of Title". Section 1-201.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Notification". Section 1-202.
"Notifies". Section 1-202.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.
"Warehouse". Section 7-102.

CASE NOTES

Analysis

Commercially reasonable sale.
In general.
Notice of sale.
Review.

Commercially reasonable sale.

Evidence was sufficient to establish prima facie case that warehouseman's sale of goods for $1,090 or well below alleged value of at least $37,000 was not conducted in "commercially reasonable manner" and subjected warehouseman to liability. D.C. Code 1981, § 28:7-210(1, 2). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

In general.

The right to a bill in equity to enforce a warehouseman's lien cannot be claimed under Code of Law 1911, p. 419, § 35, providing that the statute remedy does not preclude other remedies, where plaintiff did not proceed by bill in equity in the first instance, but elected to proceed otherwise, and, after losing possession of the goods through a replevin suit between other parties, filed a bill to restrain that proceeding. Sachs v. Kinyoun, 47 App.D.C. 561, 1918 U.S. App. LEXIS 2457 (1918).

The statutory right of a warehouseman to enforce, by the sale of goods stored with him, his lien for unpaid charges thereon, is a power uncoupled with an interest, and every prerequisite to the exercise of the power must precede its exercise in order to make such a sale valid. Baum v. Wm. Knabe & Co. Mfg. Co., 33 App.D.C. 237, 1909 U.S. App. LEXIS 6058 (1909).

Notice of sale.

Warehouseman's letter to property owner which notified owner of possible sale of goods to satisfy overdue account, which did not contain itemized statement of claims, and which did not contain description of goods subject to warehouseman's lien was legally insufficient to give property owner notice of sale to satisfy lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Public advertisement of auction sale of goods allegedly subject to warehouseman's lien which did not include name of person on whose account sale was being held failed to comply with requirement to foreclose warehouseman's lien and, therefore, was prima facie evidence of warehouseman's liability. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Review.

Trial court's conclusion that warehouseman sent letter notifying property owner of possible sale of goods could not be disturbed on review of involuntary dismissal after nonjury trial. D.C. Code 1981, § 28:7-210(2); Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Part 3. Bills of Lading: Special Provisions.

§ 28:7-301. Liability for nonreceipt or misdescription; "Said to contain"; "Shipper's weight, load, and count"; improper handling.

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in

which the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by the phrase "contents or condition of contents of packages unknown", "said to contain", "shipper's weight, load, and count", or words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of a bill of lading;

(1) The issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk; and

(2) Words such as "shipper's weight, load, and count", or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed in packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so. In that case, "shipper's weight" or words of similar import are ineffective.

(d) The issuer of a bill of lading, by including in the bill the words "shipper's weight, load, and count", or words of similar import, may indicate that the goods were loaded by the shipper, and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to an issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer's responsibility or liability under the contract of carriage to any person other than the shipper.

(Dec. 30, 1963, 77 Stat. 723, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(ww), 44 DCR 1271; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-301.

1973 Ed., § 28:7-301.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 23, Uniform Bills of Lading Act.

Changes: Rewritten in part.

Purposes of Changes:

1. The provision as to misdating in subsection (1) conforms to the policy of the amendment to the Federal Bills of Lading Act by 44 Stat. 1450 (1927), as amended 49 U.S.C. Section 102, after the holding in Browne v. Union Pac. R. Co., 113 Kan. 726, 216 P. 299 (1923), affirmed on other grounds, 267 U.S. 255, 45 S.Ct. 315, 69 L.Ed. 601 (1925). Subsections (2) and (3) conform to the policy of the Federal Bills of Lading Act, 49 U.S.C. Sections 100, 101, and the laws of sev-

eral states. See, e.g., N.Y.Pers.Prop.Law Section 209; Report of N.Y. Law Revision Commission, N.Y.Leg.Doc. (1941) No. 65(F).

2. The language of the old Uniform Act suggested that a carrier is ordinarily liable for damage caused by improper loading, but may relieve himself of liability by disclosing on the bill that shipper actually loaded. A more accurate statement of the law is that the carrier is not liable for losses caused by act or default of the shipper, which would include improper loading. There is some question whether under present law a carrier is liable even to a good faith purchaser of a negotiable bill for such losses, if the shipper's faulty loading in fact caused the loss. It is this doubtful liability which subsection (4) permits the carrier to bar by disclosure of shipper's loading. There is no implication that decisions such as Modern Tool Corp. v. Pennsylvania R. Co., 100 F.Supp. 595 (D.N.J.1951), are disapproved.

3. This section is a simplified restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor or shipper. The issuer is liable on documents issued by an agent, contrary to instructions of his principal without receiving goods. No disclaimer of this liability is permitted since it is not a matter either of the care of the goods or their description.

4. The shipper's erroneous report to the carrier concerning the goods may cause damage to the carrier. Subsection (5) therefore provides appropriate indemnity.

Cross References:

Sections 7-203 and 7-309.

Definitional Cross References:

"Bill of lading". Section 1-201.
"Consignee". Section 7-102.
"Document". Section 7-102.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Notice". Section 1-201.
"Party". Section 1-201.
"Purchaser". Section 1-201.
"Receipt of goods". Section 2-103.
"Value". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-301.

Changes: Changes for clarity, style and to recognize deregulation in the transportation industry.

Purposes: 1. This section continues the rules from former Section 7-301 with one substantive change. The obligations of the issuer of the bill of lading under former subsections (2) and (3) were limited to issuers who were common carriers. Subsections (b) and (c) apply the same rules to all issuers not just common carriers. This section is compatible with the policies stated in the federal Bills of Lading Act, 49 U.S.C. § 80113 (2000).

2. The language of the pre-Code Uniform Bills of Lading Act suggested that a carrier is ordinarily liable for damage caused by improper loading, but may relieve itself of liability by disclosing on the bill that shipper actually loaded. A more accurate statement of the law is that the carrier is not liable for losses caused by act or default of the shipper, which would include improper loading. D. H. Overmyer Co. v. Nelson Brantley Glass Go., 168 S.E.2d 176 (Ga. Ct. App. 1969). There was some question whether under pre-Code law a carrier was liable even to a good faith purchaser of a negotiable bill for such losses, if the shipper's faulty loading in fact caused the loss. Subsection (d) permits the carrier to bar, by disclosure of shipper's loading, liability to a good faith purchaser. There is no implication that decisions such as Modern Tool Corp. v. Pennsylvania R. Co., 100 F.Supp. 595 (D.N.J.1951), are disapproved.

3. This section is a restatement of existing law as to the method by which a bailee may avoid responsibility for the accuracy of descriptions which are made by or in reliance upon information furnished by the depositor or shipper. The wording in this section — "contents or condition of contents of packages unknown" or "shipper's weight, load and count" — to indicate that the shipper loaded the goods or that the carrier does not know the description, condition, or contents of the loaded packages continues to be appropriate as commonly understood in the transportation industry. The reasons for this wording are as important in 2002 as when the prior section initially was approved. The issuer is liable on documents issued by an agent, contrary to instructions of his principal, without receiving goods. No disclaimer of this liability is permitted since it is not a matter either of the care of the goods or their description.

4. The shipper's erroneous report to the carrier concerning the goods may cause damage to the carrier. Subsection (e) therefore provides appropriate indemnity.

5. The word "freight" in the former Section 7-301 has been changed to "goods" to conform to international and domestic land transport usage in which "freight" means the price paid for carriage of the goods and not the goods themselves. Hence, changing the word "freight" to the word "goods" is a clarifying change that fits both international and domestic practice.

Cross References: Sections 7-203, 7-309 and 7-501.

Definitional Cross References: "Bill of lading". Section 1-201.

"Consignee". Section 7-102.

"Document of Title". Section 1-201.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Notice". Section 1-202.
"Party". Section 1-201.
"Purchaser." Section 1-201.
"Receipt of Goods". Section 2-103.
"Value". Section 1-204.

§ 28:7-302. Through bills of lading and similar documents of title.

(a) The issuer of a through bill of lading, or other document of title embodying an undertaking to be performed in part by a person acting as its agent or by a performing carrier, is liable to any person entitled to recover on the bill or other document for any breach by the other person or the performing carrier of its obligation under the bill or other document. However, to the extent that the bill or other document covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation, this liability for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person's obligation is discharged by delivery of the goods to another person pursuant to the bill or other document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) of this section is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the bill or other document occurred:

(1) The amount it may be required to pay to any person entitled to recover on the bill or other document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and

(2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the bill or other document for the breach.

(Dec. 30, 1963, 77 Stat. 724, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-302.
1973 Ed., § 28:7-302.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. The purpose of this section is to subject the initial carrier under a through bill to suit for breach of the contract of carriage by any connecting carrier and to make it clear that any such connecting carrier holds the goods on terms which are defined by the document of title even though such connecting carrier did

not issue the document. Since the connecting carrier does hold on the terms of the document, it must honor a proper demand for delivery or a diversion order just as the original bailee would have to. Similarly it has the benefits of the excuses for nondelivery and limitations of liability provided for the original bailee. Unlike the original bailee-issuer, the connecting carrier's responsibility is limited to the period while the goods are in its possession. The section is patterned generally after the Interstate Commerce Act, but does not impose any obligation to issue through bills.

2. The reference to documents other than through bills looks to the possibility that multipurpose documents may come into use, e.g., combination warehouse receipts and bills of lading.

3. Where the obligations or standards applicable to different parties bound by a document of title are different, the initial carrier's responsibility for portions of the journey not on its own lines will be determined by the standards appropriate to the connecting carrier. Thus a land carrier issuing a through bill of lading involving water carriage at a later stage will have the benefit of the water carrier's immunity from liability for negligence of its servants in navigating the vessel, where the law provides such an immunity for water carriers and the loss occurred while the goods were in the water carrier's possession.

4. Under Subsection (1) the issuer of a through bill of lading may become liable for the fault of another person. Subsection (3) gives it appropriate rights of recourse.

Definitional Cross References:

"Agreement". Section 1-201.
"Bailee". Section 7-102.
"Bill of lading". Section 1-201.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Overseas". Section 2-323.
"Party". Section 1-201.
"Person". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-302.

Changes: To conform to current terminology and for style.

Purposes: 1. This section continues the rules from former Section 7-302 without substantive change. The term "performing carrier" is substituted for the term "connecting carrier" to conform the terminology of this section with terminology used in recent UNCITRAL and OAS proposals concerning transportation and through bills of lading. This change in terminology is not substantive. This section is compatible with liability on carriers under federal law. See 49 U.S.C. §§ 11706, 14706 and 15906.

The purpose of this section is to subject the initial carrier under a through bill to suit for breach of the contract of carriage by any performing carrier and to make it clear that any such performing carrier holds the goods on terms which are defined by the document of title even though such performing carrier did not issue the document. Since the performing carrier does hold the goods on the terms of the document, it must honor a proper demand for delivery or a diversion order just as the original bailee would have to. Similarly it has the benefits of the excuses for non-delivery and limitations of liability provided for the original bailee who issued the bill. Unlike the original bailee-issuer, the performing carrier's responsibility is limited to the period while the goods are in its possession. The section does not impose any obligation to issue through bills.

2. The reference to documents other than through bills looks to the possibility that multipurpose documents may come into use, e.g., combination warehouse receipts and bills of lading. As electronic documents of title come into common usage, storage documents (e.g. warehouse receipts) and transportation documents (e.g. bills of lading) may merge seamlessly into one electronic document that can serve both the storage and transportation segments of the movement of goods.

3. Under subsection (a) the issuer of a through bill of lading may become liable for the fault of another person. Subsection (c) gives the issuer appropriate rights of recourse.

4. Despite the broad language of subsection (a), Section 7-302 is subject to preemption by federal laws and treaties. Section 7-103. The precise scope of federal preemption in the transportation sector is a question determined under federal law.

Cross reference: Section 7-103

Definitional Cross References: "Agreement". Section 1-201.
"Bailee". Section 7-102.
"Bill of lading". Section 1-201.
"Delivery". Section 1-201.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Party". Section 1-201.
"Person". Section 1-201.

§ 28:7-303. Diversion; reconsignment; change of instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the

goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) The holder of a negotiable bill;

(2) The consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;

(3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or

(4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) of this section are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms.

(Dec. 30, 1963, 77 Stat. 724, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-403.

Prior Codifications. — 1981 Ed., § 28:7-303.

1973 Ed., § 28:7-303.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Purposes:

1. The old Acts contained no reference to diversion, a very common commercial practice which defeats delivery to the consignee originally named in a bill of lading. The carrier was protected under the heading of "justified delivery" if the substituted consignee who received delivery was "a person lawfully entitled to possession of the goods." Cf. subsection (1)(d). This in turn depended on whether the person ordering the diversion was the owner of the goods or empowered to dispose of them, which again might depend upon whether under sales law title had passed from the consignor-seller to the consignee-buyer. The carrier is plainly not in a position to decide such questions when directed by the person with whom it has contracted for transportation to change the destination of the goods in transit. Carriers may as a business matter be willing to accept instructions from consignees in which case, as under the old uniform acts, the carrier will be liable for misdelivery if the consignee was not the owner or otherwise empowered to dispose of the goods. The section imposes no duty on carriers to undertake diversion; it is of course subject to the provisions of filed tariffs. Section 7-103.

2. It should be noted that the section provides only an immunity for carriers against liability for "misdelivery." It does not, for example, defeat the title to the goods which the consignee-buyer may have acquired from the consignor-seller upon delivery of the goods to the carrier under a non-negotiable bill of lading. Thus if the carrier, upon instructions from the consignor, returns the goods to him, the consignee may recover the goods from the consignor or his insolvent estate. However, under certain circumstances, the consignee's title may be defeated by diversion of the goods in transit to a different consignee.

Cross References:

Point 2: Sections 7-403 and 7-504(3).

Definitional Cross References:

"Bailee". Section 7-102.
"Bill of lading". Section 1-201.
"Consignee". Section 7-102.
"Consignor". Section 7-102.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Notice". Section 1-201.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Term". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-303.

Changes: To accommodate electronic documents and for style.

Purposes: 1. Diversion is a very common commercial practice which defeats delivery to the consignee originally named in a bill of

lading. This section continues former Section 7-303's safe harbor rules for carriers in situations involving diversion and adapts those rules to electronic documents of title. This section works compatibly with Section 2-705. Carriers may as a business matter be willing to accept instructions from consignees in which case the carrier will be liable for misdelivery if the consignee was not the owner or otherwise empowered to dispose of the goods under subsection (a)(4). The section imposes no duty on carriers to undertake diversion. The carrier is of course subject to the provisions of mandatory filed tariffs as provided in Section 7-103.

2. It should be noted that the section provides only an immunity for carriers against liability for "misdelivery." It does not, for example, defeat the title to the goods which the consignee-buyer may have acquired from the consignor-seller upon delivery of the goods to the carrier under a non- negotiable bill of lading. Thus if the carrier, upon instructions from the consignor, returns the goods to the consignor, the consignee may recover the goods from the consignor or the consignor's insolvent estate. However, under certain circumstances, the consignee's title may be defeated by diversion of the goods in transit to a different consignee. The rights that arise between the consignor-seller and the consignee-buyer out of a contract for the sale of goods are governed by Article 2.

Cross References: Point 1: Sections 2-705 and 7-103.

Point 2: Article 2, Sections 7-403 and 7-504(3).

Definitional Cross References: "Bailee". Section 7-102.

"Bill of lading". Section 1-201.
"Carrier". Section 7-102
"Consignee". Section 7-102.
"Consignor". Section 7-102.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Notice". Section 1-202.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Term". Section 1-201.

§ 28:7-304. Tangible bills of lading in a set.

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one bill.

(c) If a tangible negotiable bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrendering its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee shall deliver in accordance with Part 4 of this article against the first presented part of a tangible bill of lading lawfully issued in a set. Delivery in this manner discharges the bailee's obligation on the whole bill.

(Dec. 30, 1963, 77 Stat. 725, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-304.

1973 Ed., § 28:7-304.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6, Uniform Bills of Lading Act.

Changes: This section adds to existing legislation, which merely prohibits bills in a set in ordinary domestic trade, a statement of the legal effect of a lawfully issued set.

Purposes of Changes:

The statement of the legal effect of a lawfully issued set is in accord with existing commercial law relating to maritime and other overseas bills. This law has been codified in the Hague and Warsaw Conventions and in the Carriage of Goods by Sea Act, the provisions of which would ordinarily govern in situations where bills in a set are recognized by this Article.

Cross Reference:

Section 10-103.

Definitional Cross References:

"Bailee". Section 7-102.
"Bill of lading". Section 7-102.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Overseas". Section 2-323.
"Person". Section 1-201.
"Receipt of goods". Section 2-103.

Prior Uniform Statutory Provision: Former Section 7-304.

Changes: To limit bills in a set to tangible bills of lading and to use terminology more consistent with modern usage.

Purposes: 1. Tangible bills of lading in a set are still used in some nations in international trade. Consequently, a tangible bill of lading part of a set could be at issue in a lawsuit that might come within Article 7. The statement of the legal effect of a lawfully issued set is in accord with existing commercial law relating to maritime and other international tangible bills of lading. This law has been codified in the Hague and Warsaw Conventions and in the Carriage of Goods by Sea Act, the provisions of which would ordinarily govern in situations where bills in a set are recognized by this Article. Tangible bills of lading in a set are prohibited in domestic trade.

2. Electronic bills of lading in domestic or international trade will not be issued in a set given the requirements of control necessary to deliver the bill to another person. An electronic bill of lading will be a single, authoritative copy. Section 7-106. Hence, this section differentiates between electronic bills of lading and tangible bills of lading. This section does not prohibit electronic data messages about goods in transit because these electronic data messages are not the issued bill of lading. Electronic data messages contain information for the carrier's management and handling of the cargo but this information for the carrier's use is not the issued bill of lading.

Cross Reference: Section 7-103, 7-303 and 7-106.

Definitional Cross References: "Bailee". Section 7-102.

"Bill of lading". Section 1-201.
"Delivery". Section 1-201.
"Document of title". Section 1-201.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Person". Section 1-201.
"Receipt of goods". Section 2-103.

§ 28:7-305. Destination bills.

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against a carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to § 28:7-105, may procure a substitute bill to be issued at any place designated in the request.

(Dec. 30, 1963, 77 Stat. 725, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-305.
1973 Ed., § 28:7-305.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

This proposal is designed to facilitate the use of order bills in connection with fast shipments. Use of order bills on high speed shipments is impeded by the fact that the goods may arrive at destination before the documents, so that no one is ready to take delivery from the carrier. This is especially inconvenient for carriers by truck and air, who do not have terminal facilities where shipments can be held to await consignee's appearance. Order bills would be useful to take advantage of bank collection. This may be preferable to C.O.D. shipment in which the carrier, e.g. a truck driver, is the collecting and remitting agent. Financing of shipments under this plan would be handled as follows: seller at San Francisco delivers the goods to an airline with instructions to issue a bill in New York to a named bank. Seller receives a receipt embodying this undertaking to issue a destination bill. Airline wires its New York freight agent to issue the bill as instructed by the seller. Seller wires the New York bank a draft on buyer. New York bank indorses the bill to buyer when he honors the draft. Normally seller would act through his own bank in San Francisco, which would extend him credit in reliance on the airline's contract to deliver a bill to the order of its New York correspondent. This section is entirely permissive; it imposes no duty to issue such bills. Whether a connecting carrier will act as issuing agent is left to agreement between carriers.

Definitional Cross References:

"Bill of lading". Section 1-201.
"Consignor". Section 7-102.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Receipt of goods". Section 2-103.

Prior Uniform Statutory Provision: Former Section 7-305.

Changes: To accommodate electronic bills of lading and for style.

Purposes: 1. Subsection (a) continues the rules of former Section 7-305(1) without substantive change. This proposal is designed to facilitate the use of order bills in connection with fast shipments. Use of order bills on high speed shipments is impeded by the fact that the goods may arrive at destination before the documents, so that no one is ready to take delivery from the carrier. This is especially inconvenient for carriers by truck and air, who do not have terminal facilities where shipments can be held to await the consignee's appearance. Order bills would be useful to take advantage of bank collection. This may be preferable to C.O.D. shipment in which the carrier, e.g. a truck driver, is the collecting and remitting agent. Financing of shipments under this plan would be handled as follows: seller at San Francisco delivers the goods to an airline with instructions to issue a bill in New York to a named bank. Seller receives a receipt embodying this undertaking to issue a destination bill. Airline wires its New York freight agent to issue the bill as instructed by the seller. Seller wires the New York bank a draft on buyer. New York bank indorses the bill to buyer when the buyer honors the draft. Normally seller would act through its own bank in San Francisco, which would extend credit in reliance on the airline's contract to deliver a bill to the order of its New York correspondent. This section is entirely permissive; it imposes no duty to issue such bills. Whether a performing carrier will act as issuing agent is left to agreement between carriers.

2. Subsection (b) continues the rule from former Section 7-305(2) with accommodation for electronic bills of lading. If the substitute bill changes from an electronic to a tangible medium or vice versa, the issuance of the substitute bill must comply with Section 7-105 to give the substitute bill validity and effect.

Cross Reference: Section 7-105.

Definitional Cross References: "Bill of lading". Section 1-201.
"Consignor". Section 7-102.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Receipt of goods". Section 2-103.

§ 28:7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

(Dec. 30, 1963, 77 Stat. 725, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-306.
1973 Ed., § 28:7-306.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 16, Uniform Bills of Lading Act.

Changes: Generally revised and simplified; explicit treatment of the situation where a blank in an executed document is filled without authority.

Purposes of Changes:

An unauthorized alteration whether made with or without fraudulent intent does not relieve the issuer of his liability on the document as originally executed. Uniform Warehouse Receipts Act 13 excused the issuer from any liability to a fraudulent alterer, other than the liability to deliver the goods according to the terms of the original document. It is difficult to conceive what liability the draftsman intended to excuse. Uniform Bills of Lading Act 16 contains no such excuse provision, and is followed in this respect in the present section. Uniform Bills of Lading Act 16 characterizes an unauthorized alteration as "void" but apparently nothing more was intended than that the alteration did not change the obligation of the issuer. This is sufficiently covered by the terms of this Section. Moreover cases are conceivable in which an alteration would not be "void"; for example, an alteration made by common consent of a transferor and transferee of a document might evidence an enforceable contract between them.

The same rule is made applicable to the filling in of blanks, a matter on which the prior Acts were silent.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Issuer". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-306.

Changes: None

Purposes: An unauthorized alteration or filling in of a blank, whether made with or without fraudulent intent, does not relieve the issuer of its liability on the document as originally executed. This section applies to both tangible and electronic bills of lading, applying the same rule to both types of bills of lading. The control concept of Section 7-106 requires that any changes to the electronic document of title be readily identifiable as authorized or unauthorized. Section 7-306 should be compared to Section 7-208 where a different rule applies to the unauthorized filling in of a blank for tangible warehouse receipts.

Cross Reference: Sections 7-106 and 7-208.

Definitional Cross References: "Bill of lading". Section 1-201.

"Issuer". Section 7-102.

§ 28:7-307. Lien of carrier.

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) of this section on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other lien under subsection (a) of this section is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

(Dec. 30, 1963, 77 Stat. 725, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-307.

1973 Ed., § 28:7-307.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 27 through 32, Uniform Warehouse Receipts Act.

Changes: Rewritten; lien extended to carrier. Lien of common carrier validated unless carrier had notice that consignor lacked authority to subject the goods to charges and expenses. Where the carrier is not required by law to receive the goods for transportation, lien validated against anyone who permitted the bailor to have possession even if he had no real or apparent authority.

Purposes of Changes:

The section is intended to give carriers a specific statutory lien for charges and expenses similar to that given to warehousemen by the first sentence of Section 7-209. But since carriers do not commonly claim a lien for charges in relation to other goods or lend money on the security of goods in their hands, provisions for a general lien or a security interest similar to those in Section 7-209(1) and (2) are omitted. See Comment to Section 7-105. Since the lien given by this section is specific, and the storage or transportation often preserves or increases the value of the goods, subsection (2) validates the lien against anyone who permitted the bailor to have possession of the goods. Where the carrier is required to receive the goods for transportation, the owner's interest may be subjected to charges and expenses arising out of deposit of his goods by a thief. Cf. Section 9-310. The crucial mental element is the carrier's knowledge or reason to know of the bailor's lack of authority.

Cross References:

Sections 7-209, 9-102(2) and 9-310.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Consignor". Section 7-102.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-307.

Changes: Expanded to cover proceeds of the goods transported.

Purposes: 1. The section is intended to give carriers a specific statutory lien for charges and expenses similar to that given to warehouses by the first sentence of Section 7-209(a) and extends that lien to the proceeds of the goods as long as the carrier has possession of the proceeds. But because carriers do not commonly claim a lien for charges in relation to other goods or lend money on the security of goods in their hands, provisions for a general lien or a security interest similar to those in Section 7-209(a) and (b) are omitted. Carriers may utilize Article 9 to obtain a security interest and become a secured party or a carrier may agree to limit its lien rights in a transportation agreement with the shipper. As the lien given by this section is specific, and the storage or transportation often preserves or increases the value of the goods, subsection (b) validates the lien against anyone who permitted the bailor to have possession of the goods. Where the carrier is required to receive the goods for transportation, the owner's interest may be subjected to charges and expenses arising out of deposit of his goods by a thief. The crucial mental element is the carrier's knowledge or reason to know of the bailor's lack of authority. If the carrier does not know or have reason to know of the bailor's lack of authority, the carrier has a lien under this section against any person so long as the conditions of subsection (b) are satisfied. In light of the crucial mental element, Sections 7-307 and 9-333 combine to give priority to a carrier's lien over security interests in the goods. In this regard, the judicial decision in In re Sharon Steel Corp., 25 U.C.C. Rep.2d 503, 176 B.R. 384 (W.D. Pa. 1995) is correct and is the controlling precedent.

2. The reference to charges in this section means charges relating to the bailment relationship for transportation. Charges does not mean that the bill of lading must state a specific rate or a specific amount. However, failure to state a specific rate or a specific amount has legal consequences under the second sentence of subsection (a).

3. The carrier's specific lien under this section is a possessory lien. See subsection (c). Part 3 of Article 7 does not require any particular form for a bill of lading. The carrier's lien arises when the carrier has issued a bill of lading.

Cross References: Point 1: Sections 7-209, 9-109 and 9-333.

Point 3. Section 7-202 and 7-209.

Definitional Cross References: "Bill of lading". Section 1-201.

"Carrier". Section 7-102.
"Consignor". Section 7-102.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Value". Section 1-204.

§ 28:7-308. Enforcement of carrier's lien.

(a)(1) A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.

(2) The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold.

(3) A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by paragraph (2) of this subsection.

(b) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and this article.

(c) A carrier may buy at any public sale pursuant to this section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the carrier would have been bound to deliver the goods.

(f) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) of this section or the procedure set forth in § 28:7-210(b).

(h) A carrier is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

(Dec. 30, 1963, 77 Stat. 726, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(xx), 44 DCR 1271; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-308.
1973 Ed., § 28:7-308.

Legislative history of Law 11-255. — For

legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28:7-301.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 33, Uniform Warehouse Receipts Act.

Changes: Rewritten; provisions extended to carriers' liens; simplified foreclosure proceeding provided.

Purposes of Changes:

This section is intended to give the carrier an enforcement procedure of his lien coextensive with that given the warehousemen in cases other than those covering noncommercial storage by him. See Comment to Section 7-210.

Cross Reference:

Section 7-210.

Definitional Cross References:

"Bill of lading". Section 1-201.
"Creditor". Section 1-201.
"Delivery". Section 1-201.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Notification". Section 1-201.
"Notifies". Section 1-201.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-308.

Changes: To conform language to modern usage and for style.

Purposes: This section is intended to give the carrier an enforcement procedure of its lien coextensive with that given the warehouse in cases other than those covering noncommercial storage by the warehouse. See Section 7-210 and comments.

Cross Reference: Section 7-210.

Definitional Cross References: "Bill of lading". Section 1-201.
"Carrier". Section 7-102.
"Creditor". Section 1-201.
"Delivery". Section 1-201.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Notification". Section 1-202.
"Notifies". Section 1-202.
"Person". Section 1-201.
"Purchaser". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.

§ 28:7-309. Duty of care; contractual limitation of carrier's liability.

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement.

(Dec. 30, 1963, 77 Stat. 726, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-309.
1973 Ed., § 28:7-309.

Legislative history of Law 19-299. — See note to § 28:7-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 3, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

The old uniform act provided that bills of lading could not contain terms impairing the obligation of reasonable care. Whether this is violated by a stipulation that in case of loss the bailee's liability is limited to stated amounts has been much controverted. For interstate rail transportation the matter is settled by the Carmack Amendment to the Interstate Commerce Act (See 49 U.S.C.A. s 20(11)). The present section is a generalized version of the Interstate Commerce Act provisions. The obligation of due care is radically qualified, in the case of maritime bills and international airbills, by federal legislation and treaty. All this special legislation would remain in effect even if Congress enacts this Code, including the present Article. See Section 7-103.

Subsection (1) does not impair any rule of law imposing the liability of an insurer on a common carrier in intrastate commerce. Subsection (2), however, applies to such liability as well as to liability based on negligence. The entire section is subject under Section 7-103 to applicable provisions in filed tariffs, such as the common disclaimer of responsibility for undeclared articles of extraordinary value, hidden from view. Tariffs which lawfully provide a maximum unit value beyond which goods are not taken fall within the same principle, and are expressly covered by the words "value as lawfully provided in the tariff."

Cross Reference:

Section 7-103.

Definitional Cross References:

"Action". Section 1-201.

"Bill of lading". Section 1-201.

"Consignor". Section 7-102.

"Document". Section 7-102.

"Goods". Section 7-102.

"Value". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-309.

Changes: References to tariffs eliminated because of deregulation, adding reference to transportation agreements, and for style.

Purposes: 1. A bill of lading may also serve as the contract between the carrier and the bailor. Parties in their contract should be able to limit the amount of damages for breach of that contract including breach of the duty to take reasonable care of the goods. The parties cannot disclaim by contract the carrier's obligation of care. Section 1-302.

Federal statutes and treaties for air, maritime and rail transport may alter the standard of care. These federal statutes and treaties preempt this section when applicable. Section 7-103. Subsection (a) does not impair any rule of law imposing the liability of an insurer on a common carrier in intrastate commerce. Subsection (b), however, applies to the common carrier's liability as an insurer as well as to liability based on negligence. Subsection (b) allows the term limiting damages to appear either in the bill of lading or in the parties' transportation agreement. Compare 7-204(b). Subsection (c) allows the parties to agree to provisions regarding time and manner of presenting claims or commencing actions if the provisions are either in the bill of lading or the transportation agreement. Compare 7-204(c). Transportation agreements are commonly used to establish agreed terms between carriers and shippers that have an on-going relationship.

2. References to public tariffs in former Section 7-309(2) and (3) have been deleted in light of the modern era of deregulation. See Comment 2 to Section 7-103. If a tariff is required under state or federal law, pursuant to Section 7-103(a), the tariff would control over the rule of this section. As governed by contract law, parties may incorporate by reference the limits on the amount of damages or the reasonable provisions as to the time and manner of presenting claims set forth in applicable tariffs, e.g. a maximum unit value beyond which goods are not taken or a disclaimer of responsibility for undeclared articles of extraordinary value.

3. As under former Section 7-309(2), subsection (b) provides that a limitation of damages is ineffective if the carrier has converted the goods to its own use. A mere failure to redeliver the goods is not conversion to the carrier's own use. "Conversion to its own use" is narrower than the idea of conversion generally. Art Masters Associates, Ltd. v. United Parcel Service, 77 N.Y.2d 200, 567 N.E.2d 226 (1990); See, Kemper Ins. Co. v. Fed. Ex. Corp., 252 F.3d 509 (1st Cir), cert. denied 534 U.S. 1020 (2001) (opinion interpreting federal law).

4. As used in this section, damages may include damages arising from delay in delivery. Delivery dates and times are often specified in the parties' contract. See Section 7-403.

Cross Reference: Sections 1-302, 7-103, 7-204, 7-403.

Definitional Cross References: "Action". Section 1-201.
"Bill of lading". Section 1-201.
"Carrier". Section 7-102.
"Consignor". Section 7-102.
"Document of Title". Section 1-102.
"Goods". Section 7-102.
"Value". Section 1-204.

CASE NOTES

Contracts limiting carrier's liability.
Interstate Commerce Commission regulation prohibiting carriers from including in their bills of lading any provision absolving carrier of liability for loss or damage to certain fragile items packed by shipper is not arbitrary or irrational. Interstate Commerce Act, § 20(11), 49 U.S.C. § 20(11). Household Goods Carriers' Bureau v. Interstate Commerce Com., 584 F.2d 437, 1978 U.S. App. LEXIS 10423 (C.A.D.C. 1978).

Part 4. Warehouse Receipts and Bills of Lading: General Obligations.

§ 28:7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this article on an issuer apply to a document of title even if:

(1) The document does not comply with the requirements of this article or of any other statute, rule, or regulation regarding its issuance, form, or content;

(2) The issuer violated laws regulating the conduct of its business;

(3) The goods covered by the document were owned by the bailee when the document was issued; or

(4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt.

(Dec. 30, 1963, 77 Stat. 727, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-401.
1973 Ed., § 28:7-401.
Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 20, Uniform Warehouse Receipts Act; Section 23, Uniform Bills of Lading Act.
Changes: Most of the material is new; the uniform act sections cited deal only with non-receipt and misdescription.
Purposes of Changes and New Matter:
The bailee's liability on his document despite non-receipt or misdescription of the goods is affirmed in Sections 7-203 and 7-301. The purpose of this section is to make it clear that regardless of irregularities a document which falls within the definition of document of title imposes on the issuer the obligations stated in this Article. For example, a bailee will not be permitted to avoid his obligation to deliver the goods (Section 7-403) or his obligation of due care with respect to them (Sections 7-204 and 7-309) by taking the position that no valid "document" was issued because he failed to file a statutory bond or did not pay stamp taxes or did not disclose the place of storage in the document. Sanctions against violations of statutory or administrative duties with respect to

documents should be limited to revocation of license or other measures prescribed by the regulation imposing the duty. As to the continuing vitality of regulations, in addition to those found in this Article, of documents of title, see Sections 7-103 and 10-103.

Cross References:

Sections 7-103, 7-203, 7-204, 7-301, 7-309 and 10-103.

Definitional Cross References:

"Bailee". Section 7-102.
"Document". Section 7-102.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Person". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-401.

Changes: Changes for style only.

Purposes: The bailee's liability on its document despite non-receipt or misdescription of the goods is affirmed in Sections 7-203 and 7-301. The purpose of this section is to make it clear that regardless of irregularities a document which falls within the definition of document of title imposes on the issuer the obligations stated in this Article. For example, a bailee will not be permitted to avoid its obligation to deliver the goods (Section 7-403) or its obligation of due care with respect to them (Sections 7-204 and 7-309) by taking the position that no valid "document" was issued because it failed to file a statutory bond or did not pay stamp taxes or did not disclose the place of storage in the document. Tate v. Action Moving & Storage, Inc., 383 S.E.2d 229 (N.C. App. 1989), *rev. denied* 389 S.E.2d 104 (N.C. 1990). Sanctions against violations of statutory or administrative duties with respect to documents should be limited to revocation of license or other measures prescribed by the regulation imposing the duty. See Section 7-103.

Cross References: Sections 7-103, 7-203, 7-204, 7-301, 7-309.

Definitional Cross References: "Bailee". Section 7-102.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Person". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouse". Section 7-102.

CASE NOTES

Warehouse receipts.

Household goods descriptive inventory which listed and described items stored by warehouseman, which stated no value for items, and which was signed by apparent officer of warehouseman, but not property owner, was "receipt issued by person engaged in business of storing goods for hire," and, therefore, "warehouse receipt" and "document of title." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g), 28:7-202, 28:7-401; Civil Rule 41(b). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

§ 28:7-402. Duplicate document of title; overissue.

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to § 28:7-105. The issuer is liable for damages caused by its overissue or failure to identify a duplicate document by a conspicuous notation.

(Dec. 30, 1963, 77 Stat. 727, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-402.
1973 Ed., § 28:7-402.

Legislative history of Law 19-299. — See note to § 28:7-401.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 6, Uniform Warehouse Receipts Act; Section 7, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

1. This section treats a duplicate which is not properly identified as such like any other overissue of documents: a purchaser of such a document acquires no title but only a cause of action for damages against the person who made his deception possible, except in the cases noted in the section. But parts of a bill lawfully issued in a set of parts are not "overissue" (Section 7-304). Of course, if the issuer has clearly indicated that a document is a duplicate so that no one can be deceived by it, and in fact the duplicate is a correct copy of the original, the warehouseman is not liable for preparing and delivering such a duplicate copy.

2. The section applies to nonnegotiable documents to the extent of providing an action for damages for one who acquires an unmarked duplicate from a transferor who knew the facts and would therefore himself have had no cause of action against the issuer of the duplicate. Ordinarily the transferee of a nonnegotiable document acquires only the rights of his transferor.

3. Overissue is defined so as to exclude the common situation where two valid documents of different issuers are outstanding for the same goods at the same time. Thus freight forwarders commonly issue bills of lading to their customers for small shipments to be combined into carload shipments for which the railroad will issue a bill of lading to the forwarder. So also a warehouse receipt may be outstanding against goods, and the holder of the receipt may issue delivery orders against the same goods. In these cases dealings with the subsequently issued documents may be effective to transfer title; e.g. negotiation of a delivery order will effectively transfer title in the ordinary case where no dishonesty has occurred and the goods are available to satisfy the orders. Section 7-503 provides for cases of conflict between documents of different issuers.

Cross References:

Point 1: Sections 7-207, 7-304, and 7-601.

Point 3: Section 7-503.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Conspicuous". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Fungible" goods. Section 1-201.

"Goods". Section 7-102.

"Issuer". Section 7-102.

"Right". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-402.

Changes: Changes to accommodate electronic documents.

Purposes: 1. This section treats a duplicate which is not properly identified as a duplicate like any other overissue of documents: a purchaser of such a document acquires no title but only a cause of action for damages against the person that made the deception possible, except in the cases noted in the section. But parts of a tangible bill lawfully issued in a set of parts are not "overissue" (Section 7-304). Of course, if the issuer has clearly indicated that a document is a duplicate so that no one can be deceived by it, and in fact the duplicate is a correct copy of the original, the issuer is not liable for preparing and delivering such a duplicate copy.

Section 7-105 allows documents of title to be reissued in another medium. Re-issuance of a document in an alternative medium under Section 7-105 requires that the original document be surrendered to the issuer in order to make the substitute document the effective document. If the substitute document is not issued in compliance with section 7-105, then the document should be treated as a duplicate under this section.

2. The section applies to nonnegotiable documents to the extent of providing an action for damages for one who acquires an unmarked duplicate from a transferor who knew the facts and would therefore have had no cause of action against the issuer of the duplicate. Ordinarily the transferee of a nonnegotiable document acquires only the rights of its transferor.

3. Overissue is defined so as to exclude the common situation where two valid documents of different issuers are outstanding for the same goods at the same time. Thus freight forwarders commonly issue bills of lading to their customers for small shipments to be combined into carload shipments for which the railroad will issue a bill of lading to the forwarder. So also a warehouse receipt may be outstanding against goods, and the holder of the receipt may issue delivery orders against the same goods. In these cases dealings with the subsequently issued documents may be effective to transfer title; e.g. negotiation of a delivery order will effectively transfer title in the ordinary case where no dishonesty has occurred and the goods are available to satisfy the orders. Section 7-503 provides for cases of conflict between documents of different issuers.

Cross References: Point 1: Sections 7-105, 7-207, 7-304, and 7-601.

Point 3: Section 7-503.

Definitional Cross References: "Bill of lading". Section 1-201.

"Conspicuous". Section 1-201.

"Document of title". Section 1-201.

"Fungible goods." Section 1-201.
"Goods". Section 7-102.
"Issuer". Section 7-102.
"Right". Section 1-201.

§ 28:7-403. Obligation of bailee to deliver; excuse.

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c) of this section, unless and to the extent that the bailee establishes any of the following:

(1) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;

(3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse's lawful termination of storage;

(4) The exercise by a seller of its right to stop delivery pursuant to § 28:2-705 or by a lessor of its right to stop delivery pursuant to § 28:2A-526;

(5) A diversion, reconsignment, or other disposition pursuant to § 28:7-303;

(6) Release, satisfaction, or any other personal defense against the claimant; or

(7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is a person against which the document of title does not confer a right under § 28:7-503(a):

(1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and

(2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or the bailee is liable to any person to which the document is duly negotiated.

(Dec. 30, 1963, 77 Stat. 727, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-202, § 28:7-209, and § 28:7-503.

Prior Codifications. — 1981 Ed., § 28:7-403.
1973 Ed., § 28:7-403.

Legislative history of Law 19-299. — See note to § 28:7-401.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 8 through 12, 16 and 19, Uniform Warehouse Receipts Act; Sections 11 through 15, 19 and 22, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

1. The general and primary purpose of this revision is to simplify the statement of the bailee's obligation on the document. The interrelations of the separate sections of the old uniform acts dealing with "obligation to deliver," "justification in delivering," and "liability for misdelivery" are obscure. The present section is constructed on the basis of stating what previous deliveries or other circumstances operate to excuse the bailee's normal obligation

on the document. Accordingly, "justified" deliveries under the old uniform acts now find their place as "excuse" under subsection (1). Unjustified deliveries, i.e., "misdeliveries" under the old acts, are simply omitted from the list of excuses, thus permitting the normal obligation on the document to be asserted.

2. The principal case covered by subsection (1)(a) is delivery to a person whose title is paramount to the rights represented by the document. For example, if a thief deposits stolen goods in a warehouse and takes a negotiable receipt, the warehouseman is not liable on the receipt if he has surrendered the goods to the true owner, even though the receipt is held by a good faith purchaser.

See Section 7-503(1). However, if the owner entrusted the goods to a person with power of disposition, and that person deposited the goods and took a negotiable document, the owner's receipt would not be rightful as against a holder to whom the negotiable document was duly negotiated, and delivery to the owner would not give the bailee a defense against such a holder. See Sections 7-502(1)(b), 7-503(1)(a).

3. Subsection (1)(b) amounts to a cross reference to all the tort law that determines the varying responsibilities and standards of care applicable to commercial bailees. A restatement of this tort law would be beyond the scope of this Act. Much of the applicable law as to responsibility of bailees for the preservation of the goods and limitation of liability in case of loss has been codified for particular classes of bailees in interstate and foreign commerce by federal legislation and treaty and for intrastate carriers and other bailees by the regulatory state laws preserved by Section 7-103. In the absence of governing legislation the common law will prevail subject to the minimum standard of reasonable care prescribed by Sections 7-204 and 7-309 of this Article. The optional language in subsection (1)(b) [not adopted in Minnesota. See Minnesota Code Comments, supra] states the rule laid down for interstate carriers in many federal cases. State decisions are in conflict as to both carriers and warehousemen. Particular states may prefer to adopt the federal rule.

4. Subsection (2) eliminates the implication of the old uniform acts that a request for delivery must be accompanied by a formal tender of the amount of the charges due. Rather, the bailee must request payment of the amount of his lien when asked to deliver, and only in case this request is refused is he justified in declining to deliver because of nonpayment of charges. Where delivery without payment is forbidden by law, the request is treated as implicit. Such a prohibition reflects a policy of uniformity to prevent discrimination by failure to request payment in particular cases.

5. Subsection (3) states the obvious duty of a bailee to take up a negotiable document or note partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only one exception, that stated in subsection 1(a) of this section and in Section 7-503(1). It is limited to cases of delivery to a claimant; it has no application, for example, where goods held under a negotiable document are lawfully sold to enforce the bailee's lien.

Cross References:

Point 2: Sections 7-502 and 7-503.

Point 3: Sections 7-103, 7-204, 7-309 and 10-103.

Points 5: Section 7-503(1).

Definitional Cross References:

"Bailee". Section 7-102.

"Conspicuous". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Right" Section 1-201.

"Terms". Section 1-201.

"Warehouseman". Section 7-102.

"Written". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-403.

Changes: Definition in former Section 7-403(4) moved to Section 7-102; bracketed language in former Section 7-403(1)(b) deleted; added cross reference to Section 2A-526; changes for style.

Purposes: 1. The present section, following former Section 7-403, is constructed on the basis of stating what previous deliveries or other circumstances operate to excuse the bailee's normal obligation on the document. Accordingly, "justified" deliveries under the pre-Code uniform acts now find their place as "excuse" under subsection (a).

2. The principal case covered by subsection (a)(1) is delivery to a person whose title is paramount to the rights represented by the document. For example, if a thief deposits stolen goods in a warehouse facility and takes a negotiable receipt, the warehouse is not liable on the receipt if it has surrendered the goods to the true owner, even though the receipt is held by a good faith purchaser. See Section 7-503(a). However, if the owner entrusted the goods to a person with power of disposition, and that person deposited the goods and took a negotiable document, the owner receiving delivery would not be rightful as against a holder to whom the negotiable document was duly negotiated, and delivery to the owner would not give the bailee a defense against such a holder. See Sections 7-502(a)(2), 7-503(a)(1).

3. Subsection (a)(2) amounts to a cross reference to all the tort law that determines the varying responsibilities and standards of care applicable to commercial bailees. A restatement of this tort law would be beyond the scope of this Act. Much of the applicable law as to responsibility of bailees for the preservation of the goods and limitation of liability in case of loss has been codified for particular classes of bailees in interstate and foreign commerce by federal legislation and treaty and for intrastate carriers and other bailees by the regulatory state laws preserved by Section 7-103. In the absence of governing legislation the common law will prevail subject to the minimum standard of reasonable care prescribed by Sections 7-204 and 7-309 of this Article.

The bracketed language found in former Section 7-403(1)(b) has been deleted thereby leaving the allocations of the burden of going forward with the evidence and the burden of proof to the procedural law of the various states.

Subsection (a)(4) contains a cross reference to both the seller's and the lessor's rights to stop delivery under Article 2 and Article 2A respectively.

4. As under former Section 7-403, there is no requirement that a request for delivery must be accompanied by a formal tender of the amount of the charges due. Rather, the bailee must request payment of the amount of its lien when asked to deliver, and only in case this request is refused is it justified in declining to deliver because of nonpayment of charges. Where delivery without payment is forbidden by law, the request is treated as implicit. Such a prohibition reflects a policy of uniformity to prevent discrimination by failure to request payment in particular cases. Subsection (b) must be read in conjunction with the priorities given to the warehouse lien and the carrier lien under Section 7-209 and 7-307, respectively. If the parties are in dispute about whether the request for payment of the lien is legally proper, the bailee may have recourse to interpleader. See Section 7-603.

5. Subsection (c) states the obvious duty of a bailee to take up a negotiable document or note partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only one exception, that stated in subsection (a)(1) of this section and in Section 7-503(a). Subsection (c) is limited to cases of delivery to a claimant; it has no application, for example, where goods held under a negotiable document are lawfully sold to enforce the bailee's lien.

6. When courts are considering subsection (a)(7), "any other lawful excuse," among others, refers to compliance with court orders under Sections 7-601, 7-602 and 7-603.

Cross References: Point 2: Sections 7-502 and 7-503.

Point 3: Sections 2-705, 2A-526, 7-103, 7-204, and 7-309 and 10-103.

Point 4: Sections 7-209, 7-307 and 7-603.

Point 5: Section 7-503(1).

Point 6: Sections 7-601, 7-602, and 7-603.

Definitional Cross References: "Bailee". Section 7-102.

"Conspicuous". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Lessor". Section 2A-103.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Right". Section 1-201.

"Terms". Section 1-201.

"Warehouse". Section 7-102.

CASE NOTES

ANALYSIS

Abandoned and lost property.

Evidence of property owner's eight-month failure to pay warehouseman was insufficient to support trial court's conclusion that property owner who always paid sporadically had abandoned property. Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Actions by or against warehousemen.

It was unreasonable for storage company to anticipate that owner's ex-husband would succeed in claim of title to clothing and other personal items belonging to owner and their child, so that storage company was precluded from asserting defense of adverse claims to owner's action for recovery of goods. D.C. Code 1981, § 28:7-603. Security Storage Co. v. Cave, 528 A.2d 880, 1987 D.C. App. LEXIS 390 (1987).

Failure of storage company to either ascertain validity of claims adverse to owner or to file action for interpleader within reasonable time after owner's delivery request precluded it from asserting defense of adverse claim in owner's action to recover goods. Security Storage Co. v. Cave, 528 A.2d 880, 1987 D.C. App. LEXIS 390 (1987).

Warehouseman that is sued for conversion of goods stored in warehouse has burden to prove valid foreclosure of lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210. Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Evidence was sufficient to establish prima facie case that warehouseman's sale of goods for $1,090 or well below alleged value of at least $37,000 was not conducted in "commercially reasonable manner" and subjected warehouseman to liability. D.C. Code 1981, § 28:7-210(1, 2). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Notice of sale.

Warehouseman's letter to property owner which notified owner of possible sale of goods to satisfy overdue account, which did not contain itemized statement of claims, and which did not contain description of goods subject to warehouseman's lien was legally insufficient to give property owner notice of sale to satisfy lien. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

Public advertisement of auction sale of goods allegedly subject to warehouseman's lien which did not include name of person on whose account sale was being held failed to comply with requirement to foreclose warehouseman's lien and, therefore, was prima facie evidence of warehouseman's liability. D.C. Code 1981, §§ 28:7-204(1), 28:7-209(1), 28:7-210, 28:7-210(2)(c, f). Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1986 D.C. App. LEXIS 338 (1986).

§ 28:7-404. No liability for good-faith delivery pursuant to document of title.

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of a document of title or pursuant to this article is not liable for the goods even if:

(1) The person from which the bailee received the goods did not have authority to procure the document or to dispose of the goods; or

(2) The person to which the bailee delivered the goods did not have authority to receive the goods.

(Dec. 30, 1963, 77 Stat. 728, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-404.

1973 Ed., § 28:7-404.

Legislative history of Law 19-299. — See note to § 28:7-401.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 10, Uniform Warehouse Receipts Act; Section 13, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

The generalized test of good faith and observance of reasonable commercial standards is substituted for the attempts to particularize what constitutes good faith in the cited sections of the old uniform acts. The section states explicitly what is perhaps an implication from the old acts that the common law rule of "innocent conversion" by unauthorized "intermeddling" with another's property is inapplicable to the operations of commercial carriers and warehousemen, who in good faith and with reasonable observance of commercial standards perform obligations which they have assumed and which generally they are under a legal compulsion to assume. The section applies to delivery to a fraudulent holder of a valid document as well as to delivery to the holder of an invalid document.

Definitional Cross References:

"Bailee". Section 7-102.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Term". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-404.

Changes: Changes reflect the definition of good faith in Section 1-201 [7-102] and for style.

Purposes: This section uses the test of good faith, as defined in Section 1-201 [7-102], to continue the policy of former Section 7-404. Good faith now means "honesty in fact and the observance of reasonable commercial standards of fair dealing." The section states explicitly

that the common law rule of "innocent conversion" by unauthorized "intermeddling" with another's property is inapplicable to the operations of commercial carriers and warehousemen that in good faith perform obligations that they have assumed and that generally they are under a legal compulsion to assume. The section applies to delivery to a fraudulent holder of a valid document as well as to delivery to the holder of an invalid document. Of course, in appropriate circumstances, a bailee may use interpleader or other dispute resolution process. See Section 7-603.

Cross Reference: Section 7-603.

Definitional Cross References: "Bailee". Section 7-102.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 1-201 [7-102].

"Goods". Section 7-102.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Term". Section 1-201.

Part 5. Warehouse Receipts and Bills of Lading: Negotiation and Transfer.

§ 28:7-501. Form of negotiation and requirements of due negotiation.

(a) The following rules apply to a negotiable tangible document of title:

(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

(2) If the document's original terms run to bearer, it is negotiated by delivery alone.

(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery.

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of

business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.

(Dec. 30, 1963, 77 Stat. 728, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28-4915.

Prior Codifications. — 1981 Ed., § 28:7-501.

1973 Ed., § 28:7-501.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 28, 29, 31, 32 and 38, Uniform Sales Act; Sections 37, 38, 39, 40 and 47, Uniform Warehouse Receipts Act; Sections 9, 28, 29, 30, 31, and 38, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

1. In general this section is intended to clarify the language of the old acts and to restate the effect of the better decisions thereunder. An important new concept is added, however, in the requirement of "regular course of business or financing" to effect the "due negotiation" which will transfer greater rights than those held by the person negotiating. The foundation of the mercantile doctrine of good faith purchase for value has always been, as shown by the case situations, the furtherance and protection of the regular course of trade. The reason for allowing a person, in bad faith or in error, to convey away rights which are not his own has from the beginning been to make possible the speedy handling of that great run of commercial transactions which are patently usual and normal.

There are two aspects to the usual and normal course of mercantile dealings, namely, the person making the transfer and the nature of the transaction itself. The first question which arises is: Is the transferor a person with whom it is reasonable to deal as having full powers? In regard to documents of title the only holder whose possession appears, commercially, to be in order is almost invariably a person in the trade. No commercial purpose is served by allowing a tramp or a professor to "duly negotiate" an order bill of lading for hides or cotton not his own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection of subsection (4).

The second question posed by the "regular course" qualification is: Is the transaction one which is normally proper to pass full rights without inquiry, even though the transferor himself may not have such rights to pass, and even though he may be acting in breach of duty? In raising this question the "regular course" criterion has the further advantage of limiting the effective wrongful disposition to transactions whose protection will really further trade. Obviously, the snapping up of goods for quick resale at a price suspiciously below the market deserves no protection as a matter of policy: it is also clearly outside the range of regular course.

Any notice from the face of the document sufficient to put a merchant on inquiry as to the "regular course" quality of the transaction will frustrate a "due negotiation". Thus irregularity of the document on its face or unexplained staleness of a bill of lading may appropriately be recognized as negating a negotiation in "regular" course.

A pre-existing claim constitutes value, and "due negotiation" does not require "new value." A usual and ordinary transaction in which documents are received as security for credit previously extended may be in "regular" course, even though there is a demand for additional collateral because the creditor "deems himself insecure." But the matter has moved out of the regular course of financing if the debtor is thought to be insolvent, the credit previously extended is in effect cancelled, and the creditor snatches a plank in the shipwreck under the

guise of a demand for additional collateral. Where a money debt is "paid" in commodity paper, any question of "regular" course disappears, as the case is explicitly excepted from "due negotiation".

2. Negotiation under this section may be made by any holder no matter how he acquired possession of the document. The present section follows in this respect the Uniform Bills of Lading Act and amendments of the original Uniform Sales Act and Uniform Warehouse Receipts Act proposed by the Commissioners on Uniform State Laws in 1922.

3. Subsection (2)(b) makes explicit a matter upon which the intent of the old acts was clear but the language somewhat obscure: a negotiation results from a delivery to a banker or buyer to whose order the document has been taken by the person making the bailment. There is no presumption of irregularity in such a negotiation; it may very well be in "regular course."

4. This Article does not contain any provision creating a presumption of due negotiation to, and full rights in, a holder of a document of title akin to that created by Sections 16, 24 and 59 of the Negotiable Instruments Law. But the reason of the provisions of this Act (Section 1-202) on the prima facie authenticity and accuracy of third party documents, joins with the reason of the present section to work such a presumption in favor of any person who has power to make a due negotiation. It would not make sense for this Act to authorize a purchaser to indulge the presumption of regularity if the courts were not also called upon to do so.

Cross References:

Point 1: Sections 7-502 and 7-503.

Point 2: Section 7-502.

Definitional Cross References:

"Bearer". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-501.

Changes: To accommodate negotiable electronic documents of title.

Purpose: 1. Subsection (a) has been limited to tangible negotiable documents of title but otherwise remains unchanged in substance from the rules in former Section 7-501. Subsection (b) is new and applies to negotiable electronic documents of title. Delivery of a negotiable electronic document is through voluntary transfer of control. Section 1-201 definition of "delivery." The control concept as applied to negotiable electronic documents of title is the substitute for both possession and indorsement as applied to negotiable tangible documents of title. Section 7-106.

Article 7 does not separately define the term "duly negotiated." However, the elements of "duly negotiated" are set forth in subsection (a)(5) for tangible documents and (b)(3) for electronic documents. As under former Section 7-501, in order to effect a "due negotiation" the negotiation must be in the "regular course of business or financing" in order to transfer greater rights than those held by the person negotiating. The foundation of the mercantile doctrine of good faith purchase for value has always been, as shown by the case situations, the furtherance and protection of the regular course of trade. The reason for allowing a person, in bad faith or in error, to convey away rights which are not its own has from the beginning been to make possible the speedy handling of that great run of commercial transactions which are patently usual and normal.

There are two aspects to the usual and normal course of mercantile dealings, namely, the person making the transfer and the nature of the transaction itself. The first question which arises is: Is the transferor a person with whom it is reasonable to deal as having full powers? In regard to documents of title the only holder whose possession or control appears, commercially, to be in order is almost invariably a person in the trade. No commercial purpose is served by allowing a tramp or a professor to "duly negotiate" an order bill of lading for hides or cotton not their own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection of subsections (a)(5) or (b)(3).

The second question posed by the "regular course" qualification is: Is the transaction one which is normally proper to pass full rights without inquiry, even though the transferor itself may not have such rights to pass, and even though the transferor may be acting in breach of duty? In raising this question the "regular course" criterion has the further advantage of limiting, the effective wrongful disposition to transactions whose protection will really further trade. Obviously, the snapping up of goods for quick resale at a price suspiciously below the market deserves no protection as a matter of policy: it is also clearly outside the range of regular course.

Any notice on the document sufficient to put a merchant on inquiry as to the "regular course" quality of the transaction will frustrate a "due negotiation". Thus irregularity of the document or unexplained staleness of a bill of lading may appropriately be recognized as negating a negotiation in "regular" course.

A pre-existing claim constitutes value, and "due negotiation" does not require "new value." A usual and ordinary transaction in which documents are received as security for credit previously extended may be in "regular" course, even though there is a demand for additional collateral because the creditor "deems himself insecure." But the matter has moved out of the regular course of financing if the debtor is thought to be insolvent, the credit previously extended is in effect cancelled, and the creditor snatches a plank in the shipwreck under the guise of a demand for additional collateral. Where a money debt is "paid" in commodity paper, any question of "regular" course disappears, as the case is explicitly excepted from "due negotiation".

2. Negotiation under this section may be made by any holder no matter how the holder acquired possession or control of the document.

3. Subsections (a)(3) and (b)(2) make explicit a matter upon which the intent of the pre-Code law was clear but the language somewhat obscure: a negotiation results from a delivery to a banker or buyer to whose order the document has been taken by the person making the bailment. There is no presumption of irregularity in such a negotiation; it may very well be in "regular course."

4. This Article does not contain any provision creating a presumption of due negotiation to, and full rights in, a holder of a document of title akin to that created by Uniform Commercial Code Article 3. But the reason of the provisions of this Act (Section 1-307) on the prima facie authenticity and accuracy of third party documents, joins with the reason of the present section to work such a presumption in favor of any person who has power to make a due negotiation. It would not make sense for this Act to authorize a purchaser to indulge the presumption of regularity if the courts were not also called upon to do so. Allocations of the burden of going forward with the evidence and the burden of proof are left to the procedural law of the various states.

5. Subsections (c) and (d) are unchanged from prior law and apply to both tangible and electronic documents of title.

Cross References: Sections 1-307, 7-502 and 7-503.

Definitional Cross References: "Bearer". Section 1-201.

"Control". Section 7-106.
"Delivery". Section 1-201.
"Document of title". Section 1-201.
"Good faith". Section 1-201 [7-102].
"Holder". Section 1-201.
"Notice". Section 1-202.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.
"Value". Section 1-204.

§ 28:7-502. Rights acquired by due negotiation.

(a) Subject to §§ 28:7-205 and 28:7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) Title to the document;

(2) Title to the goods;

(3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this article, but in the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to § 28:7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

(1) The due negotiation or any prior due negotiation constituted a breach of duty;

(2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or

(3) A previous sale or other transfer of the goods or document has been made to a third person.

(Dec. 30, 1963, 77 Stat. 728, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-502.

1973 Ed., § 28:7-502.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 20(4), 25, 33, 38 and 62, Uniform Sales Act; Sections 41, 47, 48 and 49, Uniform Warehouse Receipts Act; Sections 32, 38, 39, 40 and 42, Uniform Bills of Lading Act.

Changes: Rewritten.

Purposes of Changes:

1. The several necessary qualifications of the broad principle that the holder of a document acquired in a due negotiation is the owner of the document and the goods have been brought together in the next section.

2. Subsection (1)(c) covers the case of "feeding" of a duly negotiated document by subsequent delivery to the bailee of such goods as the document falsely purported to cover; the bailee in such case is estopped as against the holder of the document.

3. The explicit statement in subsection (1)(d) of the bailee's direct obligation to the holder precludes the defense, sometimes successfully asserted under the old acts, that the document in question was "spent" after the carrier had delivered the goods to a previous holder. But the holder is subject to such defenses as non-negligent destruction even though not apparent on the face of the document, and the bailee's obligation is of course subject to lawful provisions in filed classifications and tariffs. See Sections 7-103, 7-403. The sentence on delivery orders applies only to delivery orders in negotiable form which have been duly negotiated. On delivery orders, see also Section 7-503(2) and Comment.

4. Subsection (2) condenses and continues the law of a number of sections of the prior acts which gave full effect to the issuance or due negotiation of a negotiable document. The subsection adds nothing to the effect of the rules stated in subsection (1), but it has been included since such explicit references were relied upon under the prior acts to preserve the rights of a purchaser by due negotiation unimpaired. The listing is not exhaustive. Only those matters have been repeated in this subsection which were explicitly reserved in the prior acts except in the case of stoppage in transit. Here, the language has been broadened to include "any stoppage" lest an inference be drawn that a stoppage of the goods before or after transit might cut off or otherwise impair the purchaser's rights.

Cross References:

Sections 7-103, 7-205, 7-403 and 7-503.

Definitional Cross References:

"Bailee". Section 7-102.
"Delivery". Section 1-201.
"Delivery order". Section 7-102.
"Document". Section 7-102.
"Document of title". Section 1-201.
"Duly negotiate". Section 7-501.
"Fungible". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Person". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.
"Warehouse receipt". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-502.

Changes: To accommodate electronic documents of title and for style.

Purpose: 1. This section applies to both tangible and electronic documents of title. The elements of duly negotiated, which constitutes a due negotiation, are set forth in Section 7-501. The several necessary qualifications of the broad principle that the holder of a document acquired in a due negotiation is the owner of the document and the goods have been brought together in the next section (Section 7-503).

2. Subsection (a)(3) covers the case of "feeding" of a duly negotiated document by subsequent delivery to the bailee of such goods as the document falsely purported to cover; the bailee in such case is estopped as against the holder of the document.

3. The explicit statement in subsection (a)(4) of the bailee's direct obligation to the holder precludes the defense that the document in question was "spent" after the carrier had delivered the goods to a previous holder. But the holder is subject to such defenses as non-negligent destruction even though not apparent on the document. The sentence on delivery orders applies only to delivery orders in negotiable

form which have been duly negotiated. On delivery orders, see also Section 7-503(b) and Comment.

4. Subsection (b) continues the law which gave full effect to the issuance or due negotiation of a negotiable document. The subsection adds nothing to the effect of the rules stated in subsection (a), but it has been included since such explicit reference was provided under former Section 7-502 to preserve the right of a purchaser by due negotiation. The listing is not exhaustive. The language "any stoppage" is included lest an inference be drawn that a stoppage of the goods before or after transit might cut off or otherwise impair the purchaser's rights.

Cross References: Sections 7-103, 7-205, 7-403, 7-501, and 7-503.

Definitional Cross References: "Bailee". Section 7-102.

"Control". Section 7-106.
"Delivery". Section 1-201.
"Delivery order". Section 7-102.
"Document of title". Section 1-201.
"Duly negotiate". Section 7-501.
"Fungible". Section 1-201.
"Goods". Section 7-102.
"Holder". Section 1-201.
"Issuer". Section 7-102.
"Person". Section 1-201.
"Rights". Section 1-201.
"Term". Section 1-201.
"Warehouse receipt". Section 1-201.

§ 28:7-503. Document of title to goods defeated in certain cases.

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:

(A) Actual or apparent authority to ship, store, or sell;

(B) Power to obtain delivery under § 28:7-403; or

(C) Power of disposition under § 28:2-403, 28:2A-304, 28:2A-305, 28:9-320, or 28:9-321(c) or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to which a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under § 28:7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, delivery by the carrier in accordance with Part 4 of this article pursuant to its own bill of lading discharges the carrier's obligation to deliver.

(Dec. 30, 1963, 77 Stat. 729, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(h), 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-403 and § 28:7-502.

Prior Codifications. — 1981 Ed., § 28:7-503.

1973 Ed., § 28:7-503.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 13-201. — Law 13-201, the "Uniform Commercial Code Se-

cured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 33, Uniform Sales Act; Section 41, Uniform Warehouse Receipts Act; Section 32, Uniform Bills of Lading Act.

Changes: Subsection (1) narrows, as compared to the cited sections, the occasions for defeating the document holder's title.

Purposes of Changes:

1. In general it may be said that the title of a purchaser by due negotiation prevails over almost any interest in the goods which existed prior to the procurement of the document of title if the possession of the goods by the person obtaining the document derived from any action by the prior claimant which introduced the goods into the stream of commerce or carried them along that stream. A thief of the goods cannot indeed by shipping or storing them to his own order acquire power to transfer them to a good faith purchaser. Nor can a tenant or mortgagor defeat any rights of a landlord or mortgagee which have been perfected under the local law merely by wrongfully shipping or storing a portion of the crop or other goods. However, "acquiescence" by the landlord or tenant does not require active consent under subsection (1)(b) and knowledge of the likelihood of storage or shipment with no objection or effort to control it is sufficient to defeat his rights as against one who takes by "due" negotiation of a negotiable document.

On the other hand, where goods are delivered to a factor for sale, even though the factor has made no advances and is limited in his duty to sell for cash, the goods are "entrusted" to him "with actual ... authority ... to sell" under subsection (1)(a), and if he procures a negotiable document of title he can transfer the owner's interest to a purchaser by due negotiation. Further, where the factor is in the business of selling, goods entrusted to him simply for safekeeping or storage may be entrusted under circumstances which give him "apparent authority to ship, store or sell" under subsection (1)(a), or power of disposition under Section 2-403, 7-205 or 9-307, or under a statute such as the earlier Factors Acts, or under a rule of law giving effect to apparent ownership. See Section 1-103.

Persons having an interest in goods also frequently deliver or entrust them to agents or servants other than factors for the purpose of shipping or warehousing or under circumstances reasonably contemplating such action. Rounding out the case law development under the prior Acts, this Act is clear that such persons assume full risk that the agent to whom the goods are so delivered may ship or store in breach of duty, take a document to his own order and then proceed to misappropriate it. This Act makes no distinction between possession or mere custody in such situations and finds no exception in the case of larceny by a bailee or the like. The safeguard in such situations lies in the requirement that a due negotiation can occur only "in the regular course of business or financing" and that the purchase be in good faith and without notice. See Section 7-501. Documents of title have no market among the commercially inexperienced and the commercially experienced do not take them without inquiry from persons known to be truck drivers or petty clerks even though such persons purport to be operating in their own names.

Again, where the seller allows a buyer to receive goods under a contract for sale, though as a "conditional delivery" or under "cash sale" terms and on explicit agreement for immediate payment, the buyer thereby acquires power to defeat the seller's interest by transfer of the goods to certain good faith purchasers. See Section 2-403. Both in policy and under the language of subsection (1)(a) that same power must be extended to accomplish the same result if the buyer procures a negotiable document of title to the goods and duly negotiates it.

2. Under subsection (1) a delivery order issued by a person having no right in or power over the goods is ineffective unless the owner acts as provided in subsection (1)(a) or (b). Thus the rights of a transferee of a non-negotiable warehouse receipt can be defeated by a delivery order subsequently issued by the transferor only if the transferee "delivers or entrusts" to the "person procuring" the delivery order or "acquiesces" in his procurement. Similarly, a second delivery order issued by the same issuer for the same goods will ordinarily be subject to the first, both under this section and under Section 7-402. After a delivery order is validly issued but before it is accepted, it may nevertheless be defeated under subsection (2) in much the same way that the rights of a transferee may be defeated under Section 7-504. For example, a buyer in ordinary course from the

issuer may defeat the rights of the holder of a prior delivery order if the bailee receives notification of the buyer's rights before notification of the holder's rights. Section 7-504(2)(b). But an accepted delivery order has the same effect as a document issued by the bailee.

3. Under subsection (3) a bill of lading issued to a freight forwarder is subordinated to the freight forwarder's certificate, since the bill on its face gives notice of the fact that a freight forwarder is in the picture and has in all probability issued a certificate. But the carrier is protected in following the terms of its own bill of lading.

Cross References:

Point 1: Sections 2-403, 7-205, 7-501, 9-307, and 9-309.

Point 2: Sections 7-402 and 7-504.

Point 3: Sections 7-402, 7-403 and 7-404.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Delivery order". Section 7-102.

"Document". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Person". Section 1-201.

"Right". Section 1-201.

"Warehouse receipt". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-503.

Changes: Changes to cross-reference to Article 2A and for style.

Purposes: 1. In general it may be said that the title of a purchaser by due negotiation prevails over almost any interest in the goods which existed prior to the procurement of the document of title if the possession of the goods by the person obtaining the document derived from any action by the prior claimant which introduced the goods into the stream of commerce or carried them along that stream. A thief of the goods cannot indeed by shipping or storing them to the thief's own order acquire power to transfer them to a good faith purchaser. Nor can a tenant or mortgagor defeat any rights of a landlord or mortgagee which have been perfected under the local law merely by wrongfully shipping or storing a portion of the crop or other goods. However, "acquiescence" by the landlord or mortgagee does not require active consent under subsection (a)(2) and knowledge of the likelihood of storage or shipment with no objection or effort to control it is sufficient to defeat the landlord's or the mortgagee's rights as against one who takes by due negotiation of a negotiable document. In re Sharon Steel, 176 B.R. 384 (Bankr. W.D. Pa. 1995); In re R.V. Segars Co, 54 B.R. 170 (Bankr. S.C. 1985); In re Jamestown Elevators, Inc., 49 B.R. 661 (Bankr. N.D. 1985).

On the other hand, where goods are delivered to a factor for sale, even though the factor has made no advances and is limited in its duty to sell for cash, the goods are "entrusted" to the factor "with actual. .. authority. .. to sell" under subsection (a)(1), and if the factor procures a negotiable document of title it can transfer the owner's interest to a purchaser by due negotiation. Further, where the factor is in the business of selling, goods entrusted to it simply for safekeeping or storage may be entrusted under circumstances which give the factor "apparent authority to ship, store or sell" under subsection (a)(1), or power of disposition under Section 2-403, 2A-304(2), 2A-305(2), 7-205, 9-320, or 9-321(c) or under a statute such as the earlier Factors Acts, or under a rule of law giving effect to apparent ownership. See Section 1-103.

Persons having an interest in goods also frequently deliver or entrust them to agents or servants other than factors for the purpose of shipping or warehousing or under circumstances reasonably contemplating such action. This Act is clear that such persons assume full risk that the agent to whom the goods are so delivered may ship or store in breach of duty, take a document to the agent's own order and then proceed to misappropriate the negotiable document of title that embodies the goods. This Act makes no distinction between possession or mere custody in such situations and finds no exception in the case of larceny by a bailee or the like. The safeguard in such situations lies in the requirement that a due negotiation can occur only "in the regular course of business or financing" and that the purchase be in good faith and without notice. See Section 7-501. Documents of title have no market among the commercially inexperienced and the commercially experienced do not take them without inquiry from persons known to be truck drivers or petty clerks even though such persons purport to be operating in their own names.

Again, where the seller allows a buyer to receive goods under a contract for sale, though as a "conditional delivery" or under "cash sale" terms and on explicit agreement for immediate payment, the buyer thereby acquires power to defeat the seller's interest by transfer of the goods to certain good faith purchasers. See Section 2-403. Both in policy and under the language of subsection (a)(1) that same power must be extended to accomplish the same result if the buyer procures a negotiable document of title to the goods and duly negotiates it.

This comment 1 should be considered in interpreting delivery, entrustment or acquiescence in application of Section 7-209(c)).

2. Under subsection (a) a delivery order issued by a person having no right in or power over the goods is ineffective unless the owner acts as provided in subsection (a)(1) or (2). Thus

the rights of a transferee of a non-negotiable warehouse receipt can be defeated by a delivery order subsequently issued by the transferor only if the transferee "delivers or entrusts" to the "person procuring" the delivery order or "acquiesces" in that person's procurement. Similarly, a second delivery order issued by the same issuer for the same goods will ordinarily be subject to the first, both under this section and under Section 7-402. After a delivery order is validly issued but before it is accepted, it may nevertheless be defeated under subsection (b) in much the same way that the rights of a transferee may be defeated under Section 7-504. For example, a buyer in ordinary course from the issuer may defeat the rights of the holder of a prior delivery order if the bailee receives notification of the buyer's rights before notification of the holder's rights. Section 7-504(b)(2). But an accepted delivery order has the same effect as a document issued by the bailee.

3. Under subsection (c) a bill of lading issued to a freight forwarder is subordinated to the freight forwarder's document of title, since the bill on its face gives notice of the fact that a freight forwarder is in the picture and the freight forwarder has in all probability issued a document of title. But the carrier is protected in following the terms of its own bill of lading.

Cross References: Point 1: Sections 1-103, 2-403, 2A-304(2), 2A-305(2), 7-205, 7-209, 7-501, 9-320, 9-321(c), and 9-331.

Point 2: Sections 7-402 and 7-504.

Point 3: Sections 7-402, 7-403 and 7-404.

Definitional Cross References: "Bill of lading". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Delivery order". Section 7-102.

"Document of title". Section 1-201.

"Duly negotiate". Section 7-501.

"Goods". Section 7-102.

"Person". Section 1-201.

"Right". Section 1-201.

"Warehouse receipt". Section 1-201.

§ 28:7-504. Rights acquired in absence of due negotiation; effect of diversion; stoppage of delivery.

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

(1) By those creditors of the transferor which could treat the transfer as void under § 28:2-402 or § 28:2A-308;

(2) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights;

(3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or

(4) As against the bailee, by good-faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and, in any event, defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under § 28:2-705 or a lessor under § 28:2A-526, subject to the requirements of due notification in those sections. A bailee that honors the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense.

(Dec. 30, 1963, 77 Stat. 729, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-503.

Prior Codifications. — 1981 Ed., § 28:7-504.

1973 Ed., § 28:7-504.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 34, Uniform Sales Act; Sections 41(b) and 42, Uniform Warehouse Receipts Act; Sections 32(b) and 33, Uniform Bills of Lading Act.

Changes: Generally rewritten; Subsection (3) is new.

Purposes of Changes and New Matter:

1. Under the general principles controlling negotiable documents, it is clear that in the absence of due negotiation a transferor cannot convey greater rights than he himself has, even when the negotiation is formally perfect. This section recognizes the transferor's power to transfer rights which he himself has or has "actual authority to convey." Thus, where a negotiable document of title is being transferred the operation of the principle of estoppel is not recognized, as contrasted with situations involving the transfer of the goods themselves. (Compare Section 2-403 on good faith purchase of goods.)

A necessary part of the price for the protection of regular dealings with negotiable documents of title is an insistence that no dealing which is in any way irregular shall be recognized as a good faith purchase of the document or of any rights pertaining to it. So, where the transfer of a negotiable document fails as a negotiation because a requisite indorsement is forged or otherwise missing, the purchaser in good faith and for value may be in the anomalous position of having less rights, in part, than if he had purchased the goods themselves. True, his rights are not subject to defeat by attachment of the goods or surrender of them to his transferor [Contrast subsection (2)]; but on the other hand, he cannot acquire enforceable rights to control or receive the goods over the bailee's objection merely by giving notice to the bailee. Similarly, a consignee who makes payment to his consignor against a straight bill of lading can thereby acquire the position of a good faith purchaser of goods under provisions of the Article of this Act on Sales (Section 2-403), whereas the same payment made in good faith against an unindorsed order bill would not have such effect. The appropriate remedy of a purchaser in such a situation is to regularize his status by compelling indorsement of the document (see Section 7-506).

2. As in the case of transfer—as opposed to "due negotiation"—of negotiable documents, subsection (1) empowers the transferor of a nonnegotiable document to transfer only such rights as he himself has or has "actual authority" to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than he actually has. Subsection (2) makes it clear, however, that the transferee of a nonnegotiable document may acquire rights greater in some respects than those of his transferor by giving notice of the transfer to the bailee.

3. Subsection (3) is in part a reiteration of the carrier's immunity from liability if it honors instructions of the consignor to divert, but there is added a provision protecting the title of the substituted consignee if the latter is a buyer in ordinary course of business. A typical situation would be where a manufacturer, having shipped a lot of standardized goods to A on nonnegotiable bill of lading, diverts the goods to customer B who pays for them. Under orthodox passage-of-title-by-appropriation doctrine A might reclaim the goods from B. However, no consideration of commercial policy supports this involvement of an innocent third party in the default of the manufacturer on his contract to A; and the common commercial practice of diverting goods in transit suggests a trade understanding in accordance with this subsection.

4. Subsection (4) gives the carrier an express right to indemnity where he honors a seller's request to stop delivery.

5. Section 1-201(27) gives the bailee protection, if due diligence is exercised, similar to that found in the third paragraph of Section 33, Uniform Bills of Lading Act, where the bailee's organization has not had time to act on a notification.

Cross References:

Point 1: Sections 2-403 and 7-506.

Point 2: Section 2-403.

Point 3: Sections 7-303 and 7-403(1)(e).

Point 4: Sections 2-705 and 7-403(1)(d).

Definitional Cross References:

"Bailee". Section 7-102.

"Bill of lading". Section 1-201.

"Buyer in ordinary course of business". Section 1-201.

"Consignee". Section 7-102.
"Consignor". Section 7-102.
"Creditor". Section 1-201.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Honor". Section 1-201.
"Notification". Section 1-201.
"Purchaser". Section 1-201.
"Rights". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-504.

Changes: To include cross-references to Article 2A and for style.

Purposes: 1. Under the general principles controlling negotiable documents, it is clear that in the absence of due negotiation a transferor cannot convey greater rights than the transferor has, even when the negotiation is formally perfect. This section recognizes the transferor's power to transfer rights which the transferor has or has "actual authority to convey." Thus, where a negotiable document of title is being transferred the operation of the principle of estoppel is not recognized, as contrasted with situations involving the transfer of the goods themselves. (Compare Section 2-403 on good faith purchase of goods.) This section applies to both tangible and electronic documents of title.

A necessary part of the price for the protection of regular dealings with negotiable documents of title is an insistence that no dealing which is in any way irregular shall be recognized as a good faith purchase of the document or of any rights pertaining to it. So, where the transfer of a negotiable document fails as a negotiation because a requisite indorsement is forged or otherwise missing, the purchaser in good faith and for value may be in the anomalous position of having less rights, in part, than if the purchaser had purchased the goods themselves. True, the purchaser's rights are not subject to defeat by attachment of the goods or surrender of them to the purchaser's transferor (contrast subsection (b)); but on the other hand, the purchaser cannot acquire enforceable rights to control or receive the goods over the bailee's objection merely by giving notice to the bailee. Similarly, a consignee who makes payment to its consignor against a straight bill of lading can thereby acquire the position of a good faith purchaser of goods under provisions of the Article of this Act on Sales (Section 2-403), whereas the same payment made in good faith against an unendorsed order bill would not have such effect. The appropriate remedy of a purchaser in such a situation is to regularize its status by compelling indorsement of the document (see Section 7-506).

2. As in the case of transfer—as opposed to "due negotiation"—of negotiable documents, subsection (a) empowers the transferor of a nonnegotiable document to transfer only such rights as the transferor has or has "actual authority" to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than the transferor actually has. Subsection (b) makes it clear, however, that the transferee of a nonnegotiable document may acquire rights greater in some respects than those of his transferor by giving notice of the transfer to the bailee. New subsection (b)(3) provides for the rights of a lessee in the ordinary course.

Subsection (b)(2)&(3) require delivery of the goods. Delivery of the goods means the voluntary transfer of physical possession of the goods. See amended 2-103.

3. Subsection (c) is in part a reiteration of the carrier's immunity from liability if it honors instructions of the consignor to divert, but there is added a provision protecting the title of the substituted consignee if the latter is a buyer in ordinary course of business. A typical situation would be where a manufacturer, having shipped a lot of standardized goods to A on nonnegotiable bill of lading, diverts the goods to customer B who pays for them. Under pre-Code passage-of-title-by-appropriation doctrine A might reclaim the goods from B. However, no consideration of commercial policy supports this involvement of an innocent third party in the default of the manufacturer on his contract to A; and the common commercial practice of diverting goods in transit suggests a trade understanding in accordance with this subsection. The same result should obtain if the substituted consignee is a lessee in ordinary course. The extent of the lessee's interest in the goods is less than a buyer's interest in the goods. However, as against the first consignee and the lessee in ordinary course as the substituted consignee, the lessee's rights in the goods as granted under the lease are superior to the first consignee's rights.

4. Subsection (d) gives the carrier an express right to indemnity where the carrier honors a seller's request to stop delivery.

5. Section 1-202 gives the bailee protection, if due diligence is exercised where the bailee's organization has not had time to act on a notification.

Cross References: Point 1: Sections 2-403 and 7-506.

Point 2: Sections 2-403 and 2A-304.

Point 3: Sections 7-303, 7-403(a)(5) and 7-404.

Point 4: Sections 2-705 and 7-403(a)(4).

Point 5: Section 1-202.

Definitional Cross References: "Bailee". Section 7-102.

"Bill of lading". Section 1-201.
"Buyer in ordinary course of business". Section 1-201.
"Consignee". Section 7-102.
"Consignor". Section 7-102.
"Creditor". Section 1-201.
"Delivery". Section 1-201.
"Document of Title". Section 1-201.
"Duly negotiate". Section 7-501.
"Good faith". Section 1-201 [7-102].
"Goods". Section 7-102.
"Honor". Section 1-201.
"Lessee in ordinary course". Section 2A-103.
"Notification" Section 1-202.
"Purchaser". Section 1-201.
"Rights". Section 1-201.

§ 28:7-505. Indorser not guarantor for other parties.

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-505.
1973 Ed., § 28:7-505.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 37, Uniform Sales Act; Section 45, Uniform Warehouse Receipts Act; Section 36, Uniform Bills of Lading Act.
Changes: No substantial change.
Purposes of Changes:
The indorsement of a document of title is generally understood to be directed towards perfecting the transferee's rights rather than towards assuming additional obligations. The language of the present section, however, does not preclude the one case in which an indorsement given for value guarantees future action, namely, that in which the bailee has not yet become liable upon the document at the time of the indorsement. Under such circumstances the indorser, of course, engages that appropriate honor of the document by the bailee will occur. See Section 7-502(1)(d) as to negotiable delivery orders. However, even in such a case, once the bailee attorns to the transferee, the indorser's obligation has been fulfilled and the policy of this section excludes any continuing obligation on the part of the indorser for the bailee's ultimate actual performance.
Cross Reference:
Section 7-502.
Definitional Cross References:
"Bailee". Section 7-102.
"Document of title". Section 1-201.
"Party". Section 1-201.
Prior Uniform Statutory Provision: Former Section 7-505.

Changes: Limited to tangible documents of title.

Purposes: This section is limited to tangible documents of title as the concept of indorsement is irrelevant to electronic documents of title. Electronic documents of title will be transferred by delivery of control. Section 7-106. The indorsement of a tangible document of title is generally understood to be directed towards perfecting the transferee's rights rather than towards assuming additional obligations. The language of the present section, however, does not preclude the one case in which an indorsement given for value guarantees future action, namely, that in which the bailee has not yet become liable upon the document at the time of the indorsement. Under such circumstances the indorser, of course, engages that appropriate honor of the document by the bailee will occur. See Section 7-502(a)(4) as to negotiable delivery orders. However, even in such a case, once the bailee attorns to the transferee, the indorser's obligation has been fulfilled and the policy of this section excludes any continuing obligation on the part of the indorser for the bailee's ultimate actual performance.

Cross Reference: Sections 7-106 and 7-502.

Definitional Cross References: "Bailee". Section 7-102.
"Document of title". Section 1-201.
"Party". Section 1-201.

§ 28:7-506. Delivery without indorsement: right to compel indorsement.

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-506.

1973 Ed., § 28:7-506.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 35, Uniform Sales Act; Section 43, Uniform Warehouse Receipts Act; Section 34, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten; former requirement that transfer be "for value" eliminated.

Purposes of Changes:

1. From a commercial point of view the intention to transfer a negotiable document of title which requires an indorsement for its transfer, is incompatible with an intention to withhold such indorsement and so defeat the effective use of the document. This position is sustained by the absence of any reported case applying the prior provisions in almost forty years of decisions. Further, the preceding section and the Comment thereto make it clear that an indorsement generally imposes no responsibility on the indorser.

2. Although this section provides that delivery of a document of title without the necessary indorsement is effective as a transfer, the transferee, of course, has not regularized his position until such indorsement is supplied. Until this is done he cannot claim rights under due negotiation within the requirements of this Article (subsection (4) of Section 7-501) on "due negotiation." Similarly despite the transfer to him of his transferor's title, he cannot demand the goods from the bailee until the negotiation has been completed and the document is in proper form for surrender. See Section 7-403(2).

Cross References:

Point 1: Section 7-505.

Point 2: Sections 7-501(4) and 7-403(2).

Definitional Cross References:

"Document of title". Section 1-201.

"Rights". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-506.

Changes: Limited to tangible documents of title.

Purposes: 1. This section is limited to tangible documents of title as the concept of indorsement is irrelevant to electronic documents of title. Electronic documents of title will be transferred by delivery of control. Section 7-106. From a commercial point of view the intention to transfer a tangible negotiable document of title which requires an indorsement for its transfer, is incompatible with an intention to withhold such indorsement and so defeat the effective use of the document. Further, the preceding section and the Comment thereto make it clear that an indorsement generally imposes no responsibility on the indorser.

2. Although this section provides that delivery of a tangible document of title without the necessary indorsement is effective as a transfer, the transferee, of course, has not regularized its position until such indorsement is supplied. Until this is done the transferee cannot claim rights under due negotiation within the requirements of this Article (Section 7-501(a)(5)) on "due negotiation". Similarly, despite the transfer to the transferee of the transferor's title, the transferee cannot demand the goods from the bailee until the negotiation has been completed and the document is in proper form for surrender. See Section 7-403(c).

Cross References: Point 1: Sections 7-106 and 7-505.

Point 2: Sections 7-501(a)(5) and 7-403(c).

Definitional Cross References: "Document of title". Section 1-201.

"Rights". Section 1-201.

§ 28:7-507. Warranties on negotiation or delivery of document of title.

If a person negotiates or delivers a document of title for value, other than as a mere intermediary under § 28:7-508, unless otherwise agreed, the transferor, in addition to any warranty made in selling or leasing the goods, warrants to its immediate purchaser only that:

(1) The document is genuine;

(2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and

(3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-507.

1973 Ed., § 28:7-507.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 36, Uniform Sales Act; Section 44, Uniform Warehouse Receipts Act; Section 35, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten without change in policy.

Purposes of Changes:

1. This section omits provisions of the prior acts on warranties as to the goods as unnecessary and incomplete. It is unnecessary because such warranties derive from the contract of sale and not from the transfer of the documents. The fact that transfer of control occurs by way of a document of title does not limit or displace the ordinary obligations of a seller. The former provision, moreover, was incomplete because it did not expressly include all of the warranties which might rest upon a seller under such circumstances. This Act handles the problem by means of the precautionary reference to "any warranty made in selling the goods." If the transfer of documents attends or follows the making of a contract for the sale of goods, the general obligations on warranties as to the goods (Sections 2-312 through 2-318) are brought to bear as well as the special warranties under this section.

2. The limited warranties of a delivering or collecting intermediary are stated in Section 7-508.

Cross References:

Point 1: Sections 2-312 through 2-318.

Point 2: Section 7-508.

Definitional Cross References:

"Document". Section 7-102.

"Document of title". Section 1-201.

"Genuine". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-507.

Changes: Substitution of the word "delivery" for the word "transfer," reference leasing transactions and style.

Purposes: 1. Delivery of goods by use of a document of title does not limit or displace the ordinary obligations of a seller or lessor as to any warranties regarding the goods that arises under other law. If the transfer of documents attends or follows the making of a contract for the sale or lease of goods, the general obligations on warranties as to the goods (Sections 2-312 through 2-318 and Sections 2A-210 through 2A-316) are brought to bear as well as the special warranties under this section.

2. The limited warranties of a delivering or collecting intermediary, including a collecting bank, are stated in Section 7-508.

Cross References: Point 1: Sections 2-312 through 2-318 and 2A-310-through 2A-316.

Point 2: Section 7-508.

Definitional Cross References: "Delivery". Section 1-201.

"Document of title". Section 1-201.

"Genuine". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 1-204.

§ 28:7-508. Warranties of collecting bank as to documents of title.

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Section references. — This section is referenced in § 28:7-507.

Prior Codifications. — 1981 Ed., § 28:7-508. 1973 Ed., § 28:7-508.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. To state the limited warranties given with respect to the documents accompanying a documentary draft.

2. In warranting its authority a bank only warrants its authority from its transferor. See Section 4-203. It does not warrant the genuineness or effectiveness of the document. Compare Section 7-507.

3. Other duties and rights of banks handling documentary drafts for collection are stated in Article 4, Part 5.

Cross References:

Sections 4-203 and 7-507, 4-501 through 4-504.

Definitional Cross References:

"Collecting bank". Section 4-105.

"Delivery". Section 1-201.

"Document". Section 7-102.

"Draft". Section 5-103.

"Good faith". Section 1-201.

Prior Uniform Statutory Provision: Former Section 7-508.

Changes: Changes for style only.

Purposes: 1. To state the limited warranties given with respect to the documents accompanying a documentary draft.

2. In warranting its authority a collecting bank or other intermediary only warrants its authority from its transferor. See Section 4-203. It does not warrant the genuineness or effectiveness of the document. Compare Section 7-507.

3. Other duties and rights of banks handling documentary drafts for collection are stated in Article 4, Part 5. On the meaning of draft, see Section 4-104 and Section 5-102, comment 11.

Cross References: Sections 4-104, 4-203, 4-501 through 4-504, 5-102, and 7-507.

Definitional Cross References: "Collecting bank". Section 4-105.

"Delivery". Section 1-201.

"Document of title". Section 1-102.

"Documentary draft". Section 4-104.

"Intermediary bank". Section 4-105.

"Good faith". Section 1-201 [7-102].

§ 28:7-509. Adequate compliance with commercial contract.

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by Article 2, 2A, or 5.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-509.

1973 Ed., § 28:7-509.

Legislative history of Law 19-299. — See note to § 28:7-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

To cross-refer to the Articles of this Act which deal with the substantive issues of the type of document of title required under the contract entered into by the parties.

Cross References: Articles 2 and 5.

Definitional Cross References:

"Contract for sale". Section 2-106.

"Document". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-509.

Changes: To reference Article 2A.

Purposes: To cross-refer to the Articles of this Act which deal with the substantive issues of the type of document of title required under the contract entered into by the parties.

Cross References: Articles 2, 2A and 5.

Definitional Cross References: "Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Lease". Section 2A-103.

Part 6. Warehouse Receipts and Bills of Lading: Miscellaneous Provisions.

§ 28:7-601. Lost, stolen, or destroyed documents of title.

(a) If a document of title is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with the order. If the document was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting of security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorney's fees in any action under this subsection.

(b) A bailee that, without a court order, delivers goods to a person claiming a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery which files a notice of claim within one year after the delivery.

(Dec. 30, 1963, 77 Stat. 730, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-601.

1973 Ed., § 28:7-601.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 14, Uniform Warehouse Receipts Act; Section 17, Uniform Bills of Lading Act.

Changes: General revision. Principal innovations include: affirmation of bailee's privilege to deliver to claimant without resort to judicial proceedings if the bailee acts in good faith and is willing to take the full risk of loss in case the lost document turns up in the hands of an innocent purchaser; explicit authorization to the court to order bailee to issue a substitute document rather than make physical delivery of the goods; inclusion of "stolen" as well as lost documents; extension of section to non-negotiable documents.

Purposes of Changes: The purposes of the changes insofar as they are not self-evident are as follows:

1. As to bailee's privilege to deliver without court order, doubt had arisen as to the propriety of such action under Section 54 of the Uniform Warehouse Receipts Act, which made it a crime to deliver goods covered by negotiable receipts without taking up the receipts "except in the cases provided for in Section 14" (the lost receipts section). This has been interpreted by one court as exempting from criminal liability only if the judicial procedure of Section 14 was followed. Dahl v. Winter-Truesdell-Diercks Co., 61 N.D. 84, 237 N.W. 202 (1931). Although the criminal provisions are not being re-enacted in this Act (and the Uniform Bills of Lading Act never did include such a criminal provision), it seems advisable to clarify the legality of the well established commercial practice of bailees to make delivery where they are satisfied that the claimant is the person entitled under a lost document. Since the bailee remains liable on the document in such cases, he will usually insist that the claimant provide an indemnity bond.

2. The old acts provide only for compulsory delivery of goods; this Section provides also for compulsory issuance of a substitute document. If continuance of the bailment is desirable there is no reason to require the goods to be withdrawn and redeposited in order to secure a negotiable document. The present acts would probably be so interpreted. Section 20 of the Federal Warehouse Act and some state laws expressly require issuance of a new receipt on proof of loss and posting of bond.

3. Claimants on non-negotiable instruments are permitted to avail themselves of this procedure because straight bills of lading sometimes contain provisions that the goods shall not be delivered except upon production of the bill. If the carrier should choose to insist upon production of the bill, the consignee should have some means of compelling delivery on satisfactory proof of entitlement.

Ordinarily no security would be necessary to indemnify a bailee in delivering to the person named in a non-negotiable document. But disputes as to negotiability may arise, in which case if there is a reasonable doubt on the point the bailee should be protected against the possibility that the missing document would, in the hands of an innocent purchaser for value, be held negotiable.

4. It seems unnecessary to state, as do the present acts, that the court shall act "on satisfactory proof of such loss or destruction." The right of action created by the section is conditioned on a document being lost, stolen or destroyed. Plaintiff must of course bring himself within the section. There is nothing in the language of the old acts to suggest that they intended to impose anything but the normal burden of proof on the plaintiff in such proceedings.

5. Subsection (2) makes it clear that after delivery without court order the bailee remains liable for actual damages. Liability for conversion is provided where the delivery is dishonest, but excluded where a filed classification or tariff is followed in good faith, or where the described bond is posted in good faith and no classification or tariff is filed. Liability for conversion in other cases is left to judicial decision.

Definitional Cross References:

"Bailee". Section 7-102.
"Bill of lading". Section 1-201.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Good faith". Section 1-201.
"Goods". Section 7-102.
"Person". Section 1-201.
"Warehouse receipt". Section 1-201.
"Warehouseman". Section 7-102.

Prior Uniform Statutory Provision: Former Section 7-601.

Changes: To accommodate electronic documents; to provide flexibility to courts similar to the flexibility in Section 3-309; to update to the modern era of deregulation; and for style.

Purposes: 1. Subsection (a) authorizes courts to order compulsory delivery of the goods or compulsory issuance of a substitute document. Compare Section 7-402. Using language similar to that found in Section 3-309, courts are given discretion as to what is adequate protection when the lost, stolen or destroyed document was negotiable or whether security should be required when the lost, stolen or destroyed document was nonnegotiable. In determining whether a party is adequately protected against loss in the case of a negotiable document, the court should consider the likelihood that the party will suffer a loss. The court is also given discretion as to the bailee's costs

and attorney fees. The rights and obligations of a bailee under this section depend upon whether the document of title is lost, stolen or destroyed and is in addition to the ability of the bailee to bring an action for interpleader. See Section 7-603.

2. Courts have the authority under this section to order a substitute document for either tangible or electronic documents. If the substitute document will be in a different medium than the original document, the court should fashion its order in light of the requirements of Section 7-105.

3. Subsection (b) follows prior Section 7-601 in recognizing the legality of the well-established commercial practice of bailees making delivery in good faith when they are satisfied that the claimant is the person entitled under a missing (i.e. lost, stolen, or destroyed) negotiable document. Acting without a court order, the bailee remains liable on the original negotiable document and, to avoid conversion liability, the bailee may insist that the claimant provide an indemnity bond. Cf. Section 7-403.

4. Claimants on non-negotiable instruments are permitted to avail themselves of the subsection (a) procedure because straight (non-negotiable) bills of lading sometimes contain provisions that the goods shall not be delivered except upon production of the bill. If the carrier should choose to insist upon production of the bill, the consignee should have some means of compelling delivery on satisfactory proof of entitlement. Without a court order, a bailee may deliver, subject to Section 7-403, to a person claiming goods under a non-negotiable document that the same person claims is lost, stolen, or destroyed.

5. The bailee's lien should be protected when a court orders delivery of the goods pursuant to this section.

Cross References: Point 1: Sections 3-309, 7-402 and 7-603.

Point 2: Section 7-105.

Point 3: Section 7-403.

Point 4: Section 7-403.

Point 5: Sections 7-209 and 7-307.

Definitional Cross References: "Bailee". Section 7-102.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 1-201 [7-102].

"Goods". Section 7-102.

"Person". Section 1-201.

§ 28:7-602. Judicial process against goods covered by negotiable document of title.

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

(Dec. 30, 1963, 77 Stat. 731, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-602.

1973 Ed., § 28:7-602.

Legislative history of Law 19-299. — See note to § 28:7-601.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provisions: Section 25, Uniform Warehouse Receipts Act; Section 24, Uniform Bills of Lading Act.

Changes: Consolidated and rewritten.

Purposes of Changes:

1. The purpose of the section is to protect the bailee from conflicting claims of the document holder and the judgment creditors of the person who deposited the goods. The rights of the former prevail unless, in effect, the judgment creditors immobilize the negotiable document. However, if the document was issued upon deposit of the goods by a person who had no power to dispose of the goods so that the docu-

ment is ineffective to pass title, judgment liens are valid to the extent of the debtor's interest in the goods.

2. The last sentence covers the possibility that the holder of a document who has been enjoined from negotiating it will violate the injunction by negotiating to an innocent purchaser for value. In such case the lien will be defeated.

Cross Reference:

Point 1: Section 7-503.

Definitional Cross References:

"Bailee". Section 7-102.
"Delivery". Section 1-201.
"Document". Section 7-102.
"Goods". Section 7-102.
"Notice". Section 1-201.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Value". Section 1-201.

Prior Uniform Statutory Provisions: Former Section 7-602.

Changes: Changes to accommodate electronic documents of title and for style.

Purposes: 1. The purpose of the section is to protect the bailee from conflicting claims of the document of title holder and the judgment creditors of the person who deposited the goods. The rights of the former prevail unless, in effect, the judgment creditors immobilize the negotiable document of title through the surrender of possession of a tangible document or control of an electronic document. However, if the document of title was issued upon deposit of the goods by a person who had no power to dispose of the goods so that the document is ineffective to pass title, judgment liens are valid to the extent of the debtor's interest in the goods.

2. The last sentence covers the possibility that the holder of a document who has been enjoined from negotiating it will violate the injunction by negotiating to an innocent purchaser for value. In such case the lien will be defeated.

Cross Reference: Sections 7-106 and 7-501 through 7-503.

Definitional Cross References: "Bailee". Section 7-102.
"Delivery". Section 1-201.
"Document of title". Section 1-201.
"Goods". Section 7-102.
"Notice". Section 1-202.
"Person". Section 1-201.
"Purchase". Section 1-201.
"Value". Section 1-204.

§ 28:7-603. Conflicting claims; interpleader.

If more than one person claims title to or possession of the goods, the bailee is excused from delivery until the bailee has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action.

(Dec. 30, 1963, 77 Stat. 731, Pub. L. 88-243, § 1; Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Prior Codifications. — 1981 Ed., § 28:7-603.
1973 Ed., § 28:7-603.

Legislative history of Law 19-299. — See note to § 28:7-601.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 16 and 17, Uniform Warehouse Receipts Act; Sections 20 and 21, Uniform Bills of Lading Act.

Changes: Consolidation without substantial change.

Purposes of Changes:

The section enables a bailee faced with conflicting claims to the goods to compel the claimants to litigate their claims with each other rather than with him.

Definitional Cross References:

"Action". Section 1-201.
"Bailee". Section 7-102.
"Delivery". Section 1-201.
"Goods". Section 7-102.
"Person". Section 1-201.
"Reasonable time". Section 1-204.

Prior Uniform Statutory Provisions: Former Section 7-603.

Changes: Changes for style only.

Purposes: 1. The section enables a bailee faced with conflicting claims to the goods to compel the claimants to litigate their claims with each other rather than with the bailee. The bailee is protected from legal liability when the bailee complies with court orders from the interpleader. See e.g. Northwestern National

Sales, Inc. v. Commercial Cold Storage, Inc., 162 Ga. App. 741, 293 S.E.2d. 30 (1982).

2. This section allows the bailee to bring an interpleader action but does not provide an exclusive basis for allowing interpleader. If either state or federal procedural rules allow an interpleader in other situations, the bailee may commence an interpleader under those rules. Even in an interpleader to which this section applies, the state or federal process of interpleader applies to the bailee's action for interpleader. For example, state or federal interpleader statutes or rules may permit a bailee to protect its lien or to seek attorney's fees and costs in the interpleader action.

Cross reference: Point 1: Section 7-403.

Definitional Cross References: "Action". Section 1-201.

"Bailee". Section 7-102.

"Delivery". Section 1-201.

"Goods". Section 7-102.

"Person". Section 1-201.

"Reasonable time". Section 1-205.

CASE NOTES

Analysis

Defenses.
In general.

Defenses.

It was unreasonable for storage company to anticipate that owner's ex-husband would succeed in claim of title to clothing and other personal items belonging to owner and their child, so that storage company was precluded from asserting defense of adverse claims to owner's action for recovery of goods. D.C. Code 1981, § 28:7-603. Security Storage Co. v. Cave, 528 A.2d 880, 1987 D.C. App. LEXIS 390 (1987).

In general.

Action for interpleader filed by storage company four months after owner's delivery request was not filed within a reasonable time and thus would not excuse company's nondelivery. D.C. Code 1981, § 28:7-603. Security Storage Co. v. Cave, 528 A.2d 880, 1987 D.C. App. LEXIS 390 (1987).

Part 7. Miscellaneous Provisions.

§ 28:7-701. Applicability.

This article applies to a document of title that is issued or a bailment that arises on or after the effective date of this article. This article does not apply to a document of title that is issued or a bailment that arises before the effective date of this article even if the document of title or bailment would be subject to this article if the document of title had been issued or bailment had arisen on or after the effective date of this article. This article does not apply to a right of action that has accrued before the effective date of this article.

(Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

This Act will apply prospectively only to documents of title issued or bailments that arise after the effective date of the Act.

§ 28:7-702. Savings clause.

A document of title issued or a bailment that arises before the effective date

of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute or other rule amended or repealed by this act as if the amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute or other rule.

(Apr. 27, 2013, D.C. Law 19-299, § 9, 60 DCR 2634.)

Legislative history of Law 19-299. — See note to § 28:7-701.

UNIFORM COMMERCIAL CODE COMMENT

This Act will apply prospectively only to documents of title issued or bailments that arise after the effective date of the Act. To the extent that issues arise based upon documents of title or rights or obligations that arise prior to the effective date of this Act, prior law will apply to resolve those issues.

Article 8. Investment Securities.

Part 1. Short Title and General Matters.

§ 28:8-101. Short title.

This article may be cited as "Uniform Commercial Code—Investment Securities."

(Dec. 30, 1963, 77 Stat. 732, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-101.

1973 Ed., § 28:8-101.

Legislative history of Law 9-196. — Law 9-196, the "Uniform Commercial Code Investment Securities Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-20, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-321 and transmitted to both Houses of Congress for its review. D.C. Law 9-196 became effective on March 16, 1993.

Legislative history of Law 9-196. — Law 9-196, the "Uniform Commercial Code Investment Securities Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-20, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-321 and transmitted to both Houses of Congress for its review. D.C. Law 9-196 became effective on March 16, 1993.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

§ 28:8-102. Definitions.

(a) For the purposes of this article, the term:

(1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) "Bearer form," as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) "Certificated security" means a security that is represented by a certificate.

(5) "Clearing corporation" means:

(A) A person that is registered as a "clearing agency" under the federal securities laws;

(B) A federal reserve bank; or

(C) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation,

including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) "Communicate" means to:

(A) Send a signed writing; or

(B) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of § 28:8-501(b)(2) or (3), that person is the entitlement holder.

(8) "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9)(A) "Financial asset," except as otherwise provided in § 28:8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this article.

(B) As context requires, the term "financial asset" means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) Repealed.

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form," as applied to a certificated security, means a form in which:

(A) The security certificate specifies a person entitled to the security; and

(B) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

(A) A clearing corporation; or

(B) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security," except as otherwise provided in § 28:8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer which:

(A) Is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(B) Is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(C)(i) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(ii) Is a medium for investment and by its terms expressly provides that it is a security governed by this article.

(16) "Security certificate" means a certificate representing a security.

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5.

(18) "Uncertificated security" means a security that is not represented by a certificate.

(b) Other definitions applying to this article and the sections in which they appear are:

(1) "Appropriate person".	§ 28:8-107.
(2) "Control".	§ 28:8-106.
(3) "Delivery".	§ 28:8-301.
(4) "Investment company security".	§ 28:8-103.
(5) "Issuer".	§ 28:8-201.
(6) "Overissue".	§ 28:8-210.
(7) "Protected purchaser".	§ 28:8-303.
(8) "Securities account".	§ 28:8-501.

(c) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(d) The characterization of a person, business, or transaction for purposes of this article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

(Dec. 30, 1963, 77 Stat. 732, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Apr. 9, 1997, D.C. Law 11-255, § 27(yy), 44 DCR 1271; Apr. 27, 2013, D.C. Law 19-299, § 10(a), 60 DCR 2634.)

Section references. — This section is referenced in § 1-204.90, § 28:4-104, § 28:8-103, and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:8-102.

1973 Ed., § 28:8-102.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 repealed (a)(10), defining "Good faith".

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to

both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. "Adverse claim." The definition of the term "adverse claim" has two components. First, the term refers only to property interests. Second, the term means not merely that a person has a property interest in a financial asset but that it is a violation of the claimant's property interest for the other person to hold or transfer the security or other financial asset.

The term adverse claim is not, of course, limited to ownership rights, but extends to other property interests established by other law. A security interest, for example, would be an adverse claim with respect to a transferee from the debtor since any effort by the secured party to enforce the security interest against the property would be an interference with the transferee's interest.

The definition of adverse claim in the prior version of Article 8 might have been read to suggest that any wrongful action concerning a security, even a simple breach of contract, gave rise to an adverse claim. Insofar as such cases as Fallon v. Wall Street Clearing Corp., 586 N.Y.S.2d 953, 182 A.D.2d 245, (1992) and Pentech Intl. v. Wall St. Clearing Co., 983 F.2d 441 (2d Cir. 1993), were based on that view, they are rejected by the new definition which explicitly limits the term adverse claim to property interests. Suppose, for example, that A contracts to sell or deliver securities to B, but fails to do so and instead sells or pledges the securities to C. B, the promisee, has an action against A for breach of contract, but absent unusual circumstances the action for breach would not give rise to a property interest in the securities. Accordingly, B does not have an adverse claim. An adverse claim might, however, be based upon principles of equitable remedies that give rise to property claims. It would, for example, cover a right established by other law to rescind a transaction in which securities were transferred. Suppose, for example, that A holds securities and is induced by B's fraud to transfer them to B. Under the law of contract or restitution, A may have a right to rescind the transfer, which gives A a property claim to the securities. If so, A has an adverse claim to the securities in B's hands. By contrast, if B had committed no fraud, but had merely committed a breach of contract in connection with the transfer from A to B, A may have only a right to damages for breach, not a right to rescind. In that case, A would not have an adverse claim to the securities in B's hands.

2. "Bearer form." The definition of "bearer form" has remained substantially unchanged since the early drafts of the original version of Article 8. The requirement that the certificate be payable to bearer by its terms rather than by an indorsement has the effect of preventing instruments governed by other law, such as chattel paper or Article 3 negotiable instruments, from being inadvertently swept into the Article 8 definition of security merely by virtue of blank indorsements. Although the other elements of the definition of security in Section 8-102(a)(14) probably suffice for that purpose in any event, the language used in the prior version of Article 8 has been retained.

3. "Broker." Broker is defined by reference to the definitions of broker and dealer in the federal securities laws. The only difference is that banks, which are excluded from the federal securities law definition, are included in the Article 8 definition when they perform functions that would bring them within the federal securities law definition if it did not have the clause excluding banks. The definition covers both those who act as agents ("brokers" in securities parlance) and those who act as principals ("dealers" in securities parlance). Since the definition refers to persons "defined" as brokers or dealers under the federal securities law, rather than to persons required to "register" as brokers or dealers under the federal securities law, it covers not only registered brokers and dealers but also those exempt from the registration requirement, such as purely intrastate brokers. The only substantive rules that turn on the defined term broker are one provision of the section on warranties, Section 8-108(i), and the special perfection rule in Article 9 for security interests granted by brokers, Section 9-115(4)(c).

4. "Certificated security." The term "certificated security" means a security that is represented by a security certificate.

5. "Clearing corporation." The definition of clearing corporation limits its application to entities that are subject to a rigorous regulatory framework. Accordingly, the definition includes only federal reserve banks, persons who are registered as "clearing agencies" under the federal securities laws (which impose a comprehensive system of regulation of the activities and rules of clearing agencies), and other entities subject to a comparable system of regulatory oversight.

6. "Communicate." The term "communicate" assures that the Article 8 rules will be sufficiently flexible to adapt to changes in information technology. Sending a signed writing always suffices as a communication, but the parties can agree that a different means of transmitting information is to be used. Agreement is defined in Section 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance." Thus, use of an information transmission method might be found to be authorized by agreement, even though the parties have not explicitly so specified in a formal agreement. The term communicate is used in Sections 8-102(a)(7) (definition of entitlement order), 8-102(a)(11) (definition of instruction), and 8-403 (demand that issuer not register transfer).

7. "Entitlement holder." This term designates those who hold financial assets through intermediaries in the indirect holding system. Because many of the rules of Part 5 impose duties on securities intermediaries in favor of entitlement holders, the definition of entitlement holder is, in most cases, limited to the person specifically designated as such on the records of the intermediary. The last sentence of the definition covers the relatively unusual cases where a person may acquire a security entitlement under Section 8-501 even though the person may not be specifically designated as an entitlement holder on the records of the securities intermediary.

A person may have an interest in a security entitlement, and may even have the right to give entitlement orders to the securities intermediary with respect to it, even though the person is not the entitlement holder. For example, a person who holds securities through a securities account in its own name may have given discretionary trading authority to another person, such as an investment adviser. Similarly, the control provisions in Section 8-106 and the related provisions in Article 9 are designed to facilitate transactions in which a person who holds securities through a securities account uses them as collateral in an arrangement where the securities intermediary has agreed that if the secured party so directs the intermediary will dispose of the positions. In such arrangements, the debtor remains the entitlement holder but has agreed that the secured party can initiate entitlement orders. Moreover, an entitlement holder may be acting for another person as a nominee, agent, trustee, or in another capacity. Unless the entitlement holder is itself acting as a securities intermediary for the other person, in which case the other person would be an entitlement holder with respect to the securities entitlement, the relationship between an entitlement holder and another person for whose benefit the entitlement holder holds a securities entitlement is governed by other law.

8. "Entitlement order." This term is defined as a notification communicated to a securities intermediary directing transfer or redemption of the financial asset to which an entitlement holder has a security entitlement. The term is used in the rules for the indirect holding system in a fashion analogous to the use of the terms "indorsement" and "instruction" in the rules for the direct holding system. If a person directly holds a certificated security in registered form and wishes to transfer it, the means of transfer is an indorsement. If a person directly holds an uncertificated security and wishes to transfer it, the means of transfer is an instruction. If a person holds a security entitlement, the means of disposition is an entitlement order. An entitlement order includes a direction under Section 8-508 to the securities intermediary to transfer a financial asset to the account of the entitlement holder at another financial intermediary or to cause the financial asset to be transferred to the entitlement holder in the direct holding system (e.g., the delivery of a securities certificate registered in the name of the former entitlement holder).

As noted in Comment 7, an entitlement order need not be initiated by the entitlement holder in order to be effective, so long as the entitlement holder has authorized the other party to initiate entitlement orders. See Section 8-107(b).

9. "Financial asset." The definition of "financial asset," in conjunction with the definition of "securities account" in Section 8-501, sets the scope of the indirect holding system rules of Part 5 of Revised Article 8. The Part 5 rules apply not only to securities held through intermediaries, but also to other financial assets held through intermediaries. The term financial asset is defined to include not only securities but also a broader category of obligations, shares, participations, and interests.

Having separate definitions of security and financial asset makes it possible to separate the question of the proper scope of the traditional Article 8 rules from the question of the proper scope of the new indirect holding system rules. Some forms of financial assets should be covered by the indirect holding system rules of Part 5, but not by the rules of Parts 2, 3, and 4. The term financial asset is used to cover such property. Because the term security entitlement is defined in terms of financial assets rather than securities, the rules concerning security entitlements set out in Part 5 of Article 8 and in Revised Article 9 apply to the broader class of financial assets.

The fact that something does or could fall within the definition of financial asset does not, without more, trigger Article 8 coverage. The

indirect holding system rules of Revised Article 8 apply only if the financial asset is in fact held in a securities account, so that the interest of the person who holds the financial asset through the securities account is a security entitlement.

Thus, questions of the scope of the indirect holding system rules cannot be framed as "Is such-and-such a 'financial asset' under Article 8?" Rather, one must analyze whether the relationship between an institution and a person on whose behalf the institution holds an asset falls within the scope of the term securities account as defined in Section 8-501. That question turns in large measure on whether it makes sense to apply the Part 5 rules to the relationship.

The term financial asset is used to refer both to the underlying asset and the particular means by which ownership of that asset is evidenced. Thus, with respect to a certificated security, the term financial asset may, as context requires, refer either to the interest or obligation of the issuer or to the security certificate representing that interest or obligation. Similarly, if a person holds a security or other financial asset through a securities account, the term financial asset may, as context requires, refer either to the underlying asset or to the person's security entitlement.

10. "Good faith." Good faith is defined in Article 8 for purposes of the application to Article 8 of Section 1-203, which provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The sole function of the good faith definition in Revised Article 8 is to give content to the Section 1-203 obligation as it applies to contracts and duties that are governed by Article 8. The standard is one of "reasonable commercial standards of fair dealing." The reference to commercial standards makes clear that assessments of conduct are to be made in light of the commercial setting. The substantive rules of Article 8 have been drafted to take account of the commercial circumstances of the securities holding and processing system. For example, Section 8-115 provides that a securities intermediary acting on an effective entitlement order, or a broker or other agent acting as a conduit in a securities transaction, is not liable to an adverse claimant, unless the claimant obtained legal process or the intermediary acted in collusion with the wrongdoer. This, and other similar provisions, see Sections 8-404 and 8-503(e), do not depend on notice of adverse claims, because it would impair rather than advance the interest of investors in having a sound and efficient securities clearance and settlement system to require intermediaries to investigate the propriety of the transactions they are processing. The good faith obligation does not supplant the standards of conduct established in provisions of this kind.

In Revised Article 8, the definition of good faith is not germane to the question whether a purchaser takes free from adverse claims. The rules on such questions as whether a purchaser who takes in suspicious circumstances is disqualified from protected purchaser status are treated not as an aspect of good faith but directly in the rules of Section 8-105 on notice of adverse claims.

11. "Indorsement" is defined as a signature made on a security certificate or separate document for purposes of transferring or redeeming the security. The definition is adapted from the language of Section 8-308(1) of the prior version and from the definition of indorsement in the Negotiable Instruments Article, see Section 3-204(a). The definition of indorsement does not include the requirement that the signature be made by an appropriate person or be authorized. Those questions are treated in the separate substantive provision on whether the indorsement is effective, rather than in the definition of indorsement. See Section 8-107.

12. "Instruction" is defined as a notification communicated to the issuer of an uncertificated security directing that transfer be registered or that the security be redeemed. Instructions are the analog for uncertificated securities of indorsements of certificated securities.

13. "Registered form." The definition of "registered form" is substantially the same as in the prior version of Article 8. Like the definition of bearer form, it serves primarily to distinguish Article 8 securities from instruments governed by other law, such as Article 3.

14. "Securities intermediary." A "securities intermediary" is a person that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. The most common examples of securities intermediaries would be clearing corporations holding securities for their participants, banks acting as securities custodians, and brokers holding securities on behalf of their customers. Clearing corporations are listed separately as a category of securities intermediary in subparagraph (i) even though in most circumstances they would fall within the general definition in subparagraph (ii). The reason is to simplify the analysis of arrangements such as the NSCC-DTC system in which NSCC performs the comparison, clearance, and netting function, while DTC acts as the depository. Because NSCC is a registered clearing agency under the federal securities laws, it is a clearing corporation and hence a securities intermediary under Article 8, regardless of whether it is at any particular time or in any particular aspect of its operations holding securities on behalf of its participants.

The terms securities intermediary and broker have different meanings. Broker means a person engaged in the business of buying and selling securities, as agent for others or as principal. Securities intermediary means a person maintaining securities accounts for others. A stockbroker, in the colloquial sense, may or may not be acting as a securities intermediary.

The definition of securities intermediary includes the requirement that the person in question is "acting in the capacity" of maintaining securities accounts for others. This is to take account of the fact that a particular entity, such as a bank, may act in many different capacities in securities transactions. A bank may act as a transfer agent for issuers, as a securities custodian for institutional investors and private investors, as a dealer in government securities, as a lender taking securities as collateral, and as a provider of general payment and collection services that might be used in connection with securities transactions. A bank that maintains securities accounts for its customers would be a securities intermediary with respect to those accounts; but if it takes a pledge of securities from a borrower to secure a loan, it is not thereby acting as a securities intermediary with respect to the pledged securities, since it holds them for its own account rather than for a customer. In other circumstances, those two functions might be combined. For example, if the bank is a government securities dealer it may maintain securities accounts for customers and also provide the customers with margin credit to purchase or carry the securities, in much the same way that brokers provide margin loans to their customers.

15. "Security." The definition of "security" has three components. First, there is the subparagraph (i) test that the interest or obligation be fully transferable, in the sense that the issuer either maintains transfer books or the obligation or interest is represented by a certificate in bearer or registered form. Second, there is the subparagraph (ii) test that the interest or obligation be divisible, that is, one of a class or series, as distinguished from individual obligations of the sort governed by ordinary contract law or by Article 3. Third, there is the subparagraph (iii) functional test, which generally turns on whether the interest or obligation is, or is of a type, dealt in or traded on securities markets or securities exchanges. There is, however, an "opt-in" provision in subparagraph (iii) which permits the issuer of any interest or obligation that is "a medium of investment" to specify that it is a security governed by Article 8.

The divisibility test of subparagraph (ii) applies to the security—that is, the underlying intangible interest—not the means by which that interest is evidenced. Thus, securities issued in book-entry only form meet the divisibility test because the underlying intangible interest is divisible via the mechanism of the indirect holding system. This is so even though the clearing corporation is the only eligible direct holder of the security.

The third component, the functional test in subparagraph (iii), provides flexibility while ensuring that the Article 8 rules do not apply to interests or obligations in circumstances so unconnected with the securities markets that parties are unlikely to have thought of the possibility that Article 8 might apply. Subparagraph (iii)(A) covers interests or obligations that either are dealt in or traded on securities exchanges or securities markets, or are of a type dealt in or traded on securities exchanges or securities markets. The "is dealt in or traded on" phrase eliminates problems in the characterization of new forms of securities which are to be traded in the markets, even though no similar type has previously been dealt in or traded in the markets. Subparagraph (iii)(B) covers the broader category of media for investment, but it applies only if the terms of the interest or obligation specify that it is an Article 8 security. This opt-in provision allows for deliberate expansion of the scope of Article 8.

Section 8-103 contains additional rules on the treatment of particular interests as securities or financial assets.

16. "Security certificate." The term "security" refers to the underlying asset, e.g., 1000 shares of common stock of Acme, Inc.

The term "security certificate" refers to the paper certificates that have traditionally been used to embody the underlying intangible interest.

17. "Security entitlement" means the rights and property interest of a person who holds securities or other financial assets through a securities intermediary. A security entitlement is both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary. A security entitlement is not, however, a specific property interest in any financial asset held by the securities intermediary or by the clearing corporation through which the securities intermediary holds the financial asset. See Sections 8-104(c) and 8-503. The formal definition of security entitlement set out in subsection (a)(17) of this section is a cross-reference to the rules of Part 5. In a sense, then, the entirety of Part 5 is the definition of security entitlement. The Part 5 rules specify the rights and property interest that comprise a security entitlement.

18. "Uncertificated security." The term "uncertificated security" means a security that is not represented by a security certificate. For uncertificated securities, there is no need to draw any distinction between the underlying asset and the means by which a direct holder's

interest in that asset is evidenced. Compare "certificated security" and "security certificate."

Definitional Cross References

"Agreement". Section 1-201(3).
"Bank". Section 1-201(4).
"Person". Section 1-201(30).
"Send". Section 1-201(38).
"Signed". Section 1-201(39).
"Writing". Section 1-201(46).

CASE NOTES

"Security".

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

§ 28:8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. The term "investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this article and not by Article 3, even though it also meets the requirements of that article. However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in § 28:9-102(a)(15), is not a security or a financial asset.

(g) A document of title is not a financial asset unless § 28:8-102(a)(9)(iii) applies.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(1), 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 10(b), 60 DCR 2634.)

Section references. — This section is referenced in § 28:8-102.

Prior Codifications. — 1981 Ed., § 28:8-103.

1973 Ed., § 28:8-103.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

The 2013 amendment by D.C. Law 19-299 added (g).

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 13-201. — Law 13-201, the "Uniform Commercial Code Secured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

Legislative history of Law 19-299. — See note to § 28:8-102.

UNIFORM COMMERCIAL CODE COMMENT

1. This section contains rules that supplement the definitions of "financial asset" and "security" in Section 8-102. The Section 8-102 definitions are worded in general terms, because they must be sufficiently comprehensive and flexible to cover the wide variety of investment products that now exist or may develop. The rules in this section are intended to foreclose interpretive issues concerning the application of the general definitions to several specific investment products. No implication is made about the application of the Section 8-102 definitions to investment products not covered by this section.

2. Subsection (a) establishes an unconditional rule that ordinary corporate stock is a security. That is so whether or not the particular issue is dealt in or traded on securities exchanges or in securities markets. Thus, shares of closely held corporations are Article 8 securities.

3. Subsection (b) establishes that the Article 8 term "security" includes the various forms of the investment vehicles offered to the public by investment companies registered as such under the federal Investment Company Act of 1940, as amended. This clarification is prompted principally by the fact that the typical transaction in shares of open-end investment companies is an issuance or redemption, rather than a transfer of shares from one person to another as is the case with ordinary corporate stock. For similar reasons, the definitions of indorsement, instruction, and entitlement order in Section 8-102 refer to "redemptions" as well as "transfers," to ensure that the Article 8 rules on such matters as signature guaranties, Section 8-306, assurances, Sections 8-402 and 8-507, and effectiveness, Section 8-107, apply to directions to redeem mutual fund shares. The exclusion of insurance products is needed because some insurance company separate accounts are registered under the Investment Company Act of 1940, but these are not traded under the usual Article 8 mechanics.

4. Subsection (c) is designed to foreclose interpretive questions that might otherwise be raised by the application of the "of a type" language of Section 8-102(a)(15)(iii) to partnership interests. Subsection (c) establishes the general rule that partnership interests or shares of limited liability companies are not Article 8 securities unless they are in fact dealt in or traded on securities exchanges or in securities markets. The issuer, however, may explicitly "opt-in" by specifying that the interests or shares are securities governed by Article 8. Partnership interests or shares of limited liability companies are included in the broader term "financial asset." Thus, if they are held through a securities account, the indirect holding system rules of Part 5 apply, and the interest of a person who holds them through such an account is a security entitlement.

5. Subsection (d) deals with the line between Article 3 negotiable instruments and Article 8 investment securities. It continues the rule of the prior version of Article 8 that a writing that meets the Article 8 definition is covered by Article 8 rather than Article 3, even though it also meets the definition of negotiable instrument. However, subsection (d) provides that an Article 3 negotiable instrument is a "financial asset" so that the indirect holding system rules apply if the instrument is held through a securities intermediary. This facilitates making items such as money market instruments eligible for deposit in clearing corporations.

6. Subsection (e) is included to clarify the treatment of investment products such as traded stock options, which are treated as financial assets but not securities. Thus, the indirect holding system rules of Part 5 apply, but the direct holding system rules of Parts 2, 3, and 4 do not.

7. Subsection (f) excludes commodity contracts from all of Article 8. However, the Article

9 rules on security interests in investment property do apply to security interests in commodity positions. See Section 9-115 and Comment 8 thereto. "Commodity contract" is defined in Section 9-115.

Definitional Cross References

"Clearing corporation". Section 8-102(a)(5).
"Commodity contract". Section 9-115.
"Financial asset". Section 8-102(a)(9).
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).

§ 28:8-104. Acquisition of security or financial asset or interest therein.

(a) A person acquires a security or an interest therein, under this article, if:

(1) The person is a purchaser to whom a security is delivered pursuant to § 28:8-301; or

(2) The person acquires a security entitlement to the security pursuant to § 28:8-501.

(b) A person acquires a financial asset, other than a security, or an interest therein, under this article, if the person acquires a security entitlement to the financial asset.

(c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in Part 5, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in § 28:8-503.

(d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b) of this section.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-104.

1973 Ed., § 28:8-104.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section lists the ways in which interests in securities and other financial assets are acquired under Article 8. In that sense, it describes the scope of Article 8. Subsection (a) describes the two ways that a person may acquire a security or interest therein under this Article: (1) by delivery (Section 8-301), and (2) by acquiring a security entitlement. Each of these methods is described in detail in the relevant substantive provisions of this Article. Part 3, beginning with the definition of "delivery" in Section 8-301, describes how interests in securities are acquired in the direct holding system. Part 5, beginning with the rules of Section 8-501 on how security entitlements are acquired, describes how interests in securities are acquired in the indirect holding system.

Subsection (b) specifies how a person may acquire an interest under Article 8 in a financial asset other than a security. This Article deals with financial assets other than securities only insofar as they are held in the indirect holding system. For example, a bankers' acceptance falls within the definition of "financial asset," so if it is held through a securities account the entitlement holder's right to it is a security entitlement governed by Part 5. The bankers' acceptance itself, however, is a nego-

tiable instrument governed by Article 3, not by Article 8. Thus, the provisions of Parts 2, 3, and 4 of this Article that deal with the rights of direct holders of securities are not applicable. Article 3, not Article 8, specifies how one acquires a direct interest in a bankers' acceptance. If a bankers' acceptance is delivered to a clearing corporation to be held for the account of the clearing corporation's participants, the clearing corporation becomes the holder of the bankers' acceptance under the Article 3 rules specifying how negotiable instruments are transferred. The rights of the clearing corporation's participants, however, are governed by Part 5 of this Article.

2. The distinction in usage in Article 8 between the term "security" (and its correlatives "security certificate" and "uncertificated security") on the one hand, and "security entitlement" on the other, corresponds to the distinction between the direct and indirect holding systems. For example, with respect to certificated securities that can be held either directly or through intermediaries, obtaining possession of a security certificate and acquiring a security entitlement are both means of holding the underlying security. For many other purposes, there is no need to draw a distinction between the means of holding. For purposes of commercial law analysis, however, the form of holding may make a difference. Where an item of property can be held in different ways, the rules on how one deals with it, including how one transfers it or how one grants a security interest in it, differ depending on the form of holding.

Although a security entitlement is means of holding the underlying security or other financial asset, a person who has a security entitlement does not have any direct claim to a specific asset in the possession of the securities intermediary. Subsection (c) provides explicitly that a person who acquires a security entitlement is a "purchaser" of any security, security entitlement, or other financial asset held by the securities intermediary only in the sense that under Section 8-503 a security entitlement is treated as a sui generis form of property interest.

3. Subsection (d) is designed to ensure that parties will retain their expected legal rights and duties under Revised Article 8. One of the major changes made by the revision is that the rules for the indirect holding system are stated in terms of the "security entitlements" held by investors, rather than speaking of them as holding direct interests in securities. Subsection (d) is designed as a translation rule to eliminate problems of co-ordination of terminology, and facilitate the continued use of systems for the efficient handling of securities and financial assets through securities intermediaries and clearing corporations. The efficiencies of a securities intermediary or clearing corporation are, in part, dependent on the ability to transfer securities credited to securities accounts in the intermediary or clearing corporation to the account of an issuer, its agent, or other person by book entry in a manner that permits exchanges, redemptions, conversions, and other transactions (which may be governed by pre-existing or new agreements, constitutional documents, or other instruments) to occur and to avoid the need to withdraw from immobilization in an intermediary or clearing corporation physical securities in order to deliver them for such purposes. Existing corporate charters, indentures and like documents may require the "presentation," "surrender," "delivery," or "transfer" of securities or security certificates for purposes of exchange, redemption, conversion or other reason. Likewise, documents may use a wide variety of terminology to describe, in the context for example of a tender or exchange offer, the means of putting the offeror or the issuer or its agent in possession of the security. Subsection (d) takes the place of provisions of prior law which could be used to reach the legal conclusion that book-entry transfers are equivalent to physical delivery to the person to whose account the book entry is credited.

Definitional Cross References

"Delivery". Section 8-301.
"Financial asset". Section 8-102(a)(9).
"Person". Section 1-201(30).
"Purchaser". Sections 1-201(33) and 8-116.
"Security". Section 8-102(a)(15).
"Security entitlement". Section 8-102(a)(17).

§ 28:8-105. Notice of adverse claim.

(a) A person has notice of an adverse claim if:

(1) The person knows of the adverse claim;

(2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) The person has a duty, imposed by statute or regulation, to investigate

whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) One year after a date set for presentment or surrender for redemption or exchange; or

(2) Six months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) Whether in bearer or registered form, has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(2) Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under Article 9 is not notice of an adverse claim to a financial asset.

(Dec. 30, 1963, 77 Stat. 736, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-105.

1973 Ed., § 28:8-105.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The rules specifying whether adverse claims can be asserted against persons who acquire securities or security entitlements, Sections 8-303, 8-502, and 8-510, provide that one is protected against an adverse claim only if one takes without notice of the claim. This section defines notice of an adverse claim.

The general Article 1 definition of "notice" in Section 1-201(25)—which provides that a person has notice of a fact if "from all the facts and circumstances known to him at the time in question he has reason to know that it exists"—does not apply to the interpretation of "notice of adverse claims." The Section 1-201(25) definition of "notice" does, however, apply to usages of that term and its cognates in Article 8 in contexts other than notice of adverse claims.

2. This section must be interpreted in light of

the definition of "adverse claim" in Section 8-102(a)(1). "Adverse claim" does not include all circumstances in which a third party has a property interest in securities, but only those situations where a security is transferred in violation of the claimant's property interest. Therefore, awareness that someone other than the transferor has a property interest is not notice of an adverse claim. The transferee must be aware that the transfer violates the other party's property interest. If A holds securities in which B has some form of property interest, and A transfers the securities to C, C may know that B has an interest, but infer that A is acting in accordance with A's obligations to B. The mere fact that C knew that B had a property interest does not mean that C had notice of an adverse claim. Whether C had notice of an adverse claim depends on whether C had sufficient awareness that A was acting in violation of B's property rights. The rule in subsection (b) is a particularization of this general principle.

3. Paragraph (a)(1) provides that a person has notice of an adverse claim if the person has knowledge of the adverse claim. Knowledge is defined in Section 1-201(25) as actual knowledge.

4. Paragraph (a)(2) provides that a person has notice of an adverse claim if the person is aware of a significant probability that an adverse claim exists and deliberately avoids information that might establish the existence of the adverse claim. This is intended to codify the "willful blindness" test that has been applied in such cases. See May v. Chapman, 16 M. & W. 355, 153 Eng. Rep. 1225 (1847); Goodman v. Simonds, 61 U.S. 343 (1857).

The first prong of the willful blindness test of paragraph (a)(2) turns on whether the person is aware facts sufficient to indicate that there is a significant probability that an adverse claim exists. The "awareness" aspect necessarily turns on the actor's state of mind. Whether facts known to a person make the person aware of a "significant probability" that an adverse claim exists turns on facts about the world and the conclusions that would be drawn from those facts, taking account of the experience and position of the person in question. A particular set of facts might indicate a significant probability of an adverse claim to a professional with considerable experience in the usual methods and procedures by which securities transactions are conducted, even though the same facts would not indicate a significant probability of an adverse claim to a non-professional.

The second prong of the willful blindness test of paragraph (a)(2) turns on whether the person "deliberately avoids information" that would establish the existence of the adverse claim. The test is the character of the person's response to the information the person has. The question is whether the person deliberately failed to seek further information because of concern that suspicions would be confirmed.

Application of the "deliberate avoidance" test to a transaction by an organization focuses on the knowledge and the actions of the individual or individuals conducting the transaction on behalf of the organization. Thus, an organization that purchases a security is not willfully blind to an adverse claim unless the officers or agents who conducted that purchase transaction are willfully blind to the adverse claim. Under the two prongs of the willful blindness test, the individual or individuals conducting a transaction must know of facts indicating a substantial probability that the adverse claim exists and deliberately fail to seek further information that might confirm or refute the indication. For this purpose, information known to individuals within an organization who are not conducting or aware of a transaction, but not forwarded to the individuals conducting the transaction, is not pertinent in determining whether the individuals conducting the transaction had knowledge of a substantial probability of the existence of the adverse claim. Cf. Section 1-201(27). An organization may also "deliberately avoid information" if it acts to preclude or inhibit transmission of pertinent information to those individuals responsible for the conduct of purchase transactions.

5. Paragraph (a)(3) provides that a person has notice of an adverse claim if the person would have learned of the adverse claim by conducting an investigation that is required by other statute or regulation. This rule applies only if there is some other statute or regulation that explicitly requires persons dealing with securities to conduct some investigation. The federal securities laws require that brokers and banks, in certain specified circumstances, check with a stolen securities registry to determine whether securities offered for sale or pledge have been reported as stolen. If securities that were listed as stolen in the registry are taken by an institution that failed to comply with requirement to check the registry, the institution would be held to have notice of the fact that they were stolen under paragraph (a)(3). Accordingly, the institution could not qualify as a protected purchaser under Section 8-303. The same result has been reached under the prior version of Article 8. See First Nat'l Bank of Cicero v. Lewco Securities, 860 F.2d 1407 (7th Cir. 1988).

6. Subsection (b) provides explicitly for some situations involving purchase from one described or identifiable as a representative. Knowledge of the existence of the representative relation is not enough in itself to constitute "notice of an adverse claim" that would disqualify the purchaser from protected purchaser status. A purchaser may take a security on the

inference that the representative is acting properly. Knowledge that a security is being transferred to an individual account of the representative or that the proceeds of the transaction will be paid into that account is not sufficient to constitute "notice of an adverse claim," but knowledge that the proceeds will be applied to the personal indebtedness of the representative is. See State Bank of Binghamton v. Bache, 162 Misc. 128, 293 N.Y.S. 667 (1937).

7. Subsection (c) specifies whether a purchaser of a "stale" security is charged with notice of adverse claims, and therefore disqualified from protected purchaser status under Section 8-303. The fact of "staleness" is viewed as notice of certain defects after the lapse of stated periods, but the maturity of the security does not operate automatically to affect holders' rights. The periods of time here stated are shorter than those appearing in the provisions of this Article on staleness as notice of defects or defenses of an issuer (Section 8-203) since a purchaser who takes a security after funds or other securities are available for its redemption has more reason to suspect claims of ownership than issuer's defenses. An owner will normally turn in a security rather than transfer it at such a time. Of itself, a default never constitutes notice of a possible adverse claim. To provide otherwise would not tend to drive defaulted securities home and would serve only to disrupt current financial markets where many defaulted securities are actively traded. Unpaid or overdue coupons attached to a bond do not bring it within the operation of this subsection, though they may be relevant under the general test of notice of adverse claims in subsection (a).

8. Subsection (d) provides the owner of a certificated security with a means of protection while a security certificate is being sent in for redemption or exchange. The owner may endorse it "for collection" or "for surrender," and this constitutes notice of the owner's claims, under subsection (d). Definitional Cross References

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Bearer form". Section 8-102(a)(2).
"Certificated security". Section 8-102(a)(4).
"Financial asset". Section 8-102(a)(9).
"Knowledge". Section 1-201(25).
"Person". Section 1-201(30).
"Purchaser". Sections 1-201(33) and 8-116.
"Registered form". Section 8-102(a)(13).
"Representative". Section 1-201(35).
"Security certificate". Section 8-102(a)(16).

§ 28:8-106. Control.

(a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is indorsed to the purchaser or in blank by an effective indorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has "control" of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has "control" of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) has control, even if the registered owner in the case of subsection (c) or the entitlement holder in the case of subsection (d) retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subsection (c)(2) or (d)(2) of this section without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(2), 47 DCR 7576.)

Section references. — This section is referenced in § 28:8-102, § 28:8-107, § 28:8-510, § 28:9-106, § 28:9-208, and § 28:9-328.

Prior Codifications. — 1981 Ed., § 28:8-106.

1973 Ed., § 28:8-106.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:8-103.

UNIFORM COMMERCIAL CODE COMMENT

1. The concept of "control" plays a key role in various provisions dealing with the rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements from entitlement holders); 9-314 (perfection of security interests); 9-328 (priorities among conflicting security interests).

Obtaining "control" means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner.

2. Subsection (a) provides that a purchaser obtains "control" with respect to a certificated security in bearer form by taking "delivery," as defined in Section 8-301. Subsection (b) provides that a purchaser obtains "control" with respect to a certificated security in registered form by taking "delivery," as defined in Section 8-301, provided that the security certificate has been indorsed to the purchaser or in blank. Section 8-301 provides that delivery of a certificated security occurs when the purchaser obtains possession of the security certificate, or when an agent for the purchaser (other than a securities intermediary) either acquires possession or acknowledges that the agent holds for the purchaser.

3. Subsection (c) specifies the means by which a purchaser can obtain control over uncertificated securities which the transferor holds directly. Two mechanisms are possible.

Under subsection (c)(1), securities can be "delivered" to a purchaser. Section 8-301(b) provides that "delivery" of an uncertificated security occurs when the purchaser becomes the registered holder. So far as the issuer is concerned, the purchaser would then be entitled to exercise all rights of ownership. See Section 8-207. As between the parties to a purchase transaction, however, the rights of the purchaser are determined by their contract. Cf. Section 9-202. Arrangements covered by this paragraph are analogous to arrangements in which bearer certificates are delivered to a secured party—so far as the issuer or any other parties are concerned, the secured party ap-

pears to be the outright owner, although it is in fact holding as collateral property that belongs to the debtor.

Under subsection (c)(2), a purchaser has control if the issuer has agreed to act on the instructions of the purchaser, even though the owner remains listed as the registered owner. The issuer, of course, would be acting wrongfully against the registered owner if it entered into such an agreement without the consent of the registered owner. Subsection (g) makes this point explicit. The subsection (c)(2) provision makes it possible for issuers to offer a service akin to the registered pledge device of the 1978 version of Article 8, without mandating that all issuers offer that service.

4. Subsection (d) specifies the means by which a purchaser can obtain control of a security entitlement. Three mechanisms are possible, analogous to those provided in subsection (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the entitlement holder. This subsection would apply whether the purchaser holds through the same intermediary that the debtor used, or has the securities position transferred to its own intermediary. Subsection (d)(2) provides that a purchaser has control if the securities intermediary has agreed to act on entitlement orders originated by the purchaser if no further consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved even though the original entitlement holder remains as the entitlement holder. Finally, a purchaser may obtain control under subsection (d)(3) if another person has control and the person acknowledges that it has control on the purchaser's behalf. Control under subsection (d)(3) parallels the delivery of certificated securities and uncertificated securities under Section 8-301. Of course, the acknowledging person cannot be the debtor.

This section specifies only the minimum requirements that such an arrangement must meet to confer "control"; the details of the arrangement can be specified by agreement. The arrangement might cover all of the positions in a particular account or subaccount, or only specified positions. There is no requirement that the control party's right to give entitlement orders be exclusive. The arrangement might provide that only the control party can give entitlement orders, or that either the entitlement holder or the control party can give entitlement orders. See subsection (f).

The following examples illustrate the application of subsection (d):

Example 1. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha also has an account with Able. Debtor instructs Able to transfer the shares to Alpha, and Able does so by crediting the shares to Alpha's account. Alpha has control of the 1000 shares under subsection (d)(1). Although Debtor may have become the beneficial owner of the new securities entitlement, as between Debtor and Alpha, Able has agreed to act on Alpha's entitlement orders because, as between Able and Alpha, Alpha has become the entitlement holder. See Section 8-506.

Example 2. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha does not have an account with Able. Alpha uses Beta as its securities custodian. Debtor instructs Able to transfer the shares to Beta, for the account of Alpha, and Able does so. Alpha has control of the 1000 shares under subsection (d)(1). As in Example 1, although Debtor may have become the beneficial owner of the new securities entitlement, as between Debtor and Alpha, Beta has agreed to act on Alpha's entitlement orders because, as between Beta and Alpha, Alpha has become the entitlement holder.

Example 3. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Debtor, Able, and Alpha enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Alpha also has the right to direct dispositions. Alpha has control of the 1000 shares under subsection (d)(2).

Example 4. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into Alpha's account at Clearing Corporation. As in Example 1, Alpha has control of the 1000 shares under subsection (d)(1).

Example 5. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Alpha does not have an account with Clearing Corporation. It holds its securities through Beta Bank, which does have an account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into Beta's account at Clearing Corporation. Beta credits the position to Alpha's account with Beta. As in Example 2, Alpha has control of the 1000 shares under subsection (d)(1).

Example 6. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an

account with Clearing Corporation. Able causes Clearing Corporation to transfer the shares into a pledge account, pursuant to an agreement under which Able will continue to receive dividends, distributions, and the like, but Alpha has the right to direct dispositions. As in Example 3, Alpha has control of the 1000 shares under subsection (d)(2).

Example 7. Able & Co., a securities dealer, grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Able holds through an account with Clearing Corporation. Able, Alpha, and Clearing Corporation enter into an agreement under which Clearing Corporation will act on instructions from Alpha with respect to the XYZ Co. stock carried in Able's account, but Able will continue to receive dividends, distributions, and the like, and will also have the right to direct dispositions. As in Example 3, Alpha has control of the 1000 shares under subsection (d)(2).

Example 8. Able & Co., a securities dealer, holds a wide range of securities through its account at Clearing Corporation. Able enters into an arrangement with Alpha Bank pursuant to which Alpha provides financing to Able secured by securities identified as the collateral on lists provided by Able to Alpha on a daily or other periodic basis. Able, Alpha, and Clearing Corporation enter into an agreement under which Clearing Corporation agrees that if at any time Alpha directs Clearing Corporation to do so, Clearing Corporation will transfer any securities from Able's account at Alpha's instructions. Because Clearing Corporation has agreed to act on Alpha's instructions with respect to any securities carried in Able's account, at the moment that Alpha's security interest attaches to securities listed by Able, Alpha obtains control of those securities under subsection (d)(2). There is no requirement that Clearing Corporation be informed of which securities Able has pledged to Alpha.

Example 9. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Beta Bank agrees with Alpha to act as Alpha's collateral agent with respect to the security entitlement. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta also has the right to direct dispositions. Because Able has agreed that it will comply with entitlement orders originated by Beta without further consent by Debtor, Beta has control of the security entitlement (see Example 3). Because Beta has control on behalf of Alpha, Alpha also has control under subsection (d)(3). It is not necessary for Able to enter into an agreement directly with Alpha or for Able to be aware of Beta's agency relationship with Alpha.

5. For a purchaser to have "control" under subsection (c)(2) or (d)(2), it is essential that the issuer or securities intermediary, as the case may be, actually be a party to the agreement. If a debtor gives a secured party a power of attorney authorizing the secured party to act in the name of the debtor, but the issuer or securities intermediary does not specifically agree to this arrangement, the secured party does not have "control" within the meaning of subsection (c)(2) or (d)(2) because the issuer or securities intermediary is not a party to the agreement. The secured party does not have control under subsection (c)(1) or (d)(1) because, although the power of attorney might give the secured party authority to act on the debtor's behalf as an agent, the secured party has not actually become the registered owner or entitlement holder.

6. Subsection (e) provides that if an interest in a security entitlement is granted by an entitlement holder to the securities intermediary through which the security entitlement is maintained, the securities intermediary has control. A common transaction covered by this provision is a margin loan from a broker to its customer.

7. The term "control" is used in a particular defined sense. The requirements for obtaining control are set out in this section.

The concept is not to be interpreted by reference to similar concepts in other bodies of law. In particular, the requirements for "possession" derived from the common law of pledge are not to be used as a basis for interpreting subsection (c)(2) or (d)(2). Those provisions are designed to supplant the concepts of "constructive possession" and the like. A principal purpose of the "control" concept is to eliminate the uncertainty and confusion that results from attempting to apply common law possession concepts to modern securities holding practices.

The key to the control concept is that the purchaser has the ability to have the securities sold or transferred without further action by the transferor. There is no requirement that the powers held by the purchaser be exclusive. For example, in a secured lending arrangement, if the secured party wishes, it can allow the debtor to retain the right to make substitutions, to direct the disposition of the uncertificated security or security entitlement, or otherwise to give instructions or entitlement orders. (As explained in Section 8-102, Comment 8, an entitlement order includes a direction under Section 8-508 to the securities intermediary to transfer a financial asset to the account of the entitlement holder at another financial intermediary or to cause the financial asset to be transferred to the entitlement holder in the direct holding system (e.g., by

delivery of a securities certificate registered in the name of the former entitlement holder).) Subsection (f) is included to make clear the general point stated in subsections (c) and (d) that the test of control is whether the purchaser has obtained the requisite power, not whether the debtor has retained other powers. There is no implication that retention by the debtor of powers other than those mentioned in subsection (f) is inconsistent with the purchaser having control. Nor is there a requirement that the purchaser's powers be unconditional, provided that further consent of the entitlement holder is not a condition.

Example 10. Debtor grants to Alpha Bank and to Beta Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. By agreement among the parties, Alpha's security interest is senior and Beta's is junior. Able agrees to act on the entitlement orders of either Alpha or Beta. Alpha and Beta each has control under subsection (d)(2). Moreover, Beta has control notwithstanding a term of Able's agreement to the effect that Able's obligation to act on Beta's entitlement orders is conditioned on Alpha's consent. The crucial distinction is that Able's agreement to act on Beta's entitlement orders is not conditioned on Debtor's further consent.

Example 11. Debtor grants to Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Able agrees to act on the entitlement orders of Alpha, but Alpha's right to give entitlement orders to the securities intermediary is conditioned on the Debtor's default. Alternatively, Alpha's right to give entitlement orders is conditioned upon Alpha's statement to Able that Debtor is in default. Because Able's agreement to act on Alpha's entitlement orders is not conditioned on Debtor's further consent, Alpha has control of the securities entitlement under either alternative.

In many situations, it will be better practice for both the securities intermediary and the purchaser to insist that any conditions relating in any way to the entitlement holder be effective only as between the purchaser and the entitlement holder. That practice would avoid the risk that the securities intermediary could be caught between conflicting assertions of the entitlement holder and the purchaser as to whether the conditions in fact have been met. Nonetheless, the existence of unfulfilled conditions effective against the intermediary would not preclude the purchaser from having control.
Definitional Cross References

Definitional Cross References

"Bearer form". Section 8-102(a)(2).
"Certificated security". Section 8-102(a)(4).
"Delivery". Section 8-301.
"Effective". Section 8-107.
"Entitlement holder". Section 8-102(a)(7).
"Entitlement order". Section 8-102(a)(8).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Purchaser". Sections 1-201(33) and 8-116.
"Registered form". Section 8-102(a)(13).
"Securities intermediary". Section 8-102(a)(14).
"Security entitlement". Section 8-102(a)(17).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-107. Whether indorsement, instruction, or entitlement order is effective.

(a) For the purposes of this article, the term "appropriate person" means:

(1) With respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) With respect to an instruction, the registered owner of an uncertificated security;

(3) With respect to an entitlement order, the entitlement holder;

(4) If the person designated in paragraph (1), (2), or (3) of this subsection is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

(5) If the person designated in paragraph (1), (2), or (3) of this subsection lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) It is made by the appropriate person;

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under § 28:8-106(c)(2) or (d)(2); or

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) The representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

(Dec. 30, 1963, 77 Stat. 738, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; July 25, 1995, D.C. Law 11-30, § 7(g), 42 DCR 1547; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-102 and § 28:8-402.

Prior Codifications. — 1981 Ed., § 28:8-107.

1973 Ed., § 28:8-107.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-30. — For legislative history of D.C. Law 11-30, see Historical and Statutory Notes following § 28:8-207.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section defines two concepts, "appropriate person" and "effective." Effectiveness is a broader concept than appropriate person. For example, if a security or securities account is registered in the name of Mary Roe, Mary Roe is the "appropriate person," but an indorsement, instruction, or entitlement order made by John Doe is "effective" if, under agency or other law, Mary Roe is precluded from denying Doe's authority. Treating these two concepts separately facilitates statement of the rules of Article 8 that state the legal effect of an indorsement, instruction, or entitlement order. For example, a securities intermediary is protected against liability if it acts on an effective entitlement order, but has a duty to comply

with an entitlement order only if it is originated by an appropriate person. See Sections 8-115 and 8-507.

One important application of the "effectiveness" concept is in the direct holding system rules on the rights of purchasers. A purchaser of a certificated security in registered form can qualify as a protected purchaser who takes free from adverse claims under Section 8-303 only if the purchaser obtains "control." Section 8-106 provides that a purchaser of a certificated security in registered form obtains control if there has been an "effective" indorsement.

2. Subsection (a) provides that the term "appropriate person" covers two categories: (1) the person who is actually designated as the person entitled to the security or security entitlement, and (2) the successor or legal representative of that person if that person has died or otherwise lacks capacity. Other law determines who has power to transfer a security on behalf of a person who lacks capacity. For example, if securities are registered in the name of more than one person and one of the designated persons dies, whether the survivor is the appropriate person depends on the form of tenancy. If the two were registered joint tenants with right of survivorship, the survivor would have that power under other law and thus would be the "appropriate person." If securities are registered in the name of an individual and the individual dies, the law of decedents' estates determines who has power to transfer the decedent's securities. That would ordinarily be the executor or administrator, but if a "small estate statute" permits a widow to transfer a decedent's securities without administration proceedings, she would be the appropriate person. If the registration of a security or a securities account contains a designation of a death beneficiary under the Uniform Transfer on Death Security Registration Act or comparable legislation, the designated beneficiary would, under that law, have power to transfer upon the person's death and so would be the appropriate person. Article 8 does not contain a list of such representatives, because any list is likely to become outdated by developments in other law.

3. Subsection (b) sets out the general rule that an indorsement, instruction, or entitlement order is effective if it is made by the appropriate person or by a person who has power to transfer under agency law or if the appropriate person is precluded from denying its effectiveness. The control rules in Section 8-106 provide for arrangements where a person who holds securities through a securities intermediary, or holds uncertificated securities directly, enters into a control agreement giving the secured party the right to initiate entitlement orders of instructions. Paragraph 2 of subsection (b) states explicitly that an entitlement order or instruction initiated by a person who has obtained such a control agreement is "effective."

Subsections (c), (d), and (e) supplement the general rule of subsection (b) on effectiveness. The term "representative," used in subsections (c) and (d), is defined in Section 1-201(35).

4. Subsection (c) provides that an indorsement, instruction, or entitlement order made by a representative is effective even though the representative's action is a violation of duties. The following example illustrates this subsection:

Example 1. Certificated securities are registered in the name of John Doe. Doe dies and Mary Roe is appointed executor. Roe indorses the security certificate and transfers it to a purchaser in a transaction that is a violation of her duties as executor. Roe's indorsement is effective, because Roe is the appropriate person under subsection (a)(4). This is so even though Roe's transfer violated her obligations as executor. The policies of free transferability of securities that underlie Article 8 dictate that neither a purchaser to whom Roe transfers the securities nor the issuer who registers transfer should be required to investigate the terms of the will to determine whether Roe is acting properly. Although Roe's indorsement is effective under this section, her breach of duty may be such that her beneficiary has an adverse claim to the securities that Roe transferred. The question whether that adverse claim can be asserted against purchasers is governed not by this section but by Section 8-303. Under Section 8-404, the issuer has no duties to an adverse claimant unless the claimant obtains legal process enjoining the issuer from registering transfer.

5. Subsection (d) deals with cases where a security or a securities account is registered in the name of a person specifically designated as a representative. The following example illustrates this subsection:

Example 2. Certificated securities are registered in the name of "John Jones, trustee of the Smith Family Trust." John Jones is removed as trustee and Martha Moe is appointed successor trustee. The securities, however, are not reregistered, but remain registered in the name of "John Jones, trustee of the Smith Family Trust." Jones indorses the security certificate and transfers it to a purchaser.

Subsection (d) provides that an indorsement by John Jones as trustee is effective even though Jones is no longer serving in that capacity. Since the securities were registered in the name of "John Jones, trustee of the Smith Family Trust," a purchaser, or the issuer when called upon to register transfer, should be entitled to assume without further inquiry that Jones has the power to act as trustee for the Smith Family Trust.

Note that subsection (d) does not apply to a case where the security or securities account is registered in the name of principal rather than the representative as such. The following example illustrates this point:

Example 3. Certificated securities are registered in the name of John Doe. John Doe dies and Mary Roe is appointed executor. The securities are not reregistered in the name of Mary Roe as executor. Later, Mary Roe is removed as executor and Martha Moe is appointed as her successor. After being removed, Mary Roe indorses the security certificate that is registered in the name of John Doe and transfers it to a purchaser. Mary Roe's indorsement is not made effective by subsection (d), because the securities were not registered in the name of Mary Roe as representative. A purchaser or the issuer registering transfer should be required to determine whether Roe has power to act for John Doe. Purchasers and issuers can protect themselves in such cases by requiring signature guaranties. See Section 8-306.

6. Subsection (e) provides that the effectiveness of an indorsement, instruction, or entitlement order is determined as of the date it is made. The following example illustrates this subsection:

Example 4. Certificated securities are registered in the name of John Doe. John Doe dies and Mary Roe is appointed executor. Mary Roe indorses the security certificate that is registered in the name of John Doe and transfers it to a purchaser. After the indorsement and transfer, but before the security certificate is presented to the issuer for registration of transfer, Mary Roe is removed as executor and Martha Moe is appointed as her successor. Mary Roe's indorsement is effective, because at the time Roe indorsed she was the appropriate person under subsection (a)(4). Her later removal as executor does not render the indorsement ineffective. Accordingly, the issuer would not be liable for registering the transfer. See Section 8-404.

Definitional Cross References

"Entitlement order". Section 8-102(a)(8).
"Financial asset". Section 8-102(a)(9).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Representative". Section 1-201(35).
"Securities account". Section 8-501.
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Security entitlement". Section 8-102(a)(17).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

(1) The certificate is genuine and has not been materially altered;

(2) The transferor or indorser does not know of any fact that might impair the validity of the security;

(3) There is no adverse claim to the security;

(4) The transfer does not violate any restriction on transfer;

(5) If the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(6) The transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

(1) The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;

(2) The security is valid;

(3) There is no adverse claim to the security; and

(4) At the time the instruction is presented to the issuer:

(A) The purchaser will be entitled to the registration of transfer;

(B) The transfer will be registered by the issuer free from all liens,

security interests, restrictions, and claims other than those specified in the instruction;

(C) The transfer will not violate any restriction on transfer; and

(D) The requested transfer will otherwise be effective and rightful.

(c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:

(1) The uncertificated security is valid;

(2) There is no adverse claim to the security;

(3) The transfer does not violate any restriction on transfer; and

(4) The transfer is otherwise effective and rightful.

(d) A person who indorses a security certificate warrants to the issuer that:

(1) There is no adverse claim to the security; and

(2) The indorsement is effective.

(e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:

(1) The instruction is effective; and

(2) At the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.

(f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.

(g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has authority to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g) of this section.

(i) Except as otherwise provided in subsection (g) of this section, a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f) of this section. A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b), and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of the customer.

(Dec. 30, 1963, 77 Stat. 737, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law

11-240, § 2, 44 DCR 1087; Apr. 20, 1999, D.C. Law 12-264, § 26(a), 46 DCR 2118.)

Section references. — This section is referenced in § 28:8-109, § 28:8-304, and § 28:8-305.

Prior Codifications. — 1981 Ed., § 28:8-108.

1973 Ed., § 28:8-306.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 12-264. — Law 12-264, the "Technical Amendments Act of 1998," was introduced in Council and assigned Bill No. 12-804, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 10, 1998, and December 1, 1998, respectively. Signed by the Mayor on January 7, 1999, it was assigned Act No. 12-626 and transmitted to both Houses of Congress for its review. D.C. Law 12-264 became effective on April 20, 1999.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsections (a), (b), and (c) deal with warranties by security transferors to purchasers. Subsections (d) and (e) deal with warranties by security transferors to issuers. Subsection (f) deals with presentment warranties.

2. Subsection (a) specifies the warranties made by a person who transfers a certificated security to a purchaser for value. Paragraphs (3), (4), and (5) make explicit several key points that are implicit in the general warranty of paragraph (6) that the transfer is effective and rightful. Subsection (b) sets forth the warranties made to a purchaser for value by one who originates an instruction. These warranties are quite similar to those made by one transferring a certificated security, subsection (a), the principal difference being the absolute warranty of validity. If upon receipt of the instruction the issuer should dispute the validity of the security, the burden of proving validity is upon the transferor. Subsection (c) provides for the limited circumstances in which an uncertificated security could be transferred without an instruction, see Section 8-301(b)(2). Subsections (d) and (e) give the issuer the benefit of the warranties of an indorser or originator on those matters not within the issuer's knowledge.

3. Subsection (f) limits the warranties made by a purchaser for value without notice whose presentation of a security certificate is defective in some way but to whom the issuer does register transfer. The effect is to deny the issuer a remedy against such a person unless at the time of presentment the person had knowledge of an unauthorized signature in a necessary indorsement. The issuer can protect itself by refusing to make the transfer or, if it registers the transfer before it discovers the defect, by pursuing its remedy against a signature guarantor.

4. Subsection (g) eliminates all substantive warranties in the relatively unusual case of a delivery of certificated security by an agent of a disclosed principal where the agent delivers the exact certificate that it received from or for the principal. Subsection (h) limits the warranties given by a secured party who redelivers a certificate. Subsection (i) specifies the warranties of brokers in the more common scenarios.

5. Under Section 1-102(3) the warranty provisions apply "unless otherwise agreed" and the parties may enter into express agreements to allocate the risks of possible defects. Usual estoppel principles apply with respect to transfers of both certificated and uncertificated securities whenever the purchaser has knowledge of the defect, and these warranties will not be breached in such a case.

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Appropriate person". Section 8-107.
"Broker". Section 8-102(a)(3).
"Certificated security". Section 8-102(a)(4).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Person". Section 1-201(30).
"Purchaser". Sections 1-201(33) and 8-116.
"Secured party". Section 9-105(1)(m).
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Uncertificated security". Section 8-102(a)(18).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-109. Warranties in indirect holding.

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) There is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in § 28:8-108(a) or (b).

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in § 28:8-108(a) or (b).

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-109.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) provides that a person who originates an entitlement order warrants to the securities intermediary that the order is authorized, and warrants the absence of adverse claims. Subsection (b) specifies the warranties that are given when a person who holds securities directly has the holding converted into indirect form. A person who delivers a certificate to a securities intermediary or originates an instruction for an uncertificated security gives to the securities intermediary the transfer warranties under Section 8-108. If the securities intermediary in turn delivers the certificate to a higher level securities intermediary, it gives the same warranties.

2. Subsection (c) states the warranties that a securities intermediary gives when a customer who has been holding securities in an account with the securities intermediary requests that certificates be delivered or that uncertificated securities be registered in the customer's name. The warranties are the same as those that brokers make with respect to securities that the brokers sell to or buy on behalf of the customers. See Section 8-108(i).

3. As with the Section 8-108 warranties, the warranties specified in this section may be modified by agreement under Section 1-102(3).

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).

"Appropriate person". Section 8-107.

"Entitlement holder". Section 8-102(a)(7).

"Entitlement order". Section 8-102(a)(8).

"Instruction". Section 8-102(a)(12).

"Person". Section 1-201(30).

"Securities account". Section 8-501.

"Securities intermediary". Section 8-102(a)(14).

"Security certificate". Section 8-102(a)(16).

"Uncertificated security". Section 8-102(a)(18).

§ 28:8-110. Applicability; choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d) of this section, governs:

(1) The validity of a security;

(2) The rights and duties of the issuer with respect to registration of transfer;

(3) The effectiveness of registration of transfer by the issuer;

(4) Whether the issuer owes any duties to an adverse claimant to a security; and

(5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e) of this section, governs:

(1) Acquisition of a security entitlement from the securities intermediary;

(2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;

(3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and

(4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) For the purposes of this article, the term "issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of the District of Columbia may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5) of this section.

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of this part or this article, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding paragraphs of this subsection applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding paragraphs of this subsection applies, the

securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

(Dec. 30, 1963, 77 Stat. 733, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(3), 47 DCR 7576.)

Section references. — This section is referenced in § 28:1-301 and § 28:9-305.

Prior Codifications. — 1981 Ed., § 28:8-110.

1973 Ed., § 28:8-106.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:8-103.

UNIFORM COMMERCIAL CODE COMMENT

1. This section deals with applicability and choice of law issues concerning Article 8. The distinction between the direct and indirect holding systems plays a significant role in determining the governing law. An investor in the direct holding system is registered on the books of the issuer and/or has possession of a security certificate. Accordingly, the jurisdiction of incorporation of the issuer or location of the certificate determine the applicable law. By contrast, an investor in the indirect holding system has a security entitlement, which is a bundle of rights against the securities intermediary with respect to a security, rather than a direct interest in the underlying security. Accordingly, in the rules for the indirect holding system, the jurisdiction of incorporation of the issuer of the underlying security or the location of any certificates that might be held by the intermediary or a higher tier intermediary, do not determine the applicable law.

The phrase "local law" refers to the law of a jurisdiction other than its conflict of laws rules. See Restatement (Second) of Conflict of Laws s 4.

2. Subsection (a) provides that the law of an issuer's jurisdiction governs certain issues where the substantive rules of Article 8 determine the issuer's rights and duties. Paragraph (1) of subsection (a) provides that the law of the issuer's jurisdiction governs the validity of the security. This ensures that a single body of law will govern the questions addressed in Part 2 of Article 8, concerning the circumstances in which an issuer can and cannot assert invalidity as a defense against purchasers. Similarly, paragraphs (2), (3), and (4) of subsection (a) ensure that the issuer will be able to look to a single body of law on the questions addressed in Part 4 of Article 8, concerning the issuer's duties and liabilities with respect to registration of transfer.

Paragraph (5) of subsection (a) applies the law of an issuer's jurisdiction to the question whether an adverse claim can be asserted against a purchaser to whom transfer has been registered, or who has obtained control over an uncertificated security. Although this issue deals with the rights of persons other than the issuer, the law of the issuer's jurisdiction applies because the purchasers to whom the provision applies are those whose protection against adverse claims depends on the fact that their interests have been recorded on the books of the issuer.

The principal policy reflected in the choice of law rules in subsection (a) is that an issuer and others should be able to look to a single body of law on the matters specified in subsection (a), rather than having to look to the law of all of the different jurisdictions in which security holders may reside. The choice of law policies reflected in this subsection do not require that the body of law governing all of the matters specified in subsection (a) be that of the jurisdiction in which the issuer is incorporated.

Thus, subsection (d) provides that the term "issuer's jurisdiction" means the jurisdiction in which the issuer is organized, or, if permitted by that law, the law of another jurisdiction selected by the issuer. Subsection (d) also provides that issuers organized under the law of a State which adopts this Article may make such a selection, except as to the validity issue specified in paragraph (1). The question whether an issuer can assert the defense of invalidity may implicate significant policies of the issuer's jurisdiction of incorporation. See, e.g., Section 8-202 and Comments thereto.

Although subsection (a) provides that the issuer's rights and duties concerning registration of transfer are governed by the law of the issuer's jurisdiction, other matters related to registration of transfer, such as appointment of a guardian for a registered owner or the existence of agency relationships, might be governed by another jurisdiction's law. Neither this section nor Section 1-105 deals with what law governs the appointment of the administrator or executor; that question is determined under generally applicable choice of law rules.

3. Subsection (b) provides that the law of the securities intermediary's jurisdiction governs the issues concerning the indirect holding system that are dealt with in Article 8. Paragraphs (1) and (2) cover the matters dealt with in the Article 8 rules defining the concept of security entitlement and specifying the duties of securities intermediaries. Paragraph (3) provides that the law of the security intermediary's jurisdiction determines whether the intermediary owes any duties to an adverse claimant. Paragraph (4) provides that the law of the security intermediary's jurisdiction determines whether adverse claims can be asserted against entitlement holders and others.

Subsection (e) determines what is a "securities intermediary's jurisdiction." The policy of subsection (b) is to ensure that a securities intermediary and all of its entitlement holders can look to a single, readily-identifiable body of law to determine their rights and duties. Accordingly, subsection (e) sets out a sequential series of tests to facilitate identification of that body of law. Paragraph (1) of subsection (e) permits specification of the securities intermediary's jurisdiction by agreement. In the absence of such a specification, the law chosen by the parties to govern the securities account determines the securities intermediary's jurisdiction. See paragraph (2). Because the policy of this section is to enable parties to determine, in advance and with certainty, what law will apply to transactions governed by this Article, the validation of the parties' selection of governing law by agreement is not conditioned upon a determination that the jurisdiction whose law is chosen bear a "reasonable relation" to the transaction. See Section 4A-507; compare Section 1-105(1). That is also true with respect to the similar provisions in subsection (d) of this section and in Section 9-305. The remaining paragraphs in subsection (e) contain additional default rules for determining the securities intermediary's jurisdiction.

Subsection (f) makes explicit a point that is implicit in the Article 8 description of a security entitlement as a bundle of rights against the intermediary with respect to a security or other financial asset, rather than as a direct interest in the underlying security or other financial asset. The governing law for relationships in the indirect holding system is not determined by such matters as the jurisdiction of incorporation of the issuer of the securities held through the intermediary, or the location of any physical certificates held by the intermediary or a higher tier intermediary.

4. Subsection (c) provides a choice of law rule for adverse claim issues that may arise in connection with delivery of security certificates in the direct holding system. It applies the law of the place of delivery. If a certificated security issued by an Idaho corporation is sold, and the sale is settled by physical delivery of the certificate from Seller to Buyer in New York, under subsection (c), New York law determines whether Buyer takes free from adverse claims. The domicile of Seller, Buyer, and any adverse claimant is irrelevant.

5. The following examples illustrate how a court in a jurisdiction which has enacted this section would determine the governing law:

Example 1. John Doe, a resident of Kansas, maintains a securities account with Able & Co. Able is incorporated in Delaware. Its chief executive offices are located in Illinois. The office where Doe transacts business with Able is located in Missouri. The agreement between Doe and Able specifies that Illinois is the securities intermediary's (Able's) jurisdiction. Through the account, Doe holds securities of a Colorado corporation, which Able holds through Clearing Corporation. The rules of Clearing Corporation provide that the rights and duties of Clearing Corporation and its participants are governed by New York law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Clearing Corporation is governed by Colorado law. Subsections (b) and (e) specify that a controversy concerning the rights and duties as between the Clearing Corporation and Able is governed by New York law, and that a controversy concerning the rights and duties as between Able and Doe is governed by Illinois law.

Example 2. Same facts as to Doe and Able as in Example 1. Through the account, Doe holds securities of a Senegalese corporation, which Able holds through Clearing Corporation. Clearing Corporation's operations are located in Belgium, and its rules and agreements with

its participants provide that they are governed by Belgian law. Clearing Corporation holds the securities through a custodial account at the Paris branch office of Global Bank, which is organized under English law. The agreement between Clearing Corporation and Global Bank provides that it is governed by French law. Subsection (a) specifies that a controversy concerning the rights and duties as between the issuer and Global Bank is governed by Senegalese law. Subsections (b) and (e) specify that a controversy concerning the rights and duties as between Global Bank and Clearing Corporation is governed by French law, that a controversy concerning the rights and duties as between Clearing Corporation and Able is governed by Belgian law, and that a controversy concerning the rights and duties as between Able and Doe is governed by Illinois law.

6. To the extent that this section does not specify the governing law, general choice of law rules apply. For example, suppose that in either of the examples in the preceding Comment, Doe enters into an agreement with Roe, also a resident of Kansas, in which Doe agrees to transfer all of his interests in the securities held through Able to Roe. Article 8 does not deal with whether such an agreement is enforceable or whether it gives Roe some interest in Doe's security entitlement. This section specifies what jurisdiction's law governs the issues that are dealt with in Article 8. Article 8, however, does specify that securities intermediaries have only limited duties with respect to adverse claims. See Section 8-115. Subsection (b)(3) of this section provides that Illinois law governs whether Able owes any duties to an adverse claimant. Thus, if Illinois has adopted Revised Article 8, Section 8-115 as enacted in Illinois determines whether Roe has any rights against Able.

7. The choice of law provisions concerning security interests in securities and security entitlements are set out in Section 9-305.

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Agreement". Section 1-201(3).
"Certificated security". Section 8-102(a)(4).
"Entitlement holder". Section 8-102(a)(7).
"Financial asset". Section 8-102(a)(9).
"Issuer". Section 8-201.
"Person". Section 1-201(30).
"Purchase". Section 1-201(32).
"Securities intermediary". Section 8-102(a)(14).
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Security entitlement". Section 8-102(a)(17).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-111. Clearing corporation rules.

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this article and affects another party who does not consent to the rule.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-111.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The experience of the past few decades shows that securities holding and settlement practices may develop rapidly, and in unforeseeable directions. Accordingly, it is desirable that the rules of Article 8 be adaptable both to ensure that commercial law can conform to changing practices and to ensure that commercial law does not operate as an obstacle to developments in securities practice. Even if practices were unchanging, it would not be possible in a general statute to specify in detail the rules needed to provide certainty in the operations of the clearance and settlement system.

The provisions of this Article and Article 1 on the effect of agreements provide considerable flexibility in the specification of the details of the rights and obligations of participants in the securities holding system by agreement. See Sections 8-504 through 8-509, and Section 1-102(3) and (4). Given the magnitude of the exposures involved in securities transactions, however, it may not be possible for the parties in developing practices to rely solely on private agreements, particularly with respect to matters that might affect others, such as creditors. For example, in order to be fully effective, rules of clearing corporations on the finality or

reversibility of securities settlements must not only bind the participants in the clearing corporation but also be effective against their creditors. Section 8-111 provides that clearing corporation rules are effective even if they indirectly affect third parties, such as creditors of a participant. This provision does not, however, permit rules to be adopted that would govern the rights and obligations of third parties other than as a consequence of rules that specify the rights and obligations of the clearing corporation and its participants.

2. The definition of clearing corporation in Section 8-102 covers only federal reserve banks, entities registered as clearing agencies under the federal securities laws, and others subject to comparable regulation. The rules of registered clearing agencies are subject to regulatory oversight under the federal securities laws.

Definitional Cross References

"Clearing corporation". Section 8-102(a)(5).

§ 28:8-112. Creditor's legal process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d) of this section. However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d) of this section.

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d) of this section.

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

(Dec. 30, 1963, 77 Stat. 740, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-112.

1973 Ed., § 28:8-317.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. In dealing with certificated securities the instrument itself is the vital thing, and therefore a valid levy cannot be made unless all possibility of the certificate's wrongfully finding its way into a transferee's hands has been removed. This can be accomplished only when the certificate is in the possession of a public officer, the issuer, or an independent third party. A debtor who has been enjoined can still transfer the security in contempt of court. See Overlock v. Jerome-Portland Copper Mining Co., 29 Ariz. 560, 243 P. 400 (1926). Therefore, although injunctive relief is provided in subsection (e) so that creditors may use this method to gain control of the certificated security, the security certificate itself must be reached to constitute a proper levy whenever the debtor has possession.

2. Subsection (b) provides that when the security is uncertificated and registered in the debtor's name, the debtor's interest can be reached only by legal process upon the issuer. The most logical place to serve the issuer would be the place where the transfer records are maintained, but that location might be difficult to identify, especially when the separate elements of a computer network might be situated in different places. The chief executive office is selected as the appropriate place by analogy to Section 9-103(3)(d). See Comment 5(c) to that section. This section indicates only how attachment is to be made, not when it is legally justified. For that reason there is no conflict between this section and Shaffer v. Heitner, 433 U.S. 186 (1977).

3. Subsection (c) provides that a security entitlement can be reached only by legal process upon the debtor's security intermediary. Process is effective only if directed to the debtor's own security intermediary. If Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor's property interest is a security entitlement against Broker.

Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation. See also Section 8-115.

4. Subsection (d) provides that when a certificated security, an uncertificated security, or a security entitlement is controlled by a secured party, the debtor's interest can be reached by legal process upon the secured party. This section does not attempt to provide for rights as between the creditor and the secured party, as, for example, whether or when the secured party must liquidate the security.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).

"Issuer". Section 8-201.

"Secured party". Section 9-105(1)(m).

"Securities intermediary". Section 8-102(a)(14).

"Security certificate". Section 8-102(a)(16).

"Security entitlement". Section 8-102(a)(17).

"Uncertificated security". Section 8-102(a)(18).

§ 28:8-113. Statute of frauds inapplicable.

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-113.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

This section provides that the statute of frauds does not apply to contracts for the sale of securities, reversing prior law which had a special statute of frauds in Section 8-319 (1978). With the increasing use of electronic means of communication, the statute of frauds is unsuited to the realities of the securities business. For securities transactions, whatever benefits a statute of frauds may play in filtering out fraudulent claims are outweighed by the obstacles it places in the development of modern commercial practices in the securities business.

Definitional Cross References

"Action". Section 1-201(1).

"Contract". Section 1-201(11).

"Writing". Section 1-201(46).

§ 28:8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

(Dec. 30, 1963, 77 Stat. 733, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-114.

1973 Ed., § 28:8-105.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

This section adapts the rules of negotiable instruments law concerning procedure in actions on instruments, see Section 3-308, to actions on certificated securities governed by this Article. An "action on a security" includes any action or proceeding brought against the issuer to enforce a right or interest that is part of the security, such as an action to collect principal or interest or a dividend, or to establish a right to vote or to receive a new security under an exchange offer or plan of reorganization. This section applies only to certificated securities; actions on uncertificated securities are governed by general evidentiary principles.

Definitional Cross References

"Action". Section 1-201(1).
"Burden of establishing". Section 1-201(8).
"Certificated security". Section 8-102(a)(4).
"Indorsement". Section 8-102(a)(11).
"Issuer". Section 8-201.
"Presumed". Section 1-201(31).
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).

§ 28:8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) Took the action after it had been served with an injunction, restraining

order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) In the case of a security certificate that has been stolen, acted with notice of the adverse claim.

(Dec. 30, 1963, 77 Stat. 741, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-115.

1973 Ed., § 28:8-318.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Other provisions of Article 8 protect certain purchasers against adverse claims, both for the direct holding system and the indirect holding system. See Sections 8-303 and 8-502. This section deals with the related question of the possible liability of a person who acted as the "conduit" for a securities transaction. It covers both securities intermediaries—the "conduits" in the indirect holding system—and brokers or other agents or bailees—the "conduits" in the direct holding system. The following examples illustrate its operation:

Example 1. John Doe is a customer of the brokerage firm of Able & Co. Doe delivers to Able a certificate for 100 shares of XYZ Co. common stock, registered in Doe's name and properly indorsed, and asks the firm to sell it for him. Able does so. Later, John Doe's spouse Mary Doe brings an action against Able asserting that Able's action was wrongful against her because the XYZ Co. stock was marital property in which she had an interest, and John Doe was acting wrongfully against her in transferring the securities.

Example 2. Mary Roe is a customer of the brokerage firm of Baker & Co. and holds her securities through a securities account with Baker. Roe instructs Baker to sell 100 shares of XYZ Co. common stock that she carried in her account. Baker does so. Later, Mary Roe's spouse John Roe brings an action against Baker asserting that Baker's action was wrongful against him because the XYZ Co. stock was marital property in which he had an interest, and Mary Roe was acting wrongfully against him in transferring the securities. Under common law conversion principles, Mary Doe might be able to assert that Able & Co. is liable to her in Example 1 for exercising dominion over property inconsistent with her rights in it. On that or some similar theory John Roe might assert that Baker is liable to him in Example 2. Section 8-115 protects both Able and Baker from liability.

2. The policy of this section is similar to that of many other rules of law that protect agents and bailees from liability as innocent converters. If a thief steals property and ships it by mail, express service, or carrier, to another person, the recipient of the property does not obtain good title, even though the recipient may have given value to the thief and had no notice or knowledge that the property was stolen. Accordingly, the true owner can recover the property from the recipient or obtain damages in a conversion or similar action. An action against the postal service, express company, or carrier presents entirely different policy considerations. Accordingly, general tort law protects agents or bailees who act on the instructions of their principals or bailors. See Restatement (Second) of Torts s 235. See also UCC Section 7-404.

3. Except as provided in paragraph 3, this section applies even though the securities intermediary, or the broker or other agent or bailee, had notice or knowledge that another person asserts a claim to the securities. Consider the following examples:

Example 3. Same facts as in Example 1, except that before John Doe brought the XYZ Co. security certificate to Able for sale, Mary Doe telephoned or wrote to the firm asserting that she had an interest in all of John Doe's securities and demanding that they not trade for him.

Example 4. Same facts as in Example 2, except that before Mary Roe gave an entitlement order to Baker to sell the XYZ Co. securities from her account, John Roe telephoned or

wrote to the firm asserting that he had an interest in all of Mary Roe's securities and demanding that they not trade for her. Section 8-115 protects Able and Baker from liability. The protections of Section 8-115 do not depend on the presence or absence of notice of adverse claims. It is essential to the securities settlement system that brokers and securities intermediaries be able to act promptly on the directions of their customers. Even though a firm has notice that someone asserts a claim to a customer's securities or security entitlements, the firm should not be placed in the position of having to make a legal judgment about the validity of the claim at the risk of liability either to its customer or to the third party for guessing wrong. Under this section, the broker or securities intermediary is privileged to act on the instructions of its customer or entitlement holder, unless it has been served with a restraining order or other legal process enjoining it from doing so. This is already the law in many jurisdictions. For example a section of the New York Banking Law provides that banks need not recognize any adverse claim to funds or securities on deposit with them unless they have been served with legal process. N.Y. Banking Law s 134. Other sections of the UCC embody a similar policy. See Sections 3-602, 5-114(2)(b).

Paragraph (1) of this section refers only to a court order enjoining the securities intermediary or the broker or other agent or bailee from acting at the instructions of the customer. It does not apply to cases where the adverse claimant tells the intermediary or broker that the customer has been enjoined, or shows the intermediary or broker a copy of a court order binding the customer.

Paragraph (3) takes a different approach in one limited class of cases, those where a customer sells stolen certificated securities through a securities firm. Here the policies that lead to protection of securities firms against assertions of other sorts of claims must be weighed against the desirability of having securities firms guard against the disposition of stolen securities. Accordingly, paragraph (3) denies protection to a broker, custodian, or other agent or bailee who receives a stolen security certificate from its customer, if the broker, custodian, or other agent or bailee had notice of adverse claims. The circumstances that give notice of adverse claims are specified in Section 8-105. The result is that brokers, custodians, and other agents and bailees face the same liability for selling stolen certificated securities that purchasers face for buying them.

4. As applied to securities intermediaries, this section embodies one of the fundamental principles of the Article 8 indirect holding system rules—that a securities intermediary owes duties only to its own entitlement holders. The following examples illustrate the operation of this section in the multi-tiered indirect holding system:

Example 5. Able & Co., a broker-dealer, holds 50,000 shares of XYZ Co. stock in its account at Clearing Corporation. Able acquired the XYZ shares from another firm, Baker & Co., in a transaction that Baker contends was tainted by fraud, giving Baker a right to rescind the transaction and recover the XYZ shares from Able. Baker sends notice to Clearing Corporation stating that Baker has a claim to the 50,000 shares of XYZ Co. in Able's account. Able then initiates an entitlement order directing Clearing Corporation to transfer the 50,000 shares of XYZ Co. to another firm in settlement of a trade. Under Section 8-115, Clearing Corporation is privileged to comply with Able's entitlement order, without fear of liability to Baker. This is so even though Clearing Corporation has notice of Baker's claim, unless Baker obtains a court order enjoining Clearing Corporation from acting on Able's entitlement order.

Example 6. Able & Co., a broker-dealer, holds 50,000 shares of XYZ Co. stock in its account at Clearing Corporation. Able initiates an entitlement order directing Clearing Corporation to transfer the 50,000 shares of XYZ Co. to another firm in settlement of a trade. That trade was made by Able for its own account, and the proceeds were devoted to its own use. Able becomes insolvent, and it is discovered that Able has a shortfall in the shares of XYZ Co. stock that it should have been carrying for its customers. Able's customers bring an action against Clearing Corporation asserting that Clearing Corporation acted wrongfully in transferring the XYZ shares on Able's order because those were shares that should have been held by Able for its customers. Under Section 8-115, Clearing Corporation is not liable to Able's customers, because Clearing Corporation acted on an effective entitlement order of its own entitlement holder, Able. Clearing Corporation's protection against liability does not depend on the presence or absence of notice or knowledge of the claim by Clearing Corporation.

5. If the conduct of a securities intermediary or a broker or other agent or bailee rises to a level of complicity in the wrongdoing of its customer or principal, the policies that favor protection against liability do not apply. Accordingly, paragraph (2) provides that the protections of this section do not apply if the securities intermediary or broker or other agent or bailee acted in collusion with the customer or principal in violating the rights of another person. The collusion test is intended to adopt a standard akin to the tort rules that determine whether a person is liable as an aider or abettor

for the tortious conduct of a third party. See Restatement (Second) of Torts s 876.

Knowledge that the action of the customer is wrongful is a necessary but not sufficient condition of the collusion test. The aspect of the role of securities intermediaries and brokers that Article 8 deals with is the clerical or ministerial role of implementing and recording the securities transactions that their customers conduct. Faithful performance of this role consists of following the instructions of the customer. It is not the role of the record-keeper to police whether the transactions recorded are appropriate, so mere awareness that the customer may be acting wrongfully does not itself constitute collusion. That, of course, does not insulate an intermediary or broker from responsibility in egregious cases where its action goes beyond the ordinary standards of the business of implementing and recording transactions, and reaches a level of affirmative misconduct in assisting the customer in the commission of a wrong.

Definitional Cross References

"Broker". Section 8-102(a)(3).

"Effective". Section 8-107.

"Entitlement order". Section 8-102(a)(8).

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security certificate". Section 8-102(a)(16).

§ 28:8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-116.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is intended to make explicit two points that, while implicit in other provisions, are of sufficient importance to the operation of the indirect holding system that they warrant explicit statement. First, it makes clear that a securities intermediary that receives a financial asset and establishes a security entitlement in respect thereof in favor of an entitlement holder is a "purchaser" of the financial asset that the securities intermediary received. Second, it makes clear that by establishing a security entitlement in favor of an entitlement holder a securities intermediary gives value for any corresponding financial asset that the securities intermediary receives or acquires from another party, whether the intermediary holds directly or indirectly.

In many cases a securities intermediary that receives a financial asset will also be transferring value to the person from whom the financial asset was received. That, however, is not always the case. Payment may occur through a different system than settlement of the securities side of the transaction, or the securities might be transferred without a corresponding payment, as when a person moves an account from one securities intermediary to another. Even though the securities intermediary does not give value to the transferor, it does give value by incurring obligations to its own entitlement holder. Although the general definition of value in Section 1-201(44)(d) should be interpreted to cover the point, this section is included to make this point explicit.

2. The following examples illustrate the effect of this section:

Example 1. Buyer buys 1000 shares of XYZ Co. common stock through Buyer's broker Able & Co. to be held in Buyer's securities account. In settlement of the trade, the selling broker delivers to Able a security certificate in street name, indorsed in blank, for 1000 shares XYZ Co. stock, which Able holds in its vault. Able credits Buyer's account for securities in that amount. Section 8-116 specifies that Able is a purchaser of the XYZ Co. stock certificate, and

gave value for it. Thus, Able can obtain the benefit of Section 8-303, which protects purchasers for value, if it satisfies the other requirements of that section.

Example 2. Buyer buys 1000 shares XYZ Co. common stock through Buyer's broker Able & Co. to be held in Buyer's securities account. The trade is settled by crediting 1000 shares XYZ Co. stock to Able's account at Clearing Corporation. Able credits Buyer's account for securities in that amount. When Clearing Corporation credits Able's account, Able acquires a security entitlement under Section 8-501. Section 8-116 specifies that Able acquired this security entitlement for value. Thus, Able can obtain the benefit of Section 8-502, which protects persons who acquire security entitlements for value, if it satisfies the other requirements of that section.

Example 3. Thief steals a certificated bearer bond from Owner. Thief sends the certificate to his broker Able & Co. to be held in his securities account, and Able credits Thief's account for the bond. Section 8-116 specifies that Able is a purchaser of the bond and gave value for it. Thus, Able can obtain the benefit of Section 8-303, which protects purchasers for value, if it satisfies the other requirements of that section.

Definitional Cross References

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security entitlement". Section 8-102(a)(17).

"Entitlement holder". Section 8-102(a)(7).

Part 2. Issue and Issuer.

§ 28:8-201. Issuer.

(a) With respect to an obligation on or a defense to a security, an "issuer" includes a person that:

(1) Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) Becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

(Dec. 30, 1963, 77 Stat. 734, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-102 and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:8-201.

1973 Ed., § 28:8-201.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. The definition of "issuer" in this section functions primarily to describe the persons whose defenses may be cut off under the rules in Part 2. In large measure it simply tracks the language of the definition of security in Section 8-102(a)(15).

2. Subsection (b) distinguishes the obligations of a guarantor as issuer from those of the principal obligor. However, it does not exempt the guarantor from the impact of subsection (d) of Section 8-202. Whether or not the obligation of the guarantor is noted on the security is immaterial. Typically, guarantors are parent corporations, or stand in some similar relationship to the principal obligor. If that relationship existed at the time the security was originally issued the guaranty would probably have been noted on the security. However, if the relationship arose afterward, e.g., through a purchase of stock or properties, or through merger or consolidation, probably the notation would not have been made. Nonetheless, the holder of the security is entitled to the benefit of the obligation of the guarantor.

3. Subsection (c) narrows the definition of "issuer" for purposes of Part 4 of this Article (registration of transfer). It is supplemented by Section 8-407.

Definitional Cross References

"Person". Section 1-201(30).

"Security". Section 8-102(a)(15).

"Security certificate". Section 8-102(a)(16).

"Uncertificated security". Section 8-102(a)(18).

§ 28:8-202. Issuer's responsibility and defenses; notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) of this subsection applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in § 28:8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

(Dec. 30, 1963, 77 Stat. 734, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-202.

1973 Ed., § 28:8-202.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. In this Article the rights of the purchaser for value without notice are divided into two aspects, those against the issuer, and those against other claimants to the security. Part 2 of this Article, and especially this section, deal with rights against the issuer.

Subsection (a) states, in accordance with the prevailing case law, the right of the issuer (who prepares the text of the security) to include terms incorporated by adequate reference to an extrinsic source, so long as the terms so incorporated do not conflict with the stated terms. Thus, the standard practice of referring in a bond or debenture to the trust indenture under which it is issued without spelling out its necessarily complex and lengthy provisions is approved. Every stock certificate refers in some manner to the charter or articles of incorporation of the issuer. At least where there is more than one class of stock authorized applicable corporation codes specifically require a statement or summary as to preferences, voting powers and the like. References to constitutions, statutes, ordinances, rules, regulations or orders are not so common, except in the obligations of governments or governmental agencies or units; but where appropriate they fit into the rule here stated.

Courts have generally held that an issuer is estopped from denying representations made in the text of a security. Delaware-New Jersey Ferry Co. v. Leeds, 21 Del.Ch. 279, 186 A. 913 (1936). Nor is a defect in form or the invalidity of a security normally available to the issuer as a defense. Bonini v. Family Theatre Corporation, 327 Pa. 273, 194 A. 498 (1937); First National Bank of Fairbanks v. Alaska Airmotive, 119 F.2d 267 (C.C.A.Alaska 1941).

2. The rule in subsection (a) requiring that the terms of a security be noted or referred to on the certificate is based on practices and expectations in the direct holding system for certificated securities. This rule does not express a general rule or policy that the terms of a security are effective only if they are communicated to beneficial owners in some particular fashion. Rather, subsection (a) is based on the principle that a purchaser who does obtain a certificate is entitled to assume that the terms of the security have been noted or referred to on the certificate. That policy does not come into play in a securities holding system in which purchasers do not take delivery of certificates.

The provisions of subsection (a) concerning notation of terms on security certificates are necessary only because paper certificates play such an important role for certificated securities that a purchaser should be protected against assertion of any defenses or rights that are not noted on the certificate. No similar

problem exists with respect to uncertificated securities. The last sentence of subsection (a) is, strictly speaking, unnecessary, since it only recognizes the fact that the terms of an uncertificated security are determined by whatever other law or agreement governs the security. It is included only to preclude any inference that uncertificated securities are subject to any requirement analogous to the requirement of notation of terms on security certificates.

The rule of subsection (a) applies to the indirect holding system only in the sense that if a certificated security has been delivered to the clearing corporation or other securities intermediary, the terms of the security should be noted or referred to on the certificate. If the security is uncertificated, that principle does not apply even at the issuer-clearing corporation level. The beneficial owners who hold securities through the clearing corporation are bound by the terms of the security, even though they do not actually see the certificate. Since entitlement holders in an indirect holding system have not taken delivery of certificates, the policy of subsection (a) does not apply.

3. The penultimate sentence of subsection (a) and all of subsection (b) embody the concept that it is the duty of the issuer, not of the purchaser, to make sure that the security complies with the law governing its issue. The penultimate sentence of subsection (a) makes clear that the issuer cannot, by incorporating a reference to a statute or other document, charge the purchaser with notice of the security's invalidity. Subsection (b) gives to a purchaser for value without notice of the defect the right to enforce the security against the issuer despite the presence of a defect that otherwise would render the security invalid.

There are three circumstances in which a purchaser does not gain such rights: first, if the defect involves a violation of constitutional provisions, these rights accrue only to a subsequent purchaser, that is, one who takes other than by original issue.

This Article leaves to the law of each particular State the rights of a purchaser on original issue of a security with a constitutional defect. No negative implication is intended by the explicit grant of rights to a subsequent purchaser.

Second, governmental issuers are distinguished in subsection (b) from other issuers as a matter of public policy, and additional safeguards are imposed before governmental issues are validated. Governmental issuers are estopped from asserting defenses only if there has been substantial compliance with the legal requirements governing the issue or if substantial consideration has been received and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security. The purpose of the substantial compliance requirement is to make certain that a mere technicality as, e.g., in the manner of publishing election notices, shall not be a ground for depriving an innocent purchaser of rights in the security. The policy is here adopted of such cases as Tommie v. City of Gadsden, 229 Ala. 521, 158 So. 763 (1935), in which minor discrepancies in the form of the election ballot used were overlooked and the bonds were declared valid since there had been substantial compliance with the statute.

A long and well established line of federal cases recognizes the principle of estoppel in favor of purchasers for value without notices where municipalities issue bonds containing recitals of compliance with governing constitutional and statutory provisions, made by the municipal authorities entrusted with determining such compliance. Chaffee County v. Potter, 142 U.S. 355 (1892); Oregon v. Jennings, 119 U.S. 74 (1886); Gunnison County Commissioners v. Rollins, 173 U.S. 255 (1898). This rule has been qualified, however, by requiring that the municipality have power to issue the security. Anthony v. County of Jasper, 101 U.S. 693 (1879); Town of South Ottawa v. Perkins, 94 U.S. 260 (1876). This section follows the case law trend, simplifying the rule by setting up two conditions for an estoppel against a governmental issuer: (1) substantial consideration given, and (2) power in the issuer to borrow money or issue the security for the stated purpose. As a practical matter the problem of policing governmental issuers has been alleviated by the present practice of requiring legal opinions as to the validity of the issue. The bulk of the case law on this point is nearly 100 years old and it may be assumed that the question now seldom arises.

Section 8-210, regarding overissue, provides the third exception to the rule that an innocent purchase for value takes a valid security despite the presence of a defect that would otherwise give rise to invalidity. See that section and its Comment for further explanation.

4. Subsection (e) is included to make clear that this section does not affect the presently recognized right of either party to a "when, as and if" or "when distributed" contract to cancel the contract on substantial change.

5. Subsection (f) has been added because the introduction of the security entitlement concept requires some adaptation of the Part 2 rules, particularly those that distinguish between purchasers who take by original issue and subsequent purchasers. The basic concept of Part 2 is to apply to investment securities the principle of negotiable instruments law that an obligor is precluded from asserting most defenses against purchasers for value without notice. Section 8-202 describes in some detail which defenses issuers can raise against pur-

chasers for value and subsequent purchasers for value. Because these rules were drafted with the direct holding system in mind, some interpretive problems might be presented in applying them to the indirect holding. For example, if a municipality issues a bond in book-entry only form, the only direct "purchaser" of that bond would be the clearing corporation. The policy of precluding the issuer from asserting defenses is, however, equally applicable. Subsection (f) is designed to ensure that the defense preclusion rules developed for the direct holding system will also apply to the indirect holding system. Definitional Cross References

Definitional Cross References

"Certificated security". Section 8-102(a)(4).

"Notice". Section 1-201(25).

"Purchaser". Sections 1-201(33) and 8-116.

"Security". Section 8-102(a)(15).

"Uncertificated security". Section 8-102(a)(18).

"Value". Sections 1-201(44) and 8-116.

§ 28:8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one year after that date; or

(2) Is not covered by paragraph (1) of this subsection and the purchaser takes the security more than 2 years after the date set for surrender or presentation or the date on which performance became due.

(Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-203.

1973 Ed., § 28:8-203.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. The problem of matured or called securities is here dealt with in terms of the effect of such events in giving notice of the issuer's defenses and not in terms of "negotiability". The substance of this section applies only to certificated securities because certificates may be transferred to a purchaser by delivery after the security has matured, been called, or become redeemable or exchangeable. It is contemplated that uncertificated securities which have matured or been called will merely be canceled on the books of the issuer and the proceeds sent to the registered owner. Uncertificated securities which have become redeemable or exchangeable, at the option of the owner, may be transferred to a purchaser, but the transfer is effectuated only by registration of transfer, thus necessitating communication with the issuer. If defects or defenses in such securities exist, the issuer will necessarily have the opportunity to bring them to the attention of the purchaser.

2. The fact that a security certificate is in circulation long after it has been called for redemption or exchange must give rise to the question in a purchaser's mind as to why it has not been surrendered. After the lapse of a reasonable period of time a purchaser can no longer claim "no reason to know" of any defects or irregularities in its issue. Where funds are

available for the redemption the security certificate is normally turned in more promptly and a shorter time is set as the "reasonable period" than is set where funds are not available.

Defaulted certificated securities may be traded on financial markets in the same manner as unmatured and undefaulted instruments and a purchaser might not be placed upon notice of irregularity by the mere fact of default. An issuer, however, should at some point be placed in a position to determine definitely its liability on an invalid or improper issue, and for this purpose a security under this section becomes "stale" two years after the default. A different rule applies when the question is notice not of issuer's defenses but of claims of ownership. Section 8-105 and Comment.

3. Nothing in this section is designed to extend the life of preferred stocks called for redemption as "shares of stock" beyond the redemption date. After such a call, the security represents only a right to the funds set aside for redemption. Definitional Cross References

Definitional Cross References

"Certificated security". Section 8-102(a)(4).

"Notice". Section 1-201(25).

"Purchaser". Sections 1-201(33) & 8-116.

"Security". Section 8-102(a)(15).

"Security certificate". Section 8-102(a)(16).

"Uncertificated security". Section 8-102(a)(18).

§ 28:8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) The security is certificated and the restriction is noted conspicuously on the security certificate; or

(2) The security is uncertificated and the registered owner has been notified of the restriction.

(Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-401.

Prior Codifications. — 1981 Ed., § 28:8-204.

1973 Ed., § 28:8-204.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. Restrictions on transfer of securities are imposed by issuers in a variety of circumstances and for a variety of purposes, such as to retain control of a close corporation or to ensure compliance with federal securities laws. Other law determines whether such restrictions are permissible. This section deals only with the consequences of failure to note the restriction on a security certificate.

This section imposes no bar to enforcement of a restriction on transfer against a person who has actual knowledge of it.

2. A restriction on transfer of a certificated security is ineffective against a person without knowledge of the restriction unless the restriction is noted conspicuously on the certificate. The word "noted" is used to make clear that the restriction need not be set forth in full text. Refusal by an issuer to register a transfer on the basis of an unnoted restriction would be a violation of the issuer's duty to register under Section 8-401.

3. The policy of this section is the same as in Section 8-202. A purchaser who takes delivery of a certificated security is entitled to rely on the terms stated on the certificate. That policy obviously does not apply to uncertificated securities. For uncertificated securities, this section requires only that the registered owner has been notified of the restriction. Suppose, for example, that A is the registered owner of an uncertificated security, and that the issuer has notified A of a restriction on transfer. A agrees to sell the security to B, in violation of the restriction. A completes a written instruction directing the issuer to register transfer to B, and B pays A for the security at the time A delivers the instruction to B. A does not inform

B of the restriction, and B does not otherwise have notice or knowledge of it at the time B pays and receives the instruction. B presents the instruction to the issuer, but the issuer refuses to register the transfer on the grounds that it would violate the restriction. The issuer has complied with this section, because it did notify the registered owner A of the restriction. The issuer's refusal to register transfer is not wrongful. B has an action against A for breach of transfer warranty, see Section 8-108(b)(4)(iii). B's mistake was treating an uncertificated security transaction in the fashion appropriate only for a certificated security. The mechanism for transfer of uncertificated securities is registration of transfer on the books of the issuer; handing over an instruction only initiates the process. The purchaser should make arrangements to ensure that the price is not paid until it knows that the issuer has or will register transfer.

4. In the indirect holding system, investors neither take physical delivery of security certificates nor have uncertificated securities registered in their names. So long as the requirements of this section have been satisfied at the level of the relationship between the issuer and the securities intermediary that is a direct holder, this section does not preclude the issuer from enforcing a restriction on transfer. See Section 8-202(a) and Comment 2 thereto.

5. This section deals only with restrictions imposed by the issuer. Restrictions imposed by statute are not affected. See Quiner v. Marblehead Social Co., 10 Mass. 476 (1813); Madison Bank v. Price, 79 Kan. 289, 100 P. 280 (1909); Healey v. Steele Center Creamery Ass'n, 115 Minn. 451, 133 N.W. 69 (1911). Nor does it deal with private agreements between stockholders containing restrictive covenants as to the sale of the security.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Conspicuous". Section 1-201(10).
"Issuer". Section 8-201.
"Knowledge". Section 1-201(25).
"Notify". Section 1-201(25).
"Purchaser". Sections 1-201(33) and 8-116.
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) An employee of the issuer, or of any of the persons listed in paragraph (1) of this subsection, entrusted with responsible handling of the security certificate.

(Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-202.

Prior Codifications. — 1981 Ed., § 28:8-205.

1973 Ed., § 28:8-205.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. The problem of forged or unauthorized signatures may arise where an employee of the issuer, transfer agent, or registrar has access to securities which the employee is required to

prepare for issue by affixing the corporate seal or by adding a signature necessary for issue. This section is based upon the issuer's duty to avoid the negligent entrusting of securities to such persons.

Issuers have long been held responsible for signatures placed upon securities by parties whom they have held out to the public as authorized to prepare such securities. See Fifth Avenue Bank of New York v. The Forty-Second & Grand Street Ferry Railroad Co., 137 N.Y. 231, 33 N.E. 378, 19 L.R.A. 331, 33 Am.St.Rep. 712 (1893); Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68, 31 L.R.A. 776, 51 Am.St.Rep. 727 (1896). The "apparent authority" concept of some of the case-law, however, is here extended and this section expressly rejects the technical distinction, made by courts reluctant to recognize forged signatures, between cases where forgers sign signatures they are authorized to sign under proper circumstances and those in which they sign signatures they are never authorized to sign. Citizens' & Southern National Bank v. Trust Co. of Georgia, 50 Ga.App. 681, 179 S.E. 278 (1935). Normally the purchaser is not in a position to determine which signature a forger, entrusted with the preparation of securities, has "apparent authority" to sign. The issuer, on the other hand, can protect itself against such fraud by the careful selection and bonding of agents and employees, or by action over against transfer agents and registrars who in turn may bond their personnel.

2. The issuer cannot be held liable for the honesty of employees not entrusted, directly or indirectly, with the signing, preparation, or responsible handling of similar securities and whose possible commission of forgery it has no reason to anticipate. The result in such cases as Hudson Trust Co. v. American Linseed Co., 232 N.Y. 350, 134 N.E. 178 (1922), and Dollar Savings Fund & Trust Co. v. Pittsburgh Plate Glass Co., 213 Pa. 307, 62 A. 916, 5 Ann.Cas. 248 (1906) is here adopted.

3. This section is not concerned with forged or unauthorized indorsements, but only with unauthorized signatures of issuers, transfer agents, etc., placed upon security certificates during the course of their issue. The protection here stated is available to all purchasers for value without notice and not merely to subsequent purchasers.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Issuer". Section 8-201.
"Notice". Section 1-201(25).
"Purchaser". Sections 1-201(33) and 8-116.
"Security certificate". Section 8-102(a)(14).
"Unauthorized signature". Section 1-201(43).

§ 28:8-206. Completion or alteration of security certificate.

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) Any person may complete it by filling in the blanks as authorized; and

(2) Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

(Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-206.

1973 Ed., § 28:8-206.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. The problem of forged or unauthorized signatures necessary for the issue or transfer of a security is not involved here, and a person in possession of a blank certificate is not, by this

section, given authority to fill in blanks with such signatures. Completion of blanks left in a transfer instruction is dealt with elsewhere (Section 8-305(a)).

2. Blanks left upon issue of a security certificate are the only ones dealt with here, and a purchaser for value without notice is protected. A purchaser is not in a good position to determine whether blanks were completed by the issuer or by some person not authorized to complete them. On the other hand the issuer can protect itself by not placing its signature on the writing until the blanks are completed or, if it does sign before all blanks are completed, by carefully selecting the agents and employees to whom it entrusts the writing after authentication. With respect to a security certificate that is completed by the issuer but later is altered, the issuer has done everything it can to protect the purchaser and thus is not charged with the terms as altered. However, it is charged according to the original terms, since it is not thereby prejudiced. If the completion or alteration is obviously irregular, the purchaser may not qualify as a purchaser who took without notice under this section.

3. Only the purchaser who physically takes the certificate is directly protected. However, a transferee may receive protection indirectly through Section 8-302(a).

4. The protection granted a purchaser for value without notice under this section is modified to the extent that an overissue may result where an incorrect amount is inserted into a blank (Section 8-210). Definitional Cross References

Definitional Cross References

"Notice". Section 1-201(25).

"Purchaser". Sections 1-201(33) and 8-116.

"Security certificate". Section 8-102(a)(16).

"Unauthorized signature". Section 1-201(43).

"Value". Sections 1-201(44) and 8-116.

§ 28:8-207. Rights and duties of issuer with respect to registered owners.

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This article does not affect the liability of the registered owner of a security for a call, assessment, or the like.

(Dec. 30, 1963, 77 Stat. 735, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; July 25, 1995, D.C. Law 11-30, § 7(f), 42 DCR 1547; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-207.

1973 Ed., § 28:8-207.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-30. — Law 11-30, the "Technical Amendments Act of 1995," was introduced in Council and assigned Bill No. 11-58, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on February 7, 1995, and March 7, 1995, respectively. Signed by the Mayor on March 22, 1995, it was assigned Act No. 11-32 and transmitted to both Houses of Congress for its review. D.C. Law 11-30 became effective on July 25, 1995.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states the issuer's right to treat the registered owner of a security as the person entitled to exercise all the rights of an owner. This right of the issuer is limited by the provisions of Part 4 of this article. Once there has been due presentation for registration of transfer, the issuer has a duty to register ownership in the name of the transferee. Section 8-401. Thus its right to treat the old registered owner as exclusively entitled to the rights of ownership must cease.

The issuer may under this section make distributions of money or securities to the registered owners of securities without requiring

further proof of ownership, provided that such distributions are distributable to the owners of all securities of the same issue and the terms of the security do not require surrender of a security certificate as a condition of payment or exchange. Any such distribution shall constitute a defense against a claim for the same distribution by a person, even if that person is in possession of the security certificate and is a protected purchaser of the security. See PEB Commentary No. 4, dated March 10, 1990.

2. Subsection (a) is permissive and does not require that the issuer deal exclusively with the registered owner. It is free to require proof of ownership before paying out dividends or the like if it chooses to. Barbato v. Breeze Corporation, 128 N.J.L. 309, 26 A.2d 53 (1942).

3. This section does not operate to determine who is finally entitled to exercise voting and other rights or to receive payments and distributions. The parties are still free to incorporate their own arrangements as to these matters in seller-purchaser agreements which may be definitive as between them.

4. No change in existing state laws as to the liability of registered owners for calls and assessments is here intended; nor is anything in this section designed to estop record holders from denying ownership when assessments are levied if they are otherwise entitled to do so under state law. See State ex rel. Squire v. Murfey, Blosson & Co., 131 Ohio St. 289, 2 N.E.2d 866 (1936); Willing v. Delaplaine, 23 F.Supp. 579 (1937).

5. No interference is intended with the common practice of closing the transfer books or taking a record date for dividend, voting, and other purposes, as provided for in by-laws, charters, and statutes.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Registered form". Section 8-102(a)(13).
"Security". Section 8-102(a)(15).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) The certificate is genuine;

(2) The person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and

(3) The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) of this section does not assume responsibility for the validity of the security in other respects.

(Dec. 30, 1963, 77 Stat. 736, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-208.

1973 Ed., § 28:8-208.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. The warranties here stated express the current understanding and prevailing case law as to the effect of the signatures of authenticating trustees, transfer agents, and registrars. See Jarvis v. Manhattan Beach Co., 148 N.Y. 652, 43 N.E. 68, 31 L.R.A. 776, 51 Am.St.Rep. 727 (1896). Although it has generally been regarded as the particular obligation of the transfer agent to determine whether securities are in proper form as provided by the by-laws and Articles of Incorporation, neither a registrar nor an authenticating trustee should properly place a signature upon a certificate without determining whether it is at least regular on its face. The obligations of these parties in this respect have therefore been made explicit in terms of due care. See Feldmeier v. Mortgage Securities, Inc., 34 Cal.App.2d 201, 93 P.2d 593 (1939).

2. Those cases which hold that an authenticating trustee is not liable for any defect in the mortgage or property which secures the bond or for any fraudulent misrepresentations made by the issuer are not here affected since these matters do not involve the genuineness or proper form of the security. Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 P. 898 (1917); Tschetinian v. City Trust Co., 186 N.Y. 432, 79 N.E. 401 (1906); Davidge v. Guardian Trust Co. of New York, 203 N.Y. 331, 96 N.E. 751 (1911).

3. The charter or an applicable statute may affect the capacity of a bank or other corporation undertaking to act as an authenticating trustee, registrar, or transfer agent. See, for example, the Federal Reserve Act (U.S.C.A., Title 12, Banks and Banking, Section 248) under which the Board of Governors of the Federal Reserve Bank is authorized to grant special permits to National Banks permitting them to act as trustees. Such corporations are therefore held to certify as to their legal capacity to act as well as to their authority.

4. Authenticating trustees, registrars, and transfer agents have normally been held liable for an issue in excess of the authorized amount. Jarvis v. Manhattan Beach Co., supra; Mullen v. Eastern Trust & Banking Co., 108 Me. 498, 81 A. 948 (1911). In imposing upon these parties a duty of due care with respect to the amount they are authorized to help issue, this section does not necessarily validate the security, but merely holds persons responsible for the excess issue liable in damages for any loss suffered by the purchaser.

5. Aside from questions of genuineness and excess issue, these parties are not held to certify as to the validity of the security unless they specifically undertake to do so. The case law which has recognized a unique responsibility on the transfer agent's part to testify as to the validity of any security which it countersigns is rejected.

6. This provision does not prevent a transfer agent or issuer from agreeing with a registrar of stock to protect the registrar in respect of the genuineness and proper form of a security certificate signed by the issuer or the transfer agent or both. Nor does it interfere with proper indemnity arrangements between the issuer and trustees, transfer agents, registrars, and the like.

7. An unauthorized signature is a signature for purposes of this section if and only if it is made effective by Section 8-205.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Genuine". Section 1-201(18).
"Issuer". Section 8-201.
"Notice". Section 1-201(25).
"Purchaser". Sections 1-201(33) and 8-116.
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Uncertificated security". Section 8-102(a)(18).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-209. Issuer's lien.

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

(Dec. 30, 1963, 77 Stat. 733, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-209.

1973 Ed., § 28:8-103.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

This section is similar to Sections 8-202 and 8-204 which require that the terms of a certificated security and any restriction on transfer imposed by the issuer be noted on the security certificate. This section differs from those two sections in that the purchaser's knowledge of the issuer's claim is irrelevant. "Noted" makes clear that the text of the lien provisions need not be set forth in full. However, this would not override a provision of an applicable corporation code requiring statement in haec verba. This section does not apply to uncertificated securities. It applies to the indirect holding system in the same fashion as Sections 8-202 and 8-204, see Comment 2 to Section 8-202.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Issuer". Section 8-201.
"Purchaser". Sections 1-201(33) and 8-116.
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).

§ 28:8-210. Overissue.

(a) For the purposes of this section the term "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.

(b) Except as otherwise provided in subsections (c) and (d) of this section, the provisions of this article which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

(Dec. 30, 1963, 77 Stat. 733, Pub. L. 88-243, § 1; Mar. 16, 1973, D.C. Law 9-196, § 4, 39 DCR 9165 renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-102, § 28:8-404, and § 28:8-405.

Prior Codifications. — 1981 Ed., § 28:8-210. 1973 Ed., § 28:8-104.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-201.

UNIFORM COMMERCIAL CODE COMMENT

1. Deeply embedded in corporation law is the conception that "corporate power" to issue securities stems from the statute, either general or special, under which the corporation is organized. Corporation codes universally require that the charter or articles of incorporation state, at least as to capital shares, maximum limits in terms of number of shares or total dollar capital. Historically, special incorporation statutes are similarly drawn and sometimes similarly limit the face amount of authorized debt securities. The theory is that issue of securities in excess of the authorized amounts is prohibited. See, for example, McWilliams v. Geddes & Moss Undertaking Co., 169 So. 894 (1936, La.); Crawford v. Twin City Oil Co., 216 Ala. 216, 113 So. 61 (1927); New York and New Haven R.R. Co. v. Schuyler, 34 N.Y. 30 (1865). This conception persists despite modern corporation codes under which, by action of directors and stockholders, additional shares can be authorized by charter amendment and thereafter

issued. This section does not give a person entitled to validation, issue, or reissue of a security, the right to compel amendment of the charter to authorize additional shares. Therefore, in a case where issue of an additional security would require charter amendment, the plaintiff is limited to the two alternate remedies set forth in subsections (c) and (d). The last clause of subsection (a), which is added in Revised Article 8, does, however, recognize that under modern conditions, overissue may be a relatively minor technical problem that can be cured by appropriate action under governing corporate law.

2. Where an identical security is reasonably available for purchase, whether because traded on an organized market, or because one or more security owners may be willing to sell at a not unreasonable price, the issuer, although unable to issue additional shares, will be able to purchase them and may be compelled to follow that procedure. West v. Tintic Standard Mining Co., 71 Utah 158, 263 P. 490 (1928).

3. The right to recover damages from an issuer who has permitted an overissue to occur is well settled. New York and New Haven R.R. Co. v. Schuyler, 34 N.Y. 30 (1865). The measure of such damages, however, has been open to question, some courts basing them upon the value of stock at the time registration is refused; some upon the value at the time of trial; and some upon the highest value between the time of refusal and the time of trial. Allen v. South Boston Railroad, 150 Mass. 200, 22 N.E. 917, 5 L.R.A. 716, 15 Am.St.Rep. 185 (1889); Commercial Bank v. Kortright, 22 Wend. (N.Y.) 348 (1839). The purchase price of the security to the last purchaser who gave value for it is here adopted as being the fairest means of reducing the possibility of speculation by the purchaser. Interest may be recovered as the best available measure of compensation for delay.

Definitional Cross References

"Issuer". Section 8-201.

"Security". Section 8-102(a)(15).

"Security certificate". Section 8-102(a)(16).

"Uncertificated security". Section 8-102(a)(18).

Part 3. Transfer of Certificated and Uncertificated Securities.

§ 28:8-301. Delivery.

(a) Delivery of a certificated security to a purchaser occurs when:

(1) The purchaser acquires possession of the security certificate;

(2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is:

(A) registered in the name of the purchaser;

(B) payable to the order of the purchaser; or

(C) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

(Dec. 30, 1963, 77 Stat. 736, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(4), 47 DCR 7576.)

Section references. — This section is referenced in § 28:8-102, § 28:8-104, § 28:9-203, and § 28:9-313.

Prior Codifications. — 1981 Ed., § 28:8-301.

1973 Ed., § 28:8-301.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:8-103.

UNIFORM COMMERCIAL CODE COMMENT

1. This section specifies the requirements for "delivery" of securities. Delivery is used in Article 8 to describe the formal steps necessary for a purchaser to acquire a direct interest in a security under this Article. The concept of delivery refers to the implementation of a transaction, not the legal categorization of the transaction which is consummated by delivery. Issuance and transfer are different kinds of transaction, though both may be implemented by delivery. Sale and pledge are different kinds of transfers, but both may be implemented by delivery.

2. Subsection (a) defines delivery with respect to certificated securities. Paragraph (1) deals with simple cases where purchasers themselves acquire physical possession of certificates. Paragraphs (2) and (3) of subsection (a) specify the circumstances in which delivery to a purchaser can occur although the certificate is in the possession of a person other than the purchaser. Paragraph (2) contains the general rule that a purchaser can take delivery through another person, so long as the other person is actually acting on behalf of the purchaser or acknowledges that it is holding on behalf of the purchaser. Paragraph (2) does not apply to acquisition of possession by a securities intermediary, because a person who holds securities through a securities account acquires a security entitlement, rather than having a direct interest. See Section 8-501. Subsection (a)(3) specifies the limited circumstances in which delivery of security certificates to a securities intermediary is treated as a delivery to the customer. Note that delivery is a method of perfecting a security interest in a certificated security. See Section 9-313(a), (e).

3. Subsection (b) defines delivery with respect to uncertificated securities. Use of the term "delivery" with respect to uncertificated securities, does, at least on first hearing, seem a bit solecistic. The word "delivery" is, however, routinely used in the securities business in a broader sense than manual tradition. For example, settlement by entries on the books of a clearing corporation is commonly called "delivery," as in the expression "delivery versus payment." The diction of this section has the advantage of using the same term for uncertificated securities as for certificated securities, for which delivery is conventional usage. Paragraph (1) of subsection (b) provides that delivery occurs when the purchaser becomes the registered owner of an uncertificated security, either upon original issue or registration of transfer. Paragraph (2) provides for delivery of an uncertificated security through a third person, in a fashion analogous to subsection (a)(2).

Definitional Cross References

"Certificated security". Section 8-102(a)(4).

"Effective". Section 8-107.

"Issuer". Section 8-201.

"Purchaser". Sections 1-201(33) and 8-116.

"Registered form". Section 8-102(a)(13).

"Securities intermediary". Section 8-102(a)(14).

"Security certificate". Section 8-102(a)(16).

"Special indorsement". Section 8-304(a).

"Uncertificated security". Section 8-102(a)(18).

§ 28:8-302. Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

(Dec. 30, 1963, 77 Stat. 736, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(5), 47 DCR 7576.)

Prior Codifications. — 1981 Ed., § 28:8-302.

1973 Ed., § 28:8-302.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:8-103.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) provides that a purchaser of a certificated or uncertificated security acquires all rights that the transferor had or had power to transfer. This statement of the familiar "shelter" principle is qualified by the exceptions that a purchaser of a limited interest acquires only that interest, subsection (b), and that a person who does not qualify as a protected purchaser cannot improve its position by taking from a subsequent protected purchaser, subsection (c).

2. Although this section provides that a purchaser acquires a property interest in a certificated or uncertificated security, it does not state that a person can acquire an interest in a security only by purchase. Article 8 also is not a comprehensive codification of all of the law governing the creation or transfer of interests in securities. For example, the grant of a security interest is a transfer of a property interest, but the formal steps necessary to effectuate such a transfer are governed by Article 9, not by Article 8. Under the Article 9 rules, a security interest in a certificated or uncertificated security can be created by execution of a security agreement under Section 9-203 and can be perfected by filing. A transfer of an Article 9 security interest can be implemented by an Article 8 delivery, but need not be.

Similarly, Article 8 does not determine whether a property interest in certificated or uncertificated security is acquired under other law, such as the law of gifts, trusts, or equitable remedies. Nor does Article 8 deal with transfers by operation of law. For example, transfers from decedent to administrator, from ward to guardian, and from bankrupt to trustee in bankruptcy are governed by other law as to both the time they occur and the substance of the transfer. The Article 8 rules do, however, determine whether the issuer is obligated to recognize the rights that a third party, such as a transferee, may acquire under other law. See Sections 8-207, 8-401, and 8-404.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Delivery". Section 8-301.
"Notice of adverse claim". Section 8-105.
"Protected purchaser". Section 8-303.
"Purchaser". Sections 1-201(33) and 8-116.
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-303. Protected purchaser.

(a) For the purposes of this article, the term "protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

(1) Gives value;

(2) Does not have notice of any adverse claim to the security; and

(3) Obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

(Dec. 30, 1963, 77 Stat. 736, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-102.

Prior Codifications. — 1981 Ed., § 28:8-303.

1973 Ed., § 28:8-303.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) lists the requirements that a purchaser must meet to qualify as a "protected purchaser." Subsection (b) provides that a protected purchaser takes its interest free from adverse claims. "Purchaser" is defined broadly in Section 1-201.

A secured party as well as an outright buyer can qualify as a protected purchaser. Also, "purchase" includes taking by issue, so a person to whom a security is originally issued can qualify as a protected purchaser.

2. To qualify as a protected purchaser, a purchaser must give value, take without notice of any adverse claim, and obtain control. Value is used in the broad sense defined in Section 1-201(44). See also Section 8-116 (securities intermediary as purchaser for value). Adverse claim is defined in Section 8-102(a)(1). Section 8-105 specifies whether a purchaser has notice of an adverse claim. Control is defined in Section 8-106. To qualify as a protected purchaser there must be a time at which all of the requirements are satisfied. Thus if a purchaser obtains notice of an adverse claim before giving value or satisfying the requirements for control, the purchaser cannot be a protected purchaser. See also Section 8-304(d).

The requirement that a protected purchaser obtain control expresses the point that to qualify for the adverse claim cut-off rule a purchaser must take through a transaction that is implemented by the appropriate mechanism. By contrast, the rules in Part 2 provide that any purchaser for value of a security without notice of a defense may take free of the issuer's defense based on that defense. See Section 8-202.

3. The requirements for control differ depending on the form of the security. For securities represented by bearer certificates, a purchaser obtains control by delivery. See Sections 8-106(a) and 8-301(a). For securities represented by certificates in registered form, the requirements for control are: (1) delivery as defined in Section 8-301(b), plus (2) either an effective indorsement or registration of transfer by the issuer. See Section 8-106(b). Thus, a person who takes through a forged indorsement does not qualify as a protected purchaser by virtue of the delivery alone. If, however, the purchaser presents the certificate to the issuer for registration of transfer, and the issuer registers transfer over the forged indorsement, the purchaser can qualify as a protected purchaser of the new certificate. If the issuer registers transfer on a forged indorsement, the true owner will be able to recover from the issuer for wrongful registration, see Section 8-404, unless the owner's delay in notifying the issuer of a loss or theft of the certificate results in preclusion under Section 8-406.

For uncertificated securities, a purchaser can obtain control either by delivery, see Sections 8-106(c)(1) and 8-301(b), or by obtaining an agreement pursuant to which the issuer agrees to act on instructions from the purchaser without further consent from the registered owner, see Section 8-106(c)(2). The control agreement device of Section 8-106(c)(2) takes the place of the "registered pledge" concept of the 1978 version of Article 8. A secured lender who obtains a control agreement under Section 8-106(c)(2) can qualify as a protected purchaser of an uncertificated security.

4. This section states directly the rules determining whether one takes free from adverse claims without using the phrase "good faith." Whether a person who takes under suspicious circumstances is disqualified is determined by the rules of Section 8-105 on notice of adverse claims. The term "protected purchaser," which replaces the term "bona fide purchaser" used in the prior version of Article 8, is derived from the term "protected holder" used in the Convention

on International Bills and Notes prepared by the United Nations Commission on International Trade Law ("UNCITRAL").

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Certificated security". Section 8-102(a)(4).
"Control". Section 8-106.
"Notice of adverse claim". Section 8-105.
"Purchaser". Sections 1-201(33) and 8-116.
"Uncertificated security". Section 8-102(a)(18).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in § 28:8-108 and not an obligation that the security will be honored by the issuer.

(Dec. 30, 1963, 77 Stat. 738, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165 July 25, 1995, D.C. Law 11-30, § 7(g), 42 DCR 1547; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-304.

1973 Ed., § 28:8-304.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

UNIFORM COMMERCIAL CODE COMMENT

1. By virtue of the definition of indorsement in Section 8-102 and the rules of this section, the simplified method of indorsing certificated securities previously set forth in the Uniform Stock Transfer Act is continued. Although more than one special indorsement on a given security certificate is possible, the desire for dividends or interest, as the case may be, should operate to bring the certificate home for registration of transfer within a reasonable period of time. The usual form of assignment which appears on the back of a stock certificate or in a separate "power" may be filled up either in the form of an assignment, a power of attorney to transfer, or both. If it is not filled up at all but merely signed, the indorsement is in blank. If

filled up either as an assignment or as a power of attorney to transfer, the indorsement is special.

2. Subsection (b) recognizes the validity of a "partial" indorsement, e.g., as to fifty shares of the one hundred represented by a single certificate. The rights of a transferee under a partial indorsement to the status of a protected purchaser are left to the case law.

3. Subsection (c) deals with the effect of an indorsement without delivery. There must be a voluntary parting with control in order to effect a valid transfer of a certificated security as between the parties. Levey v. Nason, 279 Mass. 268, 181 N.E. 193 (1932), and National Surety Co. v. Indemnity Insurance Co. of North America, 237 App.Div. 485, 261 N.Y.S. 605 (1933). The provision in Section 10 of the Uniform Stock Transfer Act that an attempted transfer without delivery amounts to a promise to transfer is omitted. Even under that Act the effect of such a promise was left to the applicable law of contracts, and this Article by making no reference to such situations intends to achieve a similar result. With respect to delivery there is no counterpart to subsection (d) on right to compel indorsement, such as is envisaged in Johnson v. Johnson, 300 Mass. 24, 13 N.E.2d 788 (1938), where the transferee under a written assignment was given the right to compel a transfer of the certificate.

4. Subsection (d) deals with the effect of delivery without indorsement. As between the parties the transfer is made complete upon delivery, but the transferee cannot become a protected purchaser until indorsement is made. The indorsement does not operate retroactively, and notice may intervene between delivery and indorsement so as to prevent the transferee from becoming a protected purchaser. Although a purchaser taking without a necessary indorsement may be subject to claims of ownership, any issuer's defense of which the purchaser had no notice at the time of delivery will be cut off, since the provisions of this Article protect all purchasers for value without notice (Section 8-202).

The transferee's right to compel an indorsement where a security certificate has been delivered with intent to transfer is recognized in the case law. See Coats v. Guaranty Bank & Trust Co., 170 La. 871, 129 So. 513 (1930). A proper indorsement is one of the requisites of transfer which a purchaser of a certificated security has a right to obtain (Section 8-307). A purchaser may not only compel an indorsement under that section but may also recover for any reasonable expense incurred by the transferor's failure to respond to the demand for an indorsement.

5. Subsection (e) deals with the significance of an indorsement on a security certificate in bearer form. The concept of indorsement applies only to registered securities. A purported indorsement of bearer paper is normally of no effect. An indorsement "for collection," "for surrender" or the like, charges a purchaser with notice of adverse claims (Section 8-105(d)) but does not operate beyond this to interfere with any right the holder may otherwise possess to have the security registered.

6. Subsection (f) makes clear that the indorser of a security certificate does not warrant that the issuer will honor the underlying obligation. In view of the nature of investment securities and the circumstances under which they are normally transferred, a transferor cannot be held to warrant as to the issuer's actions. As a transferor the indorser, of course, remains liable for breach of the warranties set forth in this Article (Section 8-108).

Definitional Cross References

"Bearer form". Section 8-102(a)(2).
"Certificated security". Section 8-102(a)(4).
"Indorsement". Section 8-102(a)(11).
"Purchaser". Sections 1-201(33) and 8-116.
"Registered form". Section 8-102(a)(13).
"Security certificate". Section 8-102(a)(16).

§ 28:8-305. Instruction.

(a) If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.

(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by § 28:8-108 and not an obligation that the security will be honored by the issuer.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-305.
1973 Ed., § 28:8-305.

Legislative history of Law 9-196. — For

legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

UNIFORM COMMERCIAL CODE COMMENT

1. The term instruction is defined in Section 8-102(a)(12) as a notification communicated to the issuer of an uncertificated security directing that transfer be registered. Section 8-107 specifies who may initiate an effective instruction.

Functionally, presentation of an instruction is quite similar to the presentation of an indorsed certificate for reregistration. Note that instruction is defined in terms of "communicate," see Section 8-102(a)(6). Thus, the instruction may be in the form of a writing signed by the registered owner or in any other form agreed upon by the issuer and the registered owner. Allowing nonwritten forms of instructions will permit the development and employment of means of transmitting instructions electronically.

When a person who originates an instruction leaves a blank and the blank later is completed, subsection (a) gives the issuer the same rights it would have had against the originating person had that person completed the blank. This is true regardless of whether the person completing the instruction had authority to complete it. Compare Section 8-206 and its Comment, dealing with blanks left upon issue.

2. Subsection (b) makes clear that the originator of an instruction, like the indorser of a security certificate, does not warrant that the issuer will honor the underlying obligation, but does make warranties as a transferor under Section 8-108.

Definitional Cross References

"Appropriate person". Section 8-107.

"Instruction". Section 8-102(a)(12).

"Issuer". Section 8-201.

§ 28:8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) The signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) The signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) of this section and also warrants that at the time the instruction is presented to the issuer:

(1) The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) The transfer of the uncertificated security requested in the instruction

will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

(d) A guarantor under subsections (a) and (b) of this section or a special guarantor under subsection (c) of this section does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) of this section and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) of this section and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

(Dec. 30, 1963, 77 Stat. 739, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-306.

1973 Ed., § 28:8-306.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) provides that a guarantor of the signature of the indorser of a security certificate warrants that the signature is genuine, that the signer is an appropriate person or has actual authority to indorse on behalf of the appropriate person, and that the signer has legal capacity. Subsection (b) provides similar, though not identical, warranties for the guarantor of a signature of the originator of an instruction for transfer of an uncertificated security.

Appropriate person is defined in Section 8-107(a) to include a successor or person who has power under other law to act for a person who is deceased or lacks capacity. Thus if a certificate registered in the name of Mary Roe is indorsed by Jane Doe as executor of Mary Roe, a guarantor of the signature of Jane Doe warrants that she has power to act as executor.

Although the definition of appropriate person in Section 8-107(a) does not itself include an agent, an indorsement by an agent is effective under Section 8-107(b) if the agent has authority to act for the appropriate person. Accordingly, this section provides an explicit warranty of authority for agents.

2. The rationale of the principle that a signature guarantor warrants the authority of the signer, rather than simply the genuineness of the signature, was explained in the leading case of Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co., 182 N.Y. 47, 74 N.E. 571, 70 A.L.R. 787 (1905), which dealt with a guaranty of the signature of a person indorsing on behalf of a corporation. "If stock is held by an individual who is executing a power of attorney for its transfer, the member of the exchange who signs as a witness thereto guaranties not

only the genuineness of the signature affixed to the power of attorney, but that the person signing is the individual in whose name the stock stands. With reference to stock standing in the name of a corporation, which can only sign a power of attorney through its authorized officers or agents, a different situation is presented.

If the witnessing of the signature of the corporation is only that of the signature of a person who signs for the corporation, then the guaranty is of no value, and there is nothing to protect purchasers or the companies who are called upon to issue new stock in the place of that transferred from the frauds of persons who have signed the names of corporations without authority. If such is the only effect of the guaranty, purchasers and transfer agents must first go to the corporation in whose name the stock stands and ascertain whether the individual who signed the power of attorney had authority to so do. This will require time, and in many cases will necessitate the postponement of the completion of the purchase by the payment of the money until the facts can be ascertained. The broker who is acting for the owner has an opportunity to become acquainted with his customer, and may readily before sale ascertain, in case of a corporation, the name of the officer who is authorized to execute the power of attorney. It was therefore, we think, the purpose of the rule to cast upon the broker who witnesses the signature the duty of ascertaining whether the person signing the name of the corporation had authority to so do, and making the witness a guarantor that it is the signature of the corporation in whose name the stock stands."

3. Subsection (b) sets forth the warranties that can reasonably be expected from the guarantor of the signature of the originator of an instruction, who, though familiar with the signer, does not have any evidence that the purported owner is in fact the owner of the subject uncertificated security. This is in contrast to the position of the person guaranteeing a signature on a certificate who can see a certificate in the signer's possession in the name of or indorsed to the signer or in blank. Thus, the warranty in paragraph (2) of subsection (b) is expressly conditioned on the actual registration's conforming to that represented by the originator. If the signer purports to be the owner, the guarantor under paragraph (2), warrants only the identity of the signer. If, however, the signer is acting in a representative capacity, the guarantor warrants both the signer's identity and authority to act for the purported owner. The issuer needs no warranty as to the facts of registration because those facts can be ascertained from the issuer's own records.

4. Subsection (c) sets forth a "special guaranty of signature" under which the guarantor additionally warrants both registered ownership and freedom from undisclosed defects of record. The guarantor of the signature of an indorser of a security certificate effectively makes these warranties to a purchaser for value on the evidence of a clean certificate issued in the name of the indorser, indorsed to the indorser or indorsed in blank. By specially guaranteeing under subsection (c), the guarantor warrants that the instruction will, when presented to the issuer, result in the requested registration free from defects not specified.

5. Subsection (d) makes clear that the warranties of a signature guarantor are limited to those specified in this section and do not include a general warranty of rightfulness. On the other hand subsections (e) and (f) provide that a person guaranteeing an indorsement or an instruction does warrant that the transfer is rightful in all respects.

6. Subsection (g) makes clear what can be inferred from the combination of Sections 8-401 and 8-402, that the issuer may not require as a condition to transfer a guaranty of the indorsement or instruction nor may it require a special signature guaranty.

7. Subsection (h) specifies to whom the warranties in this section run, and also provides that a person who gives a guaranty under this section has an action against the indorser or originator for any loss suffered by the guarantor.

Definitional Cross References

"Appropriate person". Section 8-107.
"Genuine". Section 1-201(18).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Security certificate". Section 8-102(a)(16).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser

pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

(Dec. 30, 1963, 77 Stat. 740, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-307.

1973 Ed., § 28:8-307.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Because registration of the transfer of a security is a matter of vital importance, a purchaser is here provided with the means of obtaining such formal requirements for registration as signature guaranties, proof of authority, transfer tax stamps and the like. The transferor is the one in a position to supply most conveniently whatever documentation may be requisite for registration of transfer, and the duty to do so upon demand within a reasonable time is here stated affirmatively. If an essential item is peculiarly within the province of the transferor so that the transferor is the only one who can obtain it, the purchaser may specifically enforce the right to obtain it. Compare Section 8-304(d). If a transfer is not for value the transferor need not pay expenses.

2. If the transferor's duty is not performed the transferee may reject or rescind the contract to transfer. The transferee is not bound to do so. An action for damages for breach of contract may be preferred.

Definitional Cross References

"Purchaser". Sections 1-201(33) and 8-116.

"Security". Section 8-102(a)(15).

"Value". Sections 1-201(44) and 8-116.

Part 4. Registration.

§ 28:8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) The indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) Reasonable assurance is given that the indorsement or instruction is genuine and authorized (§ 28:8-402);

(4) Any applicable law relating to the collection of taxes has been complied with;

(5) The transfer does not violate any restriction on transfer imposed by the issuer in accordance with § 28:8-204;

(6) A demand that the issuer not register transfer has not become effective under § 28:8-403, or the issuer has complied with § 28:8-403(b) but no legal process or indemnity bond is obtained as provided in § 28:8-403(d); and

(7) The transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

(Dec. 30, 1963, 77 Stat. 742, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-401.

1973 Ed., § 28:8-401.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. This section states the duty of the issuer to register transfers. A duty exists only if certain preconditions exist. If any of the preconditions do not exist, there is no duty to register transfer. If an indorsement on a security certificate is a forgery, there is no duty. If an instruction to transfer an uncertificated security is not originated by an appropriate person, there is no duty. If there has not been compliance with applicable tax laws, there is no duty. If a security certificate is properly indorsed but nevertheless the transfer is in fact wrongful, there is no duty unless the transfer is to a protected purchaser (and the other preconditions exist).

This section does not constitute a mandate that the issuer must establish that all preconditions are met before the issuer registers a transfer. The issuer may waive the reasonable assurances specified in paragraph (a)(3). If it has confidence in the responsibility of the persons requesting transfer, it may ignore questions of compliance with tax laws. Although an issuer has no duty if the transfer is wrongful, the issuer has no duty to inquire into adverse claims, see Section 8-404.

2. By subsection (b) the person entitled to registration may not only compel it but may hold the issuer liable in damages for unreasonable delay.

3. Section 8-201(c) provides that with respect to registration of transfer, "issuer" means the person on whose behalf transfer books are maintained. Transfer agents, registrars or the like within the scope of their respective functions have rights and duties under this Part similar to those of the issuer. See Section 8-407.

Definitional Cross References

"Appropriate person". Section 8-107.
"Certificated security". Section 8-102(a)(4).
"Genuine". Section 1-201(18).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Protected purchaser". Section 8-303.
"Registered form". Section 8-102(a)(13).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) In all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) If the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) If the indorsement is made or the instruction is originated by a

fiduciary pursuant to § 28:8-107(a)(4) or (a)(5), appropriate evidence of appointment or incumbency;

(4) If there is more than one fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) If the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection, assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

(b) An issuer may elect to require reasonable assurance beyond that specified in this section.

(c) For the purposes of this section, the term:

(1) "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) "Appropriate evidence of appointment or incumbency" means:

(A) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within 60 days before the date of presentation for transfer; or

(B) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.

(Dec. 30, 1963, 77 Stat. 742, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-401.

Prior Codifications. — 1981 Ed., § 28:8-402.

1973 Ed., § 28:8-402.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

UNIFORM COMMERCIAL CODE COMMENT

1. An issuer is absolutely liable for wrongful registration of transfer if the indorsement or instruction is ineffective. See Section 8-404. Accordingly, an issuer is entitled to require such assurance as is reasonable under the circumstances that all necessary indorsements are effective, and thus to minimize its risk. This section establishes the requirements the issuer may make in terms of documentation which, except in the rarest of instances, should be easily furnished. Subsection (b) provides that an issuer may require additional assurances if that requirement is reasonable under the circumstances, but if the issuer demands more than reasonable assurance that the instruction or the necessary indorsements are genuine and authorized, the presenter may refuse the demand and sue for improper refusal to register. Section 8-401(b).

2. Under subsection (a)(1), the issuer may require in all cases a guaranty of signature. See Section 8-306. When an instruction is presented the issuer always may require reasonable assurance as to the identity of the originator. Subsection (c) allows the issuer to require that the person making these guaranties be one reasonably believed to be responsible, and the issuer may adopt standards of responsibility which are not manifestly unreasonable. Regulations under the federal securities laws, however, place limits on the requirements transfer agents may impose concerning the responsibility of eligible signature guarantors. See 17 CFR 240.17Ad-15.

3. This section, by paragraphs (2) through (5) of subsection (a), permits the issuer to seek confirmation that the indorsement or instruction is genuine and authorized. The permitted methods act as a double check on matters which are within the warranties of the signature guarantor. See Section 8-306. Thus, an agent may be required to submit a power of attorney, a corporation to submit a certified resolution evidencing the authority of its signing officer to sign, an executor or administrator to submit the usual "short-form certificate," etc. But failure of a fiduciary to obtain court approval of the transfer or to comply with other requirements does not make the fiduciary's signature ineffective. Section 8-107(c). Hence court orders and other controlling instruments are omitted from subsection (a).

Subsection (a)(3) authorizes the issuer to require "appropriate evidence" of appointment or incumbency, and subsection (c) indicates what evidence will be "appropriate". In the case of a fiduciary appointed or qualified by a court that evidence will be a court certificate dated within sixty days before the date of presentation, subsection (c)(2)(i). Where the fiduciary is not appointed or qualified by a court, as in the case of a successor trustee, subsection (c)(2)(ii) applies. In that case, the issuer may require a copy of a trust instrument or other document showing the appointment, or it may require the certificate of a responsible person. In the absence of such a document or certificate, it may require other appropriate evidence. If the security is registered in the name of the fiduciary as such, the person's signature is effective even though the person is no longer serving in that capacity, see Section 8-107(d), hence no evidence of incumbency is needed.

4. Circumstances may indicate that a necessary signature was unauthorized or was not that of an appropriate person. Such circumstances would be ignored at risk of absolute liability. To minimize that risk the issuer may properly exercise the option given by subsection (b) to require assurance beyond that specified in subsection (a). On the other hand, the facts at hand may reflect only on the rightfulness of the transfer. Such facts do not create a duty of inquiry, because the issuer is not liable to an adverse claimant unless the claimant obtains legal process. See Section 8-404.

Definitional Cross References

"Appropriate person". Section 8-107.
"Genuine". Section 1-201(18).
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.

§ 28:8-403. Demand that issuer not register transfer.

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who initiated the demand at the address provided in the demand, and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) The certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) A demand that the issuer not register transfer had previously been received; and

(3) The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in subsection (b)(3) of this section may not exceed 30 days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) File with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.

(e) This section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective.

(Dec. 30, 1963, 77 Stat. 743, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-401, § 28:8-404, and § 28:8-408.

Prior Codifications. — 1981 Ed., § 28:8-403.

1973 Ed., § 28:8-403.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

UNIFORM COMMERCIAL CODE COMMENT

1. The general rule under this Article is that if there has been an effective indorsement or instruction, a person who contends that registration of the transfer would be wrongful should not be able to interfere with the registration process merely by sending notice of the assertion to the issuer. Rather, the claimant must obtain legal process. See Section 8-404. Section 8-403 is an exception to this general rule. It permits the registered owner—but not third parties—to demand that the issuer not register a transfer.

2. This section is intended to alleviate the problems faced by registered owners of certificated securities who lose or misplace their certificates. A registered owner who realizes that a certificate may have been lost or stolen should promptly report that fact to the issuer, lest the owner be precluded from asserting a claim for wrongful registration. See Section 8-406. The usual practice of issuers and transfer agents is that when a certificate is reported as lost, the owner is notified that a replacement can be obtained if the owner provides an indemnity bond. See Section 8-405. If the registered owner does not plan to transfer the securities, the owner might choose not to obtain a replacement, particularly if the owner suspects that the certificate has merely been misplaced.

Under this section, the owner's notification that the certificate has been lost would constitute a demand that the issuer not register transfer. No indemnity bond or legal process is necessary. If the original certificate is presented for registration of transfer, the issuer is required to notify the registered owner of that fact, and defer registration of transfer for a stated period. In order to prevent undue delay in the process of registration, the stated period may not exceed thirty days.

This gives the registered owner an opportunity to either obtain legal process or post an indemnity bond and thereby prevent the issuer from registering transfer.

3. Subsection (e) makes clear that this section does not relieve an issuer from liability for registering a transfer pursuant to an ineffective indorsement. An issuer's liability for wrongful registration in such cases does not depend on the presence or absence of notice that the

indorsement was ineffective. Registered owners who are confident that they neither indorsed the certificates, nor did anything that would preclude them from denying the effectiveness of another's indorsement, see Sections 8-107(b) and 8-406, might prefer to pursue their rights against the issuer for wrongful registration rather than take advantage of the opportunity to post a bond or seek a restraining order when notified by the issuer under this section that their lost certificates have been presented for registration in apparently good order.

Definitional Cross References

"Appropriate person". Section 8-107.
"Certificated security". Section 8-102(a)(4).
"Communicate". Section 8-102(a)(6).
"Effective". Section 8-107.
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Registered form". Section 8-102(a)(13).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-404. Wrongful registration.

(a) Except as otherwise provided in § 28:8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) Pursuant to an ineffective indorsement or instruction;

(2) After a demand that the issuer not register transfer became effective under § 28:8-403(a) and the issuer did not comply with § 28:8-403(b);

(3) After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) By an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) of this section on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by § 28:8-210.

(c) Except as otherwise provided in subsection (a) of this section or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction.

(Dec. 30, 1963, 77 Stat. 739, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-406.

Prior Codifications. — 1981 Ed., § 28:8-404.

1973 Ed., § 28:8-404.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a)(1) provides that an issuer is liable if it registers transfer pursuant to an indorsement or instruction that was not effective. For example, an issuer that registers transfer on a forged indorsement is liable to the registered owner. The fact that the issuer had

no reason to suspect that the indorsement was forged or that the issuer obtained the ordinary assurances under Section 8-402 does not relieve the issuer from liability. The reason that issuers obtain signature guaranties and other assurances is that they are liable for wrongful registration.

Subsection (b) specifies the remedy for wrongful registration. Pre-Code cases established the registered owner's right to receive a new security where the issuer had wrongfully registered a transfer, but some cases also allowed the registered owner to elect between an equitable action to compel issue of a new security and an action for damages. Cf. Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N.W. 754 (1914). Article 8 does not allow such election. The true owner of a certificated security is required to take a new security except where an overissue would result and a similar security is not reasonably available for purchase. See Section 8-210. The true owner of an uncertificated security is entitled and required to take restoration of the records to their proper state, with a similar exception for overissue.

2. Read together, subsections (c) and (a) have the effect of providing that an issuer has no duties to an adverse claimant unless the claimant serves legal process on the issuer to enjoin registration. Issuers, or their transfer agents, perform a record-keeping function for the direct holding system that is analogous to the functions performed by clearing corporations and securities intermediaries in the indirect holding system. This section applies to the record-keepers for the direct holding system the same standard that Section 8-115 applies to the record-keepers for the indirect holding system. Thus, issuers are not liable to adverse claimants merely on the basis of notice. As in the case of the analogous rules for the indirect holding system, the policy of this section is to protect the right of investors to have their securities transfers processed without the disruption or delay that might result if the record-keepers risked liability to third parties. It would be undesirable to apply different standards to the direct and indirect holding systems, since doing so might operate as a disincentive to the development of a book-entry direct holding system.

3. This section changes prior law under which an issuer could be held liable, even though it registered transfer on an effective indorsement or instruction, if the issuer had in some fashion been notified that the transfer might be wrongful against a third party, and the issuer did not appropriately discharge its duty to inquire into the adverse claim. See Section 8-403 (1978).

The rule of former Section 8-403 was anomalous inasmuch as Section 8-207 provides that the issuer is entitled to "treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner." Under Section 8-207, the fact that a third person notifies the issuer of a claim does not preclude the issuer from treating the registered owner as the person entitled to the security. See Kerrigan v. American Orthodontics Corp., 960 F.2d 43 (7th Cir. 1992). The change made in the present version of Section 8-404 ensures that the rights of registered owners and the duties of issuers with respect to registration of transfer will be protected against third-party interference in the same fashion as other rights of registered ownership.

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Effective". Section 8-107.
"Indorsement". Section 8-102(a)(11).
"Instruction". Section 8-102(a)(12).
"Issuer". Section 8-201.
"Security". Section 8-102(a)(15).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

(1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;

(2) Files with the issuer a sufficient indemnity bond; and

(3) Satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by § 28:8-210. In addition to any rights on the indemnity

bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

(Dec. 30, 1963, 77 Stat. 744, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-406.

Prior Codifications. — 1981 Ed., § 28:8-405.

1973 Ed., § 28:8-405.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

§ 28:8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under § 28:8-404 or a claim to a new security certificate under § 28:8-405.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-404.

Prior Codifications. — 1981 Ed., § 28:8-406.

1973 Ed., § 28:8-406.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

UNIFORM COMMERCIAL CODE COMMENT

An owner who fails to notify the issuer within a reasonable time after the owner knows or has reason to know of the loss or theft of a security certificate is estopped from asserting the ineffectiveness of a forged or unauthorized indorsement and the wrongfulness of the registration of the transfer. If the lost certificate was indorsed by the owner, then the registration of the transfer was not wrongful under Section 8-404, unless the owner made an effective demand that the issuer not register transfer under Section 8-403.

Definitional Cross References

"Issuer". Section 8-201.

"Notify". Section 1-201(25).

"Security certificate". Section 8-102(a)(16).

§ 28:8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

(Dec. 30, 1963, 77 Stat. 744, Pub. L. 88-243, § 1; Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165; renumbered and amended, Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-407.

1973 Ed., § 28:8-406.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-401.

UNIFORM COMMERCIAL CODE COMMENT

1. Transfer agents, registrars, and the like are here expressly held liable both to the issuer and to the owner for wrongful refusal to register a transfer as well as for wrongful registration of a transfer in any case within the scope of their respective functions where the issuer would itself be liable. Those cases which have regarded these parties solely as agents of the issuer and have therefore refused to recognize their liability to the owner for mere non-feasance, i.e., refusal to register a transfer, are rejected. Hulse v. Consolidated Quicksilver Mining Corp., 65 Idaho 768, 154 P.2d 149 (1944); Nicholson v. Morgan, 119 Misc. 309, 196 N.Y.Supp. 147 (1922); Lewis v. Hargadine-McKittrick Dry Goods Co., 305 Mo. 396, 274 S.W. 1041 (1924).

2. The practice frequently followed by authenticating trustees of issuing certificates of indebtedness rather than authenticating duplicate certificates where securities have been lost or stolen became obsolete in view of the provisions of Section 8-405, which makes express provision for the issue of substitute securities. It is not a breach of trust or lack of due diligence for trustees to authenticate new securities. Cf. Switzerland General Ins. Co. v. N.Y.C. & H.R.R. Co., 152 App.Div. 70, 136 N.Y.S. 726 (1912).

Definitional Cross References

"Certificated security". Section 8-102(a)(4).
"Issuer". Section 8-201.
"Security". Section 8-102(a)(15).
"Security certificate". Section 8-102(a)(16).
"Uncertificated security". Section 8-102(a)(18).

§ 28:8-408. Statements of uncertificated securities.

(a) Within 2 business days after the transfer of an uncertificated security has been registered, the issuer shall send to the new registered owner and, if the security has been transferred subject to a registered pledge, to the registered pledgee a written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The number of shares or units transferred;

(3) The name and address and any taxpayer identification number of the new registered owner and, if the security has been transferred subject to a registered pledge, the name and address and any taxpayer identification number of the registered pledgee;

(4) A notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under § 28:8-403(d)) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions, or adverse claims; and

(5) The date the transfer was registered.

(b) Within 2 business days after the pledge of an uncertificated security has been registered, the issuer shall send to the registered owner and the registered pledgee a written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The number of shares or units pledged;

(3) The name and address and any taxpayer identification number of the registered owner and the registered pledgee;

(4) A notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under § 28:8-403(d)) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions, or adverse claims; and

(5) The date the pledge was registered.

(c) Within 2 business days after the release from pledge of an uncertificated security has been registered, the issuer shall send to the registered owner and the pledgee whose interest was released a written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The number of shares or units released from pledge;

(3) The name and address and any taxpayer identification number of the registered owner and the pledgee whose interest was released;

(4) A notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under § 28:8-403(d)) to which the uncertificated security is or may be subject at the time of registration or a statement that there are none of those liens, restrictions, or adverse claims; and

(5) The date the release was registered.

(d) An "initial transaction statement" is the statement sent to:

(1) The new registered owner and, if applicable, to the registered pledgee pursuant to subsection (a) of this section;

(2) The registered pledgee pursuant to subsection (b) of this section; or

(3) The registered owner pursuant to subsection (c) of this section.

(e) Each initial transaction statement shall be signed by or on behalf of the issuer and must be identified as "Initial Transaction Statement".

(f) Within 2 business days after the transfer of an uncertificated security has been registered, the issuer shall send to the former registered owner and the former registered pledgee, if any, a written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The number of shares or units transferred;

(3) The name and address and any taxpayer identification number of the former registered owner and of any former registered pledgee; and

(4) The date the transfer was registered.

(g) At periodic intervals no less frequent than annually and at any time upon the reasonable written request of the registered owner, the issuer shall send to the registered owner of each uncertificated security a dated written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The name and address and any taxpayer identification number of the registered owner;

(3) The number of shares or units of the uncertificated security registered in the name of the registered owner on the date of the statement;

(4) The name and address and any taxpayer identification number of the registered pledgee and the number of shares or units subject to the pledge; and

(5) A notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under § 28:8-403(d)) to which the uncertificated security is or may be subject or a statement that there are none of those liens, restrictions, or adverse claims.

(h) At periodic intervals no less frequent than annually and at any time upon the reasonable written request of the registered pledgee, the issuer shall send to the registered pledgee of each uncertificated security a dated written statement containing:

(1) A description of the issue of which the uncertificated security is a part;

(2) The name and address and any taxpayer identification number of the registered owner;

(3) The name and address any taxpayer identification number of the registered pledgee;

(4) The number of shares or units subject to the pledge; and

(5) A notation of any liens and restrictions of the issuer and any adverse claims (as to which the issuer has a duty under § 28:8-403(d)) to which the uncertificated security is or may be subject or a statement that there are none of those liens, restrictions, or adverse claims.

(i) If the issuer sends the statements described in subsections (g) and (h) of this section at periodic intervals no less frequent than quarterly, the issuer is not obligated to send additional statements upon request unless the owner or pledgee requesting them pays to the issuer the reasonable cost of furnishing them.

(j) Each statement sent pursuant to this section must bear a conspicuous legend reading substantially as follows: "This statement is merely a record of the rights of the addressee as of the time of its issuance. Delivery of this statement, of itself, confers no rights on the recipient. This statement is neither a negotiable instrument nor a security."

(Mar. 16, 1993, D.C. Law 9-196, § 4, 39 DCR 9165.)

Prior Codifications. — 1981 Ed., § 28:8-408.

Legislative history of Law 9-196. — For legislative history of D.C. Law 9-196, see Historical and Statutory Notes following § 28:8-101.

Part 5. Security Entitlements.

§ 28:8-501. Securities account; acquisition of security entitlement from securities intermediary.

(a) For the purposes of this article, the term "securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e) of this section, a person acquires a security entitlement if a securities intermediary:

(1) Indicates by book entry that a financial asset has been credited to the person's securities account;

(2) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) of this section has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-102, § 28:8-104, § 28:8-502, and § 28:9-102.

Prior Codifications. — 1981 Ed., § 28:8-501.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. Part 5 rules apply to security entitlements, and Section 8-501(b) provides that a person has a security entitlement when a financial asset has been credited to a "securities account." Thus, the term "securities account" specifies the type of arrangements between institutions and their customers that are covered by Part 5. A securities account is a consensual arrangement in which the intermediary undertakes to treat the customer as entitled to exercise the rights that comprise the financial asset. The consensual aspect is covered by the requirement that the account be established pursuant to agreement. The term agreement is used in the broad sense defined in Section 1-201(3). There is no requirement that a formal or written agreement be signed.

As the securities business is presently conducted, several significant relationships clearly fall within the definition of a securities account, including the relationship between a clearing corporation and its participants, a broker and customers who leave securities with the broker, and a bank acting as securities custodian and its custodial customers. Given the enormous variety of arrangements concerning securities that exist today, and the certainty that new arrangements will evolve in the future, it is not possible to specify all of the arrangements to which the term does and does not apply.

Whether an arrangement between a firm and another person concerning a security or other financial asset is a "securities account" under this Article depends on whether the firm has undertaken to treat the other person as entitled to exercise the rights that comprise the security or other financial asset. Section 1-102, however, states the fundamental principle of interpretation that the Code provisions should be construed and applied to promote their underlying purposes and policies. Thus, the question whether a given arrangement is a securities account should be decided not by dictionary analysis of the words of the definition taken out of context, but by considering whether it promotes the objectives of Article 8 to include the arrangement within the term securities account.

The effect of concluding that an arrangement is a securities account is that the rules of Part

5 apply. Accordingly, the definition of "securities account" must be interpreted in light of the substantive provisions in Part 5, which describe the core features of the type of relationship for which the commercial law rules of Revised Article 8 concerning security entitlements were designed. There are many arrangements between institutions and other persons concerning securities or other financial assets which do not fall within the definition of "securities account" because the institutions have not undertaken to treat the other persons as entitled to exercise the ordinary rights of an entitlement holder specified in the Part 5 rules. For example, the term securities account does not cover the relationship between a bank and its depositors or the relationship between a trustee and the beneficiary of an ordinary trust, because those are not relationships in which the holder of a financial asset has undertaken to treat the other as entitled to exercise the rights that comprise the financial asset in the fashion contemplated by the Part 5 rules.

In short, the primary factor in deciding whether an arrangement is a securities account is whether application of the Part 5 rules is consistent with the expectations of the parties to the relationship. Relationships not governed by Part 5 may be governed by other parts of Article 8 if the relationship gives rise to a new security, or may be governed by other law entirely.

2. Subsection (b) of this section specifies what circumstances give rise to security entitlements. Paragraph (1) of subsection (b) sets out the most important rule. It turns on the intermediary's conduct, reflecting a basic operating assumption of the indirect holding system that once a securities intermediary has acknowledged that it is carrying a position in a financial asset for its customer or participant, the intermediary is obligated to treat the customer or participant as entitled to the financial asset. Paragraph (1) does not attempt to specify exactly what accounting, record-keeping, or information transmission steps suffice to indicate that the intermediary has credited the account. That is left to agreement, trade practice, or rule in order to provide the flexibility necessary to accommodate varying or changing accounting and information processing systems. The point of paragraph (1) is that once an intermediary has acknowledged that it is carrying a position for the customer or participant, the customer or participant has a security entitlement. The precise form in which the intermediary manifests that acknowledgment is left to private ordering.

Paragraph (2) of subsection (b) sets out a different operational test, turning not on the intermediary's accounting system but on the facts that accounting systems are supposed to represent. Under paragraph (b)(2) a person has a security entitlement if the intermediary has received and accepted a financial asset for credit to the account of its customer or participant. For example, if a customer of a broker or bank custodian delivers a security certificate in proper form to the broker or bank to be held in the customer's account, the customer acquires a security entitlement. Paragraph (b)(2) also covers circumstances in which the intermediary receives a financial asset from a third person for credit to the account of the customer or participant. Paragraph (b)(2) is not limited to circumstances in which the intermediary receives security certificates or other financial assets in physical form. Paragraph (b)(2) also covers circumstances in which the intermediary acquires a security entitlement with respect to a financial asset which is to be credited to the account of the intermediary's own customer. For example, if a customer transfers her account from Broker A to Broker B, she acquires security entitlements against Broker B once the clearing corporation has credited the positions to Broker B's account. It should be noted, however, that paragraph (b)(2) provides that a person acquires a security entitlement when the intermediary not only receives but also accepts the financial asset for credit to the account. This limitation is included to take account of the fact that there may be circumstances in which an intermediary has received a financial asset but is not willing to undertake the obligations that flow from establishing a security entitlement. For example, a security certificate which is sent to an intermediary may not be in proper form, or may represent a type of financial asset which the intermediary is not willing to carry for others. It should be noted that in all but extremely unusual cases, the circumstances covered by paragraph (2) will also be covered by paragraph (1), because the intermediary will have credited the positions to the customer's account.

Paragraph (3) of subsection (b) sets out a residual test, to avoid any implication that the failure of an intermediary to make the appropriate entries to credit a position to a customer's securities account would prevent the customer from acquiring the rights of an entitlement holder under Part 5. As is the case with the paragraph (2) test, the paragraph (3) test would not be needed for the ordinary cases, since they are covered by paragraph (1).

3. In a sense, Section 8-501(b) is analogous to the rules set out in the provisions of Sections 8-313(1)(d) and 8-320 of the prior version of Article 8 that specified what acts by a securities intermediary or clearing corporation sufficed as a transfer of securities held in fungible bulk. Unlike the prior version of Article 8, however, this section is not based on the idea that an entitlement holder acquires rights only by virtue of a "transfer" from the securities interme-

diary to the entitlement holder. In the indirect holding system, the significant fact is that the securities intermediary has undertaken to treat the customer as entitled to the financial asset. It is up to the securities intermediary to take the necessary steps to ensure that it will be able to perform its undertaking. It is, for example, entirely possible that a securities intermediary might make entries in a customer's account reflecting that customer's acquisition of a certain security at a time when the securities intermediary did not itself happen to hold any units of that security. The person from whom the securities intermediary bought the security might have failed to deliver and it might have taken some time to clear up the problem, or there may have been an operational gap in time between the crediting of a customer's account and the receipt of securities from another securities intermediary. The entitlement holder's rights against the securities intermediary do not depend on whether or when the securities intermediary acquired its interests. Subsection (c) is intended to make this point clear. Subsection (c) does not mean that the intermediary is free to create security entitlements without itself holding sufficient financial assets to satisfy its entitlement holders. The duty of a securities intermediary to maintain sufficient assets is governed by Section 8-504 and regulatory law. Subsection (c) is included only to make it clear the question whether a person has acquired a security entitlement does not depend on whether the intermediary has complied with that duty.

4. Part 5 of Article 8 sets out a carefully designed system of rules for the indirect holding system. Persons who hold securities through brokers or custodians have security entitlements that are governed by Part 5, rather than being treated as the direct holders of securities. Subsection (d) specifies the limited circumstance in which a customer who leaves a financial asset with a broker or other securities intermediary has a direct interest in the financial asset, rather than a security entitlement.

The customer can be a direct holder only if the security certificate, or other financial asset, is registered in the name of, payable to the order of, or specially indorsed to the customer, and has not been indorsed by the customer to the securities intermediary or in blank. The distinction between those circumstances where the customer can be treated as direct owner and those where the customer has a security entitlement is essentially the same as the distinction drawn under the federal bankruptcy code between customer name securities and customer property. The distinction does not turn on any form of physical identification or segregation. A customer who delivers certificates to a broker with blank indorsements or stock powers is not a direct holder but has a security entitlement, even though the broker holds those certificates in some form of separate safe-keeping arrangement for that particular customer. The customer remains the direct holder only if there is no indorsement or stock power so that further action by the customer is required to place the certificates in a form where they can be transferred by the broker.

The rule of subsection (d) corresponds to the rule set out in Section 8-301(a)(3) specifying when acquisition of possession of a certificate by a securities intermediary counts as "delivery" to the customer.

5. Subsection (e) is intended to make clear that Part 5 does not apply to an arrangement in which a security is issued representing an interest in underlying assets, as distinguished from arrangements in which the underlying assets are carried in a securities account. A common mechanism by which new financial instruments are devised is that a financial institution that holds some security, financial instrument, or pool thereof, creates interests in that asset or pool which are sold to others. In many such cases, the interests so created will fall within the definition of "security" in Section 8-102(a)(15). If so, then by virtue of subsection (e) of Section 8-501, the relationship between the institution that creates the interests and the persons who hold them is not a security entitlement to which the Part 5 rules apply. Accordingly, an arrangement such as an American depositary receipt facility which creates freely transferable interests in underlying securities will be issuance of a security under Article 8 rather than establishment of a security entitlement to the underlying securities.

The subsection (e) rule can be regarded as an aspect of the definitional rules specifying the meaning of securities account and security entitlement. Among the key components of the definition of security in Section 8-102(a)(15) are the "transferability" and "divisibility" tests. Securities, in the Article 8 sense, are fungible interests or obligations that are intended to be tradable. The concept of security entitlement under Part 5 is quite different. A security entitlement is the package of rights that a person has against the person's own intermediary with respect to the positions carried in the person's securities account. That package of rights is not, as such, something that is traded. When a customer sells a security that she had held through a securities account, her security entitlement is terminated; when she buys a security that she will hold through her securities account, she acquires a security entitlement. In most cases, settlement of a securities trade will involve termination of one person's security entitlement and acquisition of a security entitlement by another person. That transaction, however, is not a "transfer" of the same entitle-

ment from one person to another. That is not to say that an entitlement holder cannot transfer an interest in her security entitlement as such; granting a security interest in a security entitlement is such a transfer. On the other hand, the nature of a security entitlement is that the intermediary is undertaking duties only to the person identified as the entitlement holder.

Definitional Cross References

"Financial asset". Section 8-102(a)(9).

"Indorsement". Section 8-102(a)(11).

"Securities intermediary". Section 8-102(a)(14).

"Security". Section 8-102(a)(15).

"Security entitlement". Section 8-102(a)(17).

§ 28:8-502. Assertion of adverse claim against entitlement holder.

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement under § 28:8-501 for value and without notice of the adverse claim.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-510.

Prior Codifications. — 1981 Ed., § 28:8-502.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. The section provides investors in the indirect holding system with protection against adverse claims by specifying that no adverse claim can be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim. It plays a role in the indirect holding system analogous to the rule of the direct holding system that protected purchasers take free from adverse claims (Section 8-303).

This section does not use the locution "takes free from adverse claims" because that could be confusing as applied to the indirect holding system. The nature of indirect holding system is that an entitlement holder has an interest in common with others who hold positions in the same financial asset through the same intermediary. Thus, a particular entitlement holder's interest in the financial assets held by its intermediary is necessarily "subject to" the interests of others. See Section 8-503. The rule stated in this section might have been expressed by saying that a person who acquires a security entitlement under Section 8-501 for value and without notice of adverse claims takes "that security entitlement" free from adverse claims. That formulation has not been used, however, for fear that it would be misinterpreted as suggesting that the person acquires a right to the underlying financial assets that could not be affected by the competing rights of others claiming through common or higher tier intermediaries. A security entitlement is a complex bundle of rights. This section does not deal with the question of what rights are in the bundle. Rather, this section provides that once a person has acquired the bundle, someone else cannot take it away on the basis of assertion that the transaction in which the security entitlement was created involved a violation of the claimant's rights.

2. Because securities trades are typically settled on a net basis by book-entry movements, it would ordinarily be impossible for anyone to trace the path of any particular security, no matter how the interest of parties who hold through intermediaries is described. Suppose, for example, that S has a 1000 share position in XYZ common stock through an account with a broker, Able & Co. S's identical twin impersonates S and directs Able to sell the securities. That same day, B places an order with Baker & Co., to buy 1000 shares of XYZ common stock. Later, S discovers the wrongful act and seeks to recover "her shares." Even if S can show that, at the stage of the trade, her sell order was matched with B's buy order, that would not suffice to show that "her shares" went to B. Settlement between Able and Baker occurs on a net basis for all trades in XYZ that day; indeed Able's net position may have been such that it received rather than delivered shares in XYZ through the settlement system.

In the unlikely event that this was the only trade in XYZ common stock executed in the market that day, one could follow the shares from S's account to B's account. The plaintiff in

an action in conversion or similar legal action to enforce a property interest must show that the defendant has an item of property that belongs to the plaintiff. In this example, B's security entitlement is not the same item of property that formerly was held by S, it is a new package of rights that B acquired against Baker under Section 8-501. Principles of equitable remedies might, however, provide S with a basis for contending that if the position B received was the traceable product of the wrongful taking of S's property by S's twin, a constructive trust should be imposed on B's property in favor of S. See G. Palmer, The Law of Restitution s 2.14. Section 8-502 ensures that no such claims can be asserted against a person, such as B in this example, who acquires a security entitlement under Section 8-501 for value and without notice, regardless of what theory of law or equity is used to describe the basis of the assertion of the adverse claim.

In the above example, S would ordinarily have no reason to pursue B unless Able is insolvent and S's claim will not be satisfied in the insolvency proceedings. Because S did not give an entitlement order for the disposition of her security entitlement, Able must recredit her account for the 1000 shares of XYZ common stock. See Section 8-507(b).

3. The following examples illustrate the operation of Section 8-502.

Example 1. Thief steals bearer bonds from Owner. Thief delivers the bonds to Broker for credit to Thief's securities account, thereby acquiring a security entitlement under Section 8-501(b). Under other law, Owner may have a claim to have a constructive trust imposed on the security entitlement as the traceable product of the bonds that Thief misappropriated. Because Thief was himself the wrongdoer, Thief obviously had notice of Owner's adverse claim. Accordingly, Section 8-502 does not preclude Owner from asserting an adverse claim against Thief.

Example 2. Thief steals bearer bonds from Owner. Thief owes a personal debt to Creditor. Creditor has a securities account with Broker. Thief agrees to transfer the bonds to Creditor as security for or in satisfaction of his debt to Creditor. Thief does so by sending the bonds to Broker for credit to Creditor's securities account. Creditor thereby acquires a security entitlement under Section 8-501(b). Under other law, Owner may have a claim to have a constructive trust imposed on the security entitlement as the traceable product of the bonds that Thief misappropriated. Creditor acquired the security entitlement for value, since Creditor acquired it as security for or in satisfaction of Thief's debt to Creditor. See Section 1-201(44). If Creditor did not have notice of Owner's claim, Section 8-502 precludes any action by Owner against Creditor, whether framed in constructive trust or other theory. Section 8-105 specifies what counts as notice of an adverse claim.

Example 3. Father, as trustee for Son, holds XYZ Co. shares in a securities account with Able & Co. In violation of his fiduciary duties, Father sells the XYZ Co. shares and uses the proceeds for personal purposes. Father dies, and his estate is insolvent. Assume—implausibly—that Son is able to trace the XYZ Co. shares and show that the "same shares" ended up in Buyer's securities account with Baker & Co. Section 8-502 precludes any action by Son against Buyer, whether framed in constructive trust or other theory, provided that Buyer acquired the security entitlement for value and without notice of adverse claims.

Example 4. Debtor holds XYZ Co. shares in a securities account with Able & Co. As collateral for a loan from Bank, Debtor grants Bank a security interest in the security entitlement to the XYZ Co. shares. Bank perfects by a method which leaves Debtor with the ability to dispose of the shares. See Section 9-312. In violation of the security agreement, Debtor sells the XYZ Co. shares and absconds with the proceeds. Assume—implausibly—that Bank is able to trace the XYZ Co. shares and show that the "same shares" ended up in Buyer's securities account with Baker & Co. Section 8-502 precludes any action by Bank against Buyer, whether framed in constructive trust or other theory, provided that Buyer acquired the security entitlement for value and without notice of adverse claims.

Example 5. Debtor owns controlling interests in various public companies, including Acme and Ajax. Acme owns 60% of the stock of another public company, Beta. Debtor causes the Beta stock to be pledged to Lending Bank as collateral for Ajax's debt. Acme holds the Beta stock through an account with a securities custodian, C Bank, which in turn holds through Clearing Corporation. Lending Bank is also a Clearing Corporation participant. The pledge of the Beta stock is implemented by Acme instructing C Bank to instruct Clearing Corporation to debit C Bank's account and credit Lending Bank's account. Acme and Ajax both become insolvent. The Beta stock is still valuable. Acme's liquidator asserts that the pledge of the Beta stock for Ajax's debt was wrongful as against Acme and seeks to recover the Beta stock from Lending Bank. Because the pledge was implemented by an outright transfer into Lending Bank's account at Clearing Corporation, Lending Bank acquired a security entitlement to the Beta stock under Section 8-501. Lending Bank acquired the security entitlement for value, since it acquired it as security for a debt. See Section 1-201(44). If Lending Bank did not have notice of Acme's claim, Section 8-502 will preclude any action by Acme

against Lending Bank, whether framed in constructive trust or other theory.

Example 6. Debtor grants Alpha Co. a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha also has an account with Able. Debtor instructs Able to transfer the shares to Alpha, and Able does so by crediting the shares to Alpha's account. Alpha has control of the 1000 shares under Section 8-106(d). (The facts to this point are identical to those in Section 8-106, Comment 4, Example 1, except that Alpha Co. was Alpha Bank.) Alpha next grants Beta Co. a security interest in the 1000 shares included in Alpha's security entitlement. See Section 9-207(c)(3). Alpha instructs Able to transfer the shares to Gamma Co., Beta's custodian. Able does so, and Gamma credits the 1000 shares to Beta's account. Beta now has control under Section 8-106(d). By virtue of Debtor's explicit permission or by virtue of the permission inherent in Debtor's creation of a security interest in favor of Alpha and Alpha's resulting power to grant a security interest under Section 9-207, Debtor has no adverse claim to assert against Beta, assuming implausibly that Debtor could "trace" an interest to the Gamma account. Moreover, even if Debtor did hold an adverse claim, if Beta did not have notice of Debtor's claim, Section 8-502 will preclude any action by Debtor against Beta, whether framed in constructive trust or other theory.

4. Although this section protects entitlement holders against adverse claims, it does not protect them against the risk that their securities intermediary will not itself have sufficient financial assets to satisfy the claims of all of its entitlement holders. Suppose that Customer A holds 1000 shares of XYZ Co. stock in an account with her broker, Able & Co. Able in turn holds 1000 shares of XYZ Co. through its account with Clearing Corporation, but has no other positions in XYZ Co. shares, either for other customers or for its own proprietary account. Customer B places an order with Able for the purchase of 1000 shares of XYZ Co. stock, and pays the purchase price. Able credits B's account with a 1000 share position in XYZ Co. stock, but Able does not itself buy any additional XYZ Co. shares. Able fails, having only 1000 shares to satisfy the claims of A and B. Unless other insolvency law establishes a different distributional rule, A and B would share the 1000 shares held by Able pro rata, without regard to the time that their respective entitlements were established. See Section 8-503(b). Section 8-502 protects entitlement holders, such as A and B, against adverse claimants. In this case, however, the problem that A and B face is not that someone is trying to take away their entitlements, but that the entitlements are not worth what they thought. The only role that Section 8-502 plays in this case is to preclude any assertion that A has some form of claim against B by virtue of the fact that Able's establishment of an entitlement in favor of B diluted A's rights to the limited assets held by Able.

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Financial asset". Section 8-102(a)(9).
"Notice of adverse claim". Section 8-105.
"Security entitlement". Section 8-102(a)(17).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-503. Property interest of entitlement holder in financial asset held by securities intermediary.

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in § 28:8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under §§ 28:8-505 through 28:8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section may be enforced against a purchaser of the financial asset or interest therein only if:

(1) Insolvency proceedings have been initiated by or against the securities intermediary;

(2) The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) The securities intermediary violated its obligations under § 28:8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) The purchaser is not protected under subsection (f) of this section.

(e) The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(f) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a) of this section, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under § 28:8-504.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-104.

Prior Codifications. — 1981 Ed., § 28:8-503.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. This section specifies the sense in which a security entitlement is an interest in the property held by the securities intermediary. It expresses the ordinary understanding that securities that a firm holds for its customers are not general assets of the firm subject to the claims of creditors. Since securities intermediaries generally do not segregate securities in such fashion that one could identify particular securities as the ones held for customers, it would not be realistic for this section to state that "customers' securities" are not subject to creditors' claims. Rather subsection (a) provides that to the extent necessary to satisfy all customer claims, all units of that security held by the firm are held for the entitlement holders, are not property of the securities intermediary, and are not subject to creditors' claims, except as otherwise provided in Section 8-511.

An entitlement holder's property interest under this section is an interest with respect to a specific issue of securities or financial assets. For example, customers of a firm who have positions in XYZ common stock have security entitlements with respect to the XYZ common stock held by the intermediary, while other customers who have positions in ABC common stock have security entitlements with respect to the ABC common stock held by the intermediary.

Subsection (b) makes clear that the property interest described in subsection (a) is an interest held in common by all entitlement holders who have entitlements to a particular security or other financial asset. Temporal factors are irrelevant. One entitlement holder cannot claim that its rights to the assets held by the intermediary are superior to the rights of another entitlement holder by virtue of having acquired those rights before, or after, the other

entitlement holder. Nor does it matter whether the intermediary had sufficient assets to satisfy all entitlement holders' claims at one point, but no longer does. Rather, all entitlement holders have a pro rata interest in whatever positions in that financial asset the intermediary holds.

Although this section describes the property interest of entitlement holders in the assets held by the intermediary, it does not necessarily determine how property held by a failed intermediary will be distributed in insolvency proceedings. If the intermediary fails and its affairs are being administered in an insolvency proceeding, the applicable insolvency law governs how the various parties having claims against the firm are treated. For example, the distributional rules for stockbroker liquidation proceedings under the Bankruptcy Code and Securities Investor Protection Act ("SIPA") provide that all customer property is distributed pro rata among all customers in proportion to the dollar value of their total positions, rather than dividing the property on an issue by issue basis. For intermediaries that are not subject to the Bankruptcy Code and SIPA, other insolvency law would determine what distributional rule is applied.

2. Although this section recognizes that the entitlement holders of a securities intermediary have a property interest in the financial assets held by the intermediary, the incidents of this property interest are established by the rules of Article 8, not by common law property concepts. The traditional Article 8 rules on certificated securities were based on the idea that a paper certificate could be regarded as a nearly complete reification of the underlying right. The rules on transfer and the consequences of wrongful transfer could then be written using the same basic concepts as the rules for physical chattels. A person's claim of ownership of a certificated security is a right to a specific identifiable physical object, and that right can be asserted against any person who ends up in possession of that physical certificate, unless cut off by the rules protecting purchasers for value without notice. Those concepts do not work for the indirect holding system. A security entitlement is not a claim to a specific identifiable thing; it is a package of rights and interests that a person has against the person's securities intermediary and the property held by the intermediary. The idea that discrete objects might be traced through the hands of different persons has no place in the Revised Article 8 rules for the indirect holding system. The fundamental principles of the indirect holding system rules are that an entitlement holder's own intermediary has the obligation to see to it that the entitlement holder receives all of the economic and corporate rights that comprise the financial asset, and that the entitlement holder can look only to that intermediary for performance of the obligations. The entitlement holder cannot assert rights directly against other persons, such as other intermediaries through whom the intermediary holds the positions, or third parties to whom the intermediary may have wrongfully transferred interests, except in extremely unusual circumstances where the third party was itself a participant in the wrongdoing. Subsections (c) through (e) reflect these fundamental principles.

Subsection (c) provides that an entitlement holder's property interest can be enforced against the intermediary only by exercise of the entitlement holder's rights under Sections 8-505 through 8-508. These are the provisions that set out the duty of an intermediary to see to it that the entitlement holder receives all of the economic and corporate rights that comprise the security. If the intermediary is in insolvency proceedings and can no longer perform in accordance with the ordinary Part 5 rules, the applicable insolvency law will determine how the intermediary's assets are to be distributed.

Subsections (d) and (e) specify the limited circumstances in which an entitlement holder's property interest can be asserted against a third person to whom the intermediary transferred a financial asset that was subject to the entitlement holder's claim when held by the intermediary. Subsection (d) provides that the property interest of entitlement holders cannot be asserted against any transferee except in the circumstances therein specified. So long as the intermediary is solvent, the entitlement holders must look to the intermediary to satisfy their claims. If the intermediary does not hold financial assets corresponding to the entitlement holders' claims, the intermediary has the duty to acquire them. See Section 8-504. Thus, paragraphs (1), (2), and (3) of subsection (d) specify that the only occasion in which the entitlement holders can pursue transferees is when the intermediary is unable to perform its obligation, and the transfer to the transferee was a violation of those obligations. Even in that case, a transferee who gave value and obtained control is protected by virtue of the rule in subsection (e), unless the transferee acted in collusion with the intermediary.

Subsections (d) and (e) have the effect of protecting transferees from an intermediary against adverse claims arising out of assertions by the intermediary's entitlement holders that the intermediary acted wrongfully in transferring the financial assets. These rules, however, operate in a slightly different fashion than traditional adverse claim cut-off rules. Rather than specifying that a certain class of transferee takes free from all claims, subsections (d) and (e) specify the circumstances in which this particular form of claim can be asserted against

a transferee. Revised Article 8 also contains general adverse claim cut-off rules for the indirect holding system. See Sections 8-502 and 8-510. The rule of subsections (d) and (e) takes precedence over the general cut-off rules of those sections, because Section 8-503 itself defines and sets limits on the assertion of the property interest of entitlement holders. Thus, the question whether entitlement holders' property interest can be asserted as an adverse claim against a transferee from the intermediary is governed by the collusion test of Section 8-503(e), rather than by the "without notice" test of Sections 8-502 and 8-510.

3. The limitations that subsections (c) through (e) place on the ability of customers of a failed intermediary to recover securities or other financial assets from transferees are consistent with the fundamental policies of investor protection that underlie this Article and other bodies of law governing the securities business. The commercial law rules for the securities holding and transfer system must be assessed from the forward-looking perspective of their impact on the vast number of transactions in which no wrongful conduct occurred or will occur, rather than from the post hoc perspective of what rule might be most advantageous to a particular class of persons in litigation that might arise out of the occasional case in which someone has acted wrongfully. Although one can devise hypothetical scenarios where particular customers might find it advantageous to be able to assert rights against someone other than the customers' own intermediary, commercial law rules that permitted customers to do so would impair rather than promote the interest of investors and the safe and efficient operation of the clearance and settlement system. Suppose, for example, that Intermediary A transfers securities to B, that Intermediary A acted wrongfully as against its customers in so doing, and that after the transaction Intermediary A did not have sufficient securities to satisfy its obligations to its entitlement holders. Viewed solely from the standpoint of the customers of Intermediary A, it would seem that permitting the property to be recovered from B, would be good for investors. That, however, is not the case. B may itself be an intermediary with its own customers, or may be some other institution through which individuals invest, such as a pension fund or investment company. There is no reason to think that rules permitting customers of an intermediary to trace and recover securities that their intermediary wrongfully transferred work to the advantage of investors in general. To the contrary, application of such rules would often merely shift losses from one set of investors to another. The uncertainties that would result from rules permitting such recoveries would work to the disadvantage of all participants in the securities markets.

The use of the collusion test in Section 8-503(e) furthers the interests of investors generally in the sound and efficient operation of the securities holding and settlement system. The effect of the choice of this standard is that customers of a failed intermediary must show that the transferee from whom they seek to recover was affirmatively engaged in wrongful conduct, rather than casting on the transferee any burden of showing that the transferee had no awareness of wrongful conduct by the failed intermediary. The rule of Section 8-503(e) is based on the long-standing policy that it is undesirable to impose upon purchasers of securities any duty to investigate whether their sellers may be acting wrongfully.

Rather than imposing duties to investigate, the general policy of the commercial law of the securities holding and transfer system has been to eliminate legal rules that might induce participants to conduct investigations of the authority of persons transferring securities on behalf of others for fear that they might be held liable for participating in a wrongful transfer. The rules in Part 4 of Article 8 concerning transfers by fiduciaries provide a good example. Under Lowry v. Commercial & Farmers' Bank, 15 F. Cas. 1040 (C.C.D. Md. 1848) (No. 8551), an issuer could be held liable for wrongful transfer if it registered transfer of securities by a fiduciary under circumstances where it had any reason to believe that the fiduciary may have been acting improperly. In one sense that seems to be advantageous for beneficiaries who might be harmed by wrongful conduct by fiduciaries. The consequence of the Lowry rule, however, was that in order to protect against risk of such liability, issuers developed the practice of requiring extensive documentation for fiduciary stock transfers, making such transfers cumbersome and time consuming. Accordingly, the rules in Part 4 of Article 8, and in the prior fiduciary transfer statutes, were designed to discourage transfer agents from conducting investigations into the rightfulness of transfers by fiduciaries.

The rules of Revised Article 8 implement for the indirect holding system the same policies that the rules on protected purchasers and registration of transfer adopt for the direct holding system. A securities intermediary is, by definition, a person who is holding securities on behalf of other persons. There is nothing unusual or suspicious about a transaction in which a securities intermediary sells securities that it was holding for its customers. That is exactly what securities intermediaries are in business to do. The interests of customers of securities intermediaries would not be served by a rule that required counterparties to transfers from securities intermediaries to investi-

gate whether the intermediary was acting wrongfully against its customers. Quite the contrary, such a rule would impair the ability of securities intermediaries to perform the function that customers want.

The rules of Section 8-503(c) through (e) apply to transferees generally, including pledgees. The reasons for treating pledgees in the same fashion as other transferees are discussed in the Comments to Section 8-511. The statement in subsection (a) that an intermediary holds financial assets for customers and not as its own property does not, of course, mean that the intermediary lacks power to transfer the financial assets to others. For example, although Article 9 provides that for a security interest to attach the debtor must have "rights" in the collateral, see Section 9-203, the fact that an intermediary is holding a financial asset in a form that permits ready transfer means that it has such rights, even if the intermediary is acting wrongfully against its entitlement holders in granting the security interest. The question whether the secured party takes subject to the entitlement holder's claim in such a case is governed by Section 8-511, which is an application to secured transactions of the general principles expressed in subsections (d) and (e) of this section.

Definitional Cross References

"Control". Section 8-106.
"Entitlement holder". Section 8-102(a)(7).
"Financial asset". Section 8-102(a)(9).
"Insolvency proceedings". Section 1-201(22).
"Purchaser". Sections 1-201(33) & 8-116.
"Securities intermediary". Section 8-102(a)(14).
"Security entitlement". Section 8-102(a)(17).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-504. Duty of securities intermediary to maintain financial asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a) of this section.

(c) A securities intermediary satisfies the duty in subsection (a) of this section if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-503 and § 28:8-509.

Prior Codifications. — 1981 Ed., § 28:8-504.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. This section expresses one of the core elements of the relationships for which the Part 5 rules were designed, to wit, that a securities intermediary undertakes to hold financial as-

sets corresponding to the security entitlements of its entitlement holders. The locution "shall promptly obtain and shall thereafter maintain" is taken from the corresponding regulation under federal securities law, 17 C.F.R. s 240.15c3-3. This section recognizes the reality that as the securities business is conducted today, it is not possible to identify particular securities as belonging to customers as distinguished from other particular securities that are the firm's own property. Securities firms typically keep all securities in fungible form, and may maintain their inventory of a particular security in various locations and forms, including physical securities held in vaults or in transit to transfer agents, and book entry positions at one or more clearing corporations. Accordingly, this section states that a securities intermediary shall maintain a quantity of financial assets corresponding to the aggregate of all security entitlements it has established. The last sentence of subsection (a) provides explicitly that the securities intermediary may hold directly or indirectly. That point is implicit in the use of the term "financial asset," inasmuch as Section 8-102(a)(9) provides that the term "financial asset" may refer either to the underlying asset or the means by which it is held, including both security certificates and security entitlements.

2. Subsection (b) states explicitly a point that is implicit in the notion that a securities intermediary must maintain financial assets corresponding to the security entitlements of its entitlement holders, to wit, that it is wrongful for a securities intermediary to grant security interests in positions that it needs to satisfy customers' claims, except as authorized by the customers. This statement does not determine the rights of a secured party to whom a securities intermediary wrongfully grants a security interest; that issue is governed by Sections 8-503 and 8-511.

Margin accounts are common examples of arrangements in which an entitlement holder authorizes the securities intermediary to grant security interests in the positions held for the entitlement holder. Securities firms commonly obtain the funds needed to provide margin loans to their customers by "rehypothecating" the customers' securities. In order to facilitate rehypothecation, agreements between margin customers and their brokers commonly authorize the broker to commingle securities of all margin customers for rehypothecation to the lender who provides the financing. Brokers commonly rehypothecate customer securities having a value somewhat greater than the amount of the loan made to the customer, since the lenders who provide the necessary financing to the broker need some cushion of protection against the risk of decline in the value of the rehypothecated securities. The extent and manner in which a firm may rehypothecate customers' securities are determined by the agreement between the intermediary and the entitlement holder and by applicable regulatory law. Current regulations under the federal securities laws require that brokers obtain the explicit consent of customers before pledging customer securities or commingling different customers' securities for pledge. Federal regulations also limit the extent to which a broker may rehypothecate customer securities to 110% of the aggregate amount of the borrowings of all customers.

3. The statement in this section that an intermediary must obtain and maintain financial assets corresponding to the aggregate of all security entitlements it has established is intended only to capture the general point that one of the key elements that distinguishes securities accounts from other relationships, such as deposit accounts, is that the intermediary undertakes to maintain a direct correspondence between the positions it holds and the claims of its customers. This section is not intended as a detailed specification of precisely how the intermediary is to perform this duty, nor whether there may be special circumstances in which an intermediary's general duty is excused. Accordingly, the general statement of the duties of a securities intermediary in this and the following sections is supplemented by two other provisions. First, each of Sections 8-504 through 8-508 contains an "agreement/due care" provision. Second, Section 8-509 sets out general qualifications on the duties stated in these sections, including the important point that compliance with corresponding regulatory provisions constitutes compliance with the Article 8 duties.

4. The "agreement/due care" provision in subsection (c) of this section is necessary to provide sufficient flexibility to accommodate the general duty stated in subsection (a) to the wide variety of circumstances that may be encountered in the modern securities holding system. For the most common forms of publicly traded securities, the modern depository-based indirect holding system has made the likelihood of an actual loss of securities remote, though correctable errors in accounting or temporary interruptions of data processing facilities may occur. Indeed, one of the reasons for the evolution of book-entry systems is to eliminate the risk of loss or destruction of physical certificates. There are, however, some forms of securities and other financial assets which must still be held in physical certificated form, with the attendant risk of loss or destruction. Risk of loss or delay may be a more significant consideration in connection with foreign securities. An American securities intermediary may well be willing to hold a foreign security in a securities account for its customer, but the interme-

diary may have relatively little choice of or control over foreign intermediaries through which the security must in turn be held. Accordingly, it is common for American securities intermediaries to disclaim responsibility for custodial risk of holding through foreign intermediaries.

Subsection (c)(1) provides that a securities intermediary satisfies the duty stated in subsection (a) if the intermediary acts with respect to that duty in accordance with the agreement between the intermediary and the entitlement holder. Subsection (c)(2) provides that if there is no agreement on the matter, the intermediary satisfies the subsection (a) duty if the intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset in question. This formulation does not state that the intermediary has a universally applicable statutory duty of due care. Section 1-102(3) provides that statutory duties of due care cannot be disclaimed by agreement, but the "agreement/due care" formula contemplates that there may be particular circumstances where the parties do not wish to create a specific duty of due care, for example, with respect to foreign securities. Under subsection (c)(1), compliance with the agreement constitutes satisfaction of the subsection (a) duty, whether or not the agreement provides that the intermediary will exercise due care.

In each of the sections where the "agreement/due care" formula is used, it provides that entering into an agreement and performing in accordance with that agreement is a method by which the securities intermediary may satisfy the statutory duty stated in that section. Accordingly, the general obligation of good faith performance of statutory and contract duties, see Sections 1-203 and 8-102(a)(10), would apply to such an agreement. It would not be consistent with the obligation of good faith performance for an agreement to purport to establish the usual sort of arrangement between an intermediary and entitlement holder, yet disclaim altogether one of the basic elements that define that relationship. For example, an agreement stating that an intermediary assumes no responsibilities whatsoever for the safekeeping any of the entitlement holder's securities positions would not be consistent with good faith performance of the intermediary's duty to obtain and maintain financial assets corresponding to the entitlement holder's security entitlements.

To the extent that no agreement under subsection (c)(1) has specified the details of the intermediary's performance of the subsection (a) duty, subsection (c)(2) provides that the intermediary satisfies that duty if it exercises due care in accordance with reasonable commercial standards. The duty of care includes both care in the intermediary's own operations and care in the selection of other intermediaries through whom the intermediary holds the assets in question. The statement of the obligation of due care is meant to incorporate the principles of the common law under which the specific actions or precautions necessary to meet the obligation of care are determined by such factors as the nature and value of the property, the customs and practices of the business, and the like.

5. This section necessarily states the duty of a securities intermediary to obtain and maintain financial assets only at the very general and abstract level. For the most part, these matters are specified in great detail by regulatory law. Broker-dealers registered under the federal securities laws are subject to detailed regulation concerning the safeguarding of customer securities. See 17 C.F.R. s 240.15c3-3. Section 8-509(a) provides explicitly that if a securities intermediary complies with such regulatory law, that constitutes compliance with Section 8-504. In certain circumstances, these rules permit a firm to be in a position where it temporarily lacks a sufficient quantity of financial assets to satisfy all customer claims. For example, if another firm has failed to make a delivery to the firm in settlement of a trade, the firm is permitted a certain period of time to clear up the problem before it is obligated to obtain the necessary securities from some other source.

6. Subsection (d) is intended to recognize that there are some circumstances, where the duty to maintain a sufficient quantity of financial assets does not apply because the intermediary is not holding anything on behalf of others. For example, the Options Clearing Corporation is treated as a "securities intermediary" under this Article, although it does not itself hold options on behalf of its participants. Rather, it becomes the issuer of the options, by virtue of guaranteeing the obligations of participants in the clearing corporation who have written or purchased the options cleared through it. See Section 8-103(e). Accordingly, the general duty of an intermediary under subsection (a) does not apply, nor would other provisions of Part 5 that depend upon the existence of a requirement that the securities intermediary hold financial assets, such as Sections 8-503 and 8-508.

Definitional Cross References

"Agreement". Section 1-201(3).

"Clearing corporation". Section 8-102(a)(5).

"Entitlement holder". Section 8-102(a)(7).

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security entitlement". Section 8-102(a)(17).

§ 28:8-505. Duty of securities intermediary with respect to payments and distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-503.

Prior Codifications. — 1981 Ed., § 28:8-505.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. One of the core elements of the securities account relationships for which the Part 5 rules were designed is that the securities intermediary passes through to the entitlement holders the economic benefit of ownership of the financial asset, such as payments and distributions made by the issuer. Subsection (a) expresses the ordinary understanding that a securities intermediary will take appropriate action to see to it that any payments or distributions made by the issuer are received. One of the main reasons that investors make use of securities intermediaries is to obtain the services of a professional in performing the record-keeping and other functions necessary to ensure that payments and other distributions are received.

2. Subsection (a) incorporates the same "agreement/due care" formula as the other provisions of Part 5 dealing with the duties of a securities intermediary. See Comment 4 to Section 8-504. This formulation permits the parties to specify by agreement what action, if any, the intermediary is to take with respect to the duty to obtain payments and distributions. In the absence of specification by agreement, the intermediary satisfies the duty if the intermediary exercises due care in accordance with reasonable commercial standards. The provisions of Section 8-509 also apply to the Section 8-505 duty, so that compliance with applicable regulatory requirements constitutes compliance with the Section 8-505 duty.

3. Subsection (b) provides that a securities intermediary is obligated to its entitlement holder for those payments or distributions made by the issuer that are in fact received by the intermediary. It does not deal with the details of the time and manner of payment. Moreover, as with any other monetary obligation, the obligation to pay may be subject to other rights of the obligor, by way of set-off counterclaim or the like. Section 8-509(c) makes this point explicit.

Definitional Cross References

"Agreement". Section 1-201(3).

"Entitlement holder". Section 8-102(a)(7).

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security entitlement". Section 8-102(a)(17).

§ 28:8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-506.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. Another of the core elements of the securities account relationships for which the Part 5 rules were designed is that although the intermediary may, by virtue of the structure of the indirect holding system, be the party who has the power to exercise the corporate and other rights that come from holding the security, the intermediary exercises these powers as representative of the entitlement holder rather than at its own discretion. This characteristic is one of the things that distinguishes a securities account from other arrangements where one person holds securities "on behalf of" another, such as the relationship between a mutual fund and its shareholders or a trustee and its beneficiary.

2. The fact that the intermediary exercises the rights of security holding as representative of the entitlement holder does not, of course, preclude the entitlement holder from conferring discretionary authority upon the intermediary. Arrangements are not uncommon in which investors do not wish to have their intermediaries forward proxy materials or other information. Thus, this section provides that the intermediary shall exercise corporate and other rights "if directed to do so" by the entitlement holder. Moreover, as with the other Part 5 duties, the "agreement/due care" formulation is used in stating how the intermediary is to perform this duty. This section also provides that the intermediary satisfies the duty if it places the entitlement holder in a position to exercise the rights directly. This is to take account of the fact that some of the rights attendant upon ownership of the security, such as rights to bring derivative and other litigation, are far removed from the matters that intermediaries are expected to perform.

3. This section, and the two that follow, deal with the aspects of securities holding that are related to investment decisions. For example, one of the rights of holding a particular security that would fall within the purview of this section would be the right to exercise a conversion right for a convertible security. It is quite common for investors to confer discretionary authority upon another person, such as an investment adviser, with respect to these rights and other investment decisions. Because this section, and the other sections of Part 5, all specify that a securities intermediary satisfies the Part 5 duties if it acts in accordance with the entitlement holder's agreement, there is no inconsistency between the statement of duties of a securities intermediary and these common arrangements.

4. Section 8-509 also applies to the Section 8-506 duty, so that compliance with applicable regulatory requirements constitutes compliance with this duty. This is quite important in this context, since the federal securities laws establish a comprehensive system of regulation of the distribution of proxy materials and exercise of voting rights with respect to securities held through brokers and other intermediaries. By virtue of Section 8-509(a), compliance with such regulatory requirement constitutes compliance with the Section 8-506 duty.

Definitional Cross References

"Agreement". Section 1-201(3).

"Entitlement holder". Section 8-102(a)(7).

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security entitlement". Section 8-102(a)(17).

§ 28:8-507. Duty of securities intermediary to comply with entitlement order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities

intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-507.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) of this section states another aspect of duties of securities intermediaries that make up security entitlements—the securities intermediary's duty to comply with entitlement orders. One of the main reasons for holding securities through securities intermediaries is to enable rapid transfer in settlement of trades. Thus the right to have one's orders for disposition of the security entitlement honored is an inherent part of the relationship. Subsection (b) states the correlative liability of a securities intermediary for transferring a financial asset from an entitlement holder's account pursuant to an entitlement order that was not effective.

2. The duty to comply with entitlement orders is subject to several qualifications. The intermediary has a duty only with respect to an entitlement order that is in fact originated by the appropriate person. Moreover, the intermediary has a duty only if it has had reasonable opportunity to assure itself that the order is genuine and authorized, and reasonable opportunity to comply with the order. The same "agreement/due care" formula is used in this section as in the other Part 5 sections on the duties of intermediaries, and the rules of Section 8-509 apply to the Section 8-507 duty.

3. Appropriate person is defined in Section 8-107. In the usual case, the appropriate person is the entitlement holder, see Section 8-107(a)(3). Entitlement holder is defined in Section 8-102(a)(7) as the person "identified in the records of a securities intermediary as the person having a security entitlement." Thus, the general rule is that an intermediary's duty with respect to entitlement orders runs only to the person with whom the intermediary has established a relationship. One of the basic principles of the indirect holding system is that securities intermediaries owe duties only to their own customers. See also Section 8-115. The only situation in which a securities intermediary has a duty to comply with entitlement orders originated by a person other than the person with whom the intermediary established a relationship is covered by Section 8-107(a)(4) and (a)(5), which provide that the term "appropriate person" includes the successor or personal representative of a decedent, or the custodian or guardian of a person who lacks capacity. If the entitlement holder is competent, another person does not fall within the defined term "appropriate person" merely by virtue of having power to act as an agent for the entitlement holder. Thus, an intermediary is not required to determine at its peril whether a person who purports to be authorized to act for an entitlement holder is in fact authorized to do so. If an entitlement holder wishes to be able to act through agents, the entitlement holder can establish appropriate arrangements in advance with the securities intermediary.

One important application of this principle is

that if an entitlement holder grants a security interest in its security entitlements to a third-party lender, the intermediary owes no duties to the secured party, unless the intermediary has entered into a "control" agreement in which it agrees to act on entitlement orders originated by the secured party. See Section 8-106. Even though the security agreement or some other document may give the secured party authority to act as agent for the debtor, that would not make the secured party an "appropriate person" to whom the security intermediary owes duties. If the entitlement holder and securities intermediary have agreed to such a control arrangement, then the intermediary's action in following instructions from the secured party would satisfy the subsection (a) duty. Although an agent, such as the secured party in this example, is not an "appropriate person," an entitlement order is "effective" if originated by an authorized person. See Section 8-107(a) and (b). Moreover, Section 8-507(a) provides that the intermediary satisfies its duty if it acts in accordance with the entitlement holder's agreement.

4. Subsection (b) provides that an intermediary is liable for a wrongful transfer if the entitlement order was "ineffective." Section 8-107 specifies whether an entitlement order is effective. An "effective entitlement order" is different from an "entitlement order originated by an appropriate person." An entitlement order is effective under Section 8-107(b) if it is made by the appropriate person, or by a person who has power to act for the appropriate person under the law of agency, or if the appropriate person has ratified the entitlement order or is precluded from denying its effectiveness. Thus, although a securities intermediary does not have a duty to act on an entitlement order originated by the entitlement holder's agent, the intermediary is not liable for wrongful transfer if it does so.

Subsection (b), together with Section 8-107, has the effect of leaving to other law most of the questions of the sort dealt with by Article 4A for wire transfers of funds, such as allocation between the securities intermediary and the entitlement holder of the risk of fraudulent entitlement orders.

5. The term entitlement order does not cover all directions that a customer might give a broker concerning securities held through the broker. Article 8 is not a codification of all of the law of customers and stockbrokers. Article 8 deals with the settlement of securities trades, not the trades. The term entitlement order does not refer to instructions to a broker to make trades, that is, enter into contracts for the purchase or sale of securities. Rather, the entitlement order is the mechanism of transfer for securities held through intermediaries, just as indorsements and instructions are the mechanism for securities held directly. In the ordinary case the customer's direction to the broker to deliver the securities at settlement is implicit in the customer's instruction to the broker to sell. The distinction is, however, significant in that this section has no application to the relationship between the customer and broker with respect to the trade itself. For example, assertions by a customer that it was damaged by a broker's failure to execute a trading order sufficiently rapidly or in the proper manner are not governed by this Article.

Definitional Cross References

"Agreement". Section 1-201(3).
"Appropriate person". Section 8-107.
"Effective". Section 8-107.
"Entitlement holder". Section 8-102(a)(7).
"Entitlement order". Section 8-102(a)(8).
"Financial asset". Section 8-102(a)(9).
"Securities intermediary". Section 8-102(a)(14).
"Security entitlement". Section 8-102(a)(17).

§ 28:8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-508.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. This section states another aspect of the duties of securities intermediaries that make up security entitlements—the obligation of the securities intermediary to change an entitlement holder's position into any other form of holding for which the entitlement holder is eligible or to transfer the entitlement holder's position to an account at another intermediary. This section does not state unconditionally that the securities intermediary is obligated to turn over a certificate to the customer or to cause the customer to be registered on the books of the issuer, because the customer may not be eligible to hold the security directly. For example, municipal bonds are now commonly issued in "book-entry only" form, in which the only entity that the issuer will register on its own books is a depository.

If security certificates in registered form are issued for the security, and individuals are eligible to have the security registered in their own name, the entitlement holder can request that the intermediary deliver or cause to be delivered to the entitlement holder a certificate registered in the name of the entitlement holder or a certificate indorsed in blank or specially indorsed to the entitlement holder. If security certificates in bearer form are issued for the security, the entitlement holder can request that the intermediary deliver or cause to be delivered a certificate in bearer form. If the security can be held by individuals directly in uncertificated form, the entitlement holder can request that the security be registered in its name. The specification of this duty does not determine the pricing terms of the agreement in which the duty arises.

2. The same "agreement/due care" formula is used in this section as in the other Part 5 sections on the duties of intermediaries. So too, the rules of Section 8-509 apply to the Section 8-508 duty.

Definitional Cross References

"Agreement". Section 1-201(3).

"Entitlement holder". Section 8-102(a)(7).

"Financial asset". Section 8-102(a)(9).

"Securities intermediary". Section 8-102(a)(14).

"Security entitlement". Section 8-102(a)(17).

§ 28:8-509. Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.

(a) If the substance of a duty imposed upon a securities intermediary by §§ 28:8-504 through 28:8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by §§ 28:8-504 through 28:8-508 is subject to:

(1) Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) Rights of the securities intermediary under other law, regulation, rule,

or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Sections 28:8-504 through 28:8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:8-509.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

This Article is not a comprehensive statement of the law governing the relationship between broker-dealers or other securities intermediaries and their customers. Most of the law governing that relationship is the common law of contract and agency, supplemented or supplanted by regulatory law. This Article deals only with the most basic commercial/property law principles governing the relationship. Although Sections 8-504 through 8-508 specify certain duties of securities intermediaries to entitlement holders, the point of these sections is to identify what it means to have a security entitlement, not to specify the details of performance of these duties.

For many intermediaries, regulatory law specifies in great detail the intermediary's obligations on such matters as safekeeping of customer property, distribution of proxy materials, and the like. To avoid any conflict between the general statement of duties in this Article and the specific statement of intermediaries' obligations in such regulatory schemes, subsection (a) provides that compliance with applicable regulation constitutes compliance with the duties specified in Sections 8-504 through 8-508.

Definitional Cross References

"Agreement". Section 1-201(3).

"Entitlement holder". Section 8-102(a)(7).

"Securities intermediary". Section 8-102(a)(14).

"Security agreement". Section 9-105(1)(l).

"Security interest". Section 1-201(37).

§ 28:8-510. Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c), an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under § 28:8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Article 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d), purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under § 28:8-106(d)(1);

(2) The securities intermediary's agreement to comply with the purchas-

er's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under § 28:8-106(d)(2); or

(3) If the purchaser obtained control through another person under § 28:8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087; Oct. 26, 2000, D.C. Law 13-201, § 201(i)(6), 47 DCR 7576.)

Prior Codifications. — 1981 Ed., § 28:8-510.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. This section specifies certain rules concerning the rights of persons who purchase interests in security entitlements from entitlement holders. The rules of this section are provided to take account of cases where the purchaser's rights are derivative from the rights of another person who is and continues to be the entitlement holder.

2. Subsection (a) provides that no adverse claim can be asserted against a purchaser of an interest in a security entitlement if the purchaser gives value, obtains control, and does not have notice of the adverse claim. The primary purpose of this rule is to give adverse claim protection to persons who take security interests in security entitlements and obtain control, but do not themselves become entitlement holders.

The following examples illustrate subsection (a):

Example 1. X steals a certificated bearer bond from Owner. X delivers the certificate to Able & Co. for credit to X's securities account. Later, X borrows from Bank and grants bank a security interest in the security entitlement. Bank obtains control under Section 8-106(d)(2) by virtue of an agreement in which Able agrees to comply with entitlement orders originated by Bank. X absconds.

Example 2. Same facts as in Example 1, except that Bank does not obtain a control agreement. Instead, Bank perfects by filing a financing statement.

In both of these examples, when X deposited the bonds X acquired a security entitlement under Section 8-501. Under other law, Owner may be able to have a constructive trust imposed on the security entitlement as the traceable product of the bonds that X misappropriated. X granted a security interest in that entitlement to Bank. Bank was a purchaser of an interest in the security entitlement from X. In Example 1, although Bank was not a person who acquired a security entitlement from the intermediary, Bank did obtain control. If Bank did not have notice of Owner's claim, Section 8-510(a) precludes Owner from asserting an adverse claim against Bank. In Example 2, Bank had a perfected security interest, but did not obtain control. Accordingly, Section 8-510(a) does not preclude Owner from asserting its adverse claim against Bank.

3. Subsection (b) applies to the indirect holding system a limited version of the "shelter principle." The following example illustrates the relatively limited class of cases for which it may be needed:

Example 3. Thief steals a certificated bearer bond from Owner. Thief delivers the certificate to Able & Co. for credit to Thief's securities account. Able forwards the certificate to a clearing corporation for credit to Able's account. Later Thief instructs Able to sell the positions in the bonds. Able sells to Baker & Co., acting as broker for Buyer. The trade is settled by book-entries in the accounts of Able and Baker at the clearing corporation, and in the accounts of Thief and Buyer at Able and Baker respectively. Owner may be able to reconstruct the trade records to show that settlement occurred in such fashion that the "same bonds" that were carried in Thief's account at Able are traceable into Buyer's account at Baker. Buyer later decides to donate the bonds to Alma Mater University and executes an assignment of its rights as entitlement holder to Alma Mater.

Buyer had a position in the bonds, which Buyer held in the form of a security entitlement against Baker. Buyer then made a gift of the position to Alma Mater. Although Alma Mater

is a purchaser, Section 1-201(33), it did not give value. Thus, Alma Mater is a person who purchased a security entitlement, or an interest therein, from an entitlement holder (Buyer). Buyer was protected against Owner's adverse claim by the Section 8-502 rule. Thus, by virtue of Section 8-510(b), Owner is also precluded from asserting an adverse claim against Alma Mater.

4. Subsection (c) specifies a priority rule for cases where an entitlement holder transfers conflicting interests in the same security entitlement to different purchasers. It follows the same principle as the Article 9 priority rule for investment property, that is, control trumps non-control. Indeed, the most significant category of conflicting "purchasers" may be secured parties. Priority questions for security interests, however, are governed by the rules in Article 9. Subsection (c) applies only to cases not covered by the Article 9 rules. It is intended primarily for disputes over conflicting claims arising out of repurchase agreement transactions that are not covered by the other rules set out in Articles 8 and 9.

The following example illustrates subsection (c):

Example 4. Dealer holds securities through an account at Alpha Bank. Alpha Bank in turns holds through a clearing corporation account. Dealer transfers securities to RP1 in a "hold in custody" repo transaction. Dealer then transfers the same securities to RP2 in another repo transaction. The repo to RP2 is implemented by transferring the securities from Dealer's regular account at Alpha Bank to a special account maintained by Alpha Bank for Dealer and RP2. The agreement among Dealer, RP2, and Alpha Bank provides that Dealer can make substitutions for the securities but RP2 can direct Alpha Bank to sell any securities held in the special account. Dealer becomes insolvent. RP1 claims a prior interest in the securities transferred to RP2.

In this example Dealer remained the entitlement holder but agreed that RP2 could initiate entitlement orders to Dealer's security intermediary, Alpha Bank. If RP2 had become the entitlement holder, the adverse claim rule of Section 8-502 would apply. Even if RP2 does not become the entitlement holder, the arrangement among Dealer, Alpha Bank, and RP2 does suffice to give RP2 control. Thus, under Section 8-510(c), RP2 has priority over RP1, because RP2 is a purchaser who obtained control, and RP1 is a purchaser who did not obtain control. The same result could be reached under Section 8-510(a) which provides that RP1's earlier in time interest cannot be asserted as an adverse claim against RP2. The same result would follow under the Article 9 priority rules if the interests of RP1 and RP2 are characterized as "security interests," see Section 9-328(1). The main point of the rules of Section 8-510(c) is to ensure that there will be clear rules to cover the conflicting claims of RP1 and RP2 without characterizing their interests as Article 9 security interests.

The priority rules in Article 9 for conflicting security interests also include a default temporal priority rule for cases where multiple secured parties have obtained control but omitted to specify their respective rights by agreement. See Section 9-328(2) and Comment 5 to Section 9-328. Because the purchaser priority rule in Section 8-510(c) is intended to track the Article 9 priority rules, it too has a temporal priority rule for cases where multiple non-secured party purchasers have obtained control but omitted to specify their respective rights by agreement. The rule is patterned on Section 9-328(2).

5. If a securities intermediary itself is a purchaser, subsection (d) provides that it has priority over the interest of another purchaser who has control. Article 9 contains a similar rule. See Section 9-328(3).

Definitional Cross References

"Adverse claim". Section 8-102(a)(1).
"Control". Section 8-106.
"Entitlement holder". Section 8-102(a)(7).
"Notice of adverse claim". Section 8-105.
"Purchase". Section 1-201(32).
"Purchaser". Sections 1-201(33) and 8-116.
"Securities intermediary". Section 8-102(a)(14).
"Security entitlement". Section 8-102(a)(17).
"Value". Sections 1-201(44) and 8-116.

§ 28:8-511. Priority among security interests and entitlement holders.

(a) Except as otherwise provided in subsections (b) and (c) of this section, if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Section references. — This section is referenced in § 28:8-503.

Prior Codifications. — 1981 Ed., § 28:8-511.

Legislative history of Law 11-240. — For legislative history of D.C. Law 11-240, see Historical and Statutory Notes following § 28:8-501.

UNIFORM COMMERCIAL CODE COMMENT

1. This section sets out priority rules for circumstances in which a securities intermediary fails leaving an insufficient quantity of securities or other financial assets to satisfy the claims of its entitlement holders and the claims of creditors to whom it has granted security interests in financial assets held by it. Subsection (a) provides that entitlement holders' claims have priority except as otherwise provided in subsection (b), and subsection (b) provides that the secured creditor's claim has priority if the secured creditor obtains control, as defined in Section 8-106. The following examples illustrate the operation of these rules.

Example 1. Able & Co., a broker, borrows from Alpha Bank and grants Alpha Bank a security interest pursuant to a written agreement which identifies certain securities that are to be collateral for the loan, either specifically or by category. Able holds these securities in a clearing corporation account. Able becomes insolvent and it is discovered that Able holds insufficient securities to satisfy the claims of customers who have paid for securities that they held in accounts with Able and the collateral claims of Alpha Bank. Alpha Bank's security interest in the security entitlements that Able holds through the clearing corporation account may be perfected under the automatic perfection rule of Section 9-115(4)(c), but Alpha Bank did not obtain control under Section 8-106. Thus, under Section 8-511(a) the entitlement holders' claims have priority over Alpha Bank's claim.

Example 2. Able & Co., a broker, borrows from Beta Bank and grants Beta Bank a security interest in securities that Able holds in a clearing corporation account. Pursuant to the security agreement, the securities are debited from Alpha's account and credited to Beta's account in the clearing corporation account. Able becomes insolvent and it is discovered that Able holds insufficient securities to satisfy the claims of customers who have paid for securities that they held in accounts with Able and the collateral claims of Alpha Bank. Although the transaction between Able and Beta took the form of an outright transfer on the clearing corporation's books, as between Able and Beta, Able remains the owner and Beta has a security interest. In that respect the situation is no different than if Able had delivered bearer bonds to Beta in pledge to secure a loan. Beta's security interest is perfected, and Beta obtained control. See Sections 8-106 and 9-115. Under Section 8-511(b), Beta Bank's security interest has priority over claims of Able's customers.

The result in Example 2 is an application to this particular setting of the general principle expressed in Section 8-503, and explained in the Comments thereto, that the entitlement holders of a securities intermediary cannot assert rights against third parties to whom the intermediary has wrongfully transferred interests, except in extremely unusual circumstances where the third party was itself a participant in the transferor's wrongdoing. Under subsection (b) the claim of a secured creditor of a securities intermediary has priority over the claims of entitlement holders if the secured creditor has obtained control. If, however, the secured creditor acted in collusion with the intermediary in violating the intermediary's obligation to its entitlement holders, then under Section 8-503(e), the entitlement holders, through their representative in insolvency proceedings, could recover the interest

from the secured creditor, that is, set aside the security interest.

2. The risk that investors who hold through an intermediary will suffer a loss as a result of a wrongful pledge by the intermediary is no different than the risk that the intermediary might fail and not have the securities that it was supposed to be holding on behalf of its customers, either because the securities were never acquired by the intermediary or because the intermediary wrongfully sold securities that should have been kept to satisfy customers' claims. Investors are protected against that risk by the regulatory regimes under which securities intermediaries operate. Intermediaries are required to maintain custody, through clearing corporation accounts or in other approved locations, of their customers' securities and are prohibited from using customers' securities in their own business activities. Securities firms who are carrying both customer and proprietary positions are not permitted to grant blanket liens to lenders covering all securities which they hold, for their own account or for their customers. Rather, securities firms designate specifically which positions they are pledging. Under SEC Rules 8c-1 and 15c2-1, customers' securities can be pledged only to fund loans to customers, and only with the consent of the customers. Customers' securities cannot be pledged for loans for the firm's proprietary business; only proprietary positions can be pledged for proprietary loans. SEC Rule 15c3-3 implements these prohibitions in a fashion tailored to modern securities firm accounting systems by requiring brokers to maintain a sufficient inventory of securities, free from any liens, to satisfy the claims of all of their customers for fully paid and excess margin securities. Revised Article 8 mirrors that requirement, specifying in Section 8-504 that a securities intermediary must maintain a sufficient quantity of investment property to satisfy all security entitlements, and may not grant security interests in the positions it is required to hold for customers, except as authorized by the customers.

If a failed brokerage has violated the customer protection regulations and does not have sufficient securities to satisfy customers' claims, its customers are protected against loss from a shortfall by the Securities Investor Protection Act ("SIPA"). Securities firms required to register as brokers or dealers are also required to become members of the Securities Investor Protection Corporation ("SIPC"), which provides their customers with protection somewhat similar to that provided by FDIC and other deposit insurance programs for bank depositors. When a member firm fails, SIPC is authorized to initiate a liquidation proceeding under the provisions of SIPA. If the assets of the securities firm are insufficient to satisfy all customer claims, SIPA makes contributions to the estate from a fund financed by assessments on its members to protect customers against losses up to $500,000 for cash and securities held at member firms.

Article 8 is premised on the view that the important policy of protecting investors against the risk of wrongful conduct by their intermediaries is sufficiently treated by other law.

3. Subsection (c) sets out a special rule for secured financing provided to enable clearing corporations to complete settlement. The reasons that secured financing arrangements are needed in such circumstances are explained in Comment 7 to Section 9-115. In order to permit clearing corporations to establish liquidity facilities where necessary to ensure completion of settlement, subsection (c) provides a priority for secured lenders to such clearing corporations. Subsection (c) does not turn on control because the clearing corporation may be the top tier securities intermediary for the securities pledged, so that there may be no practicable method for conferring control on the lender.

Definitional Cross References

"Clearing corporation". Section 8-102(a)(5).
"Control". Section 8-106.
"Entitlement holder". Section 8-102(a)(7).
"Financial asset". Section 8-102(a)(9).
"Securities intermediary". Section 8-102(a)(14).
"Security entitlement". Section 8-102(a)(17).
"Security interest". Section 1-201(37).
"Value". Sections 1-201(44) and 8-116.

Part 6. Transitional Provisions.

§ 28:8-601. Savings clause.

(a) This article does not affect an action or proceeding commenced before this subtitle takes effect.

(b) If a security interest in a security is perfected at the date this subtitle takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this article, no further action is required to continue perfection. If a security interest in a security is perfected

at the date this article takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this article, the security interest remains perfected for a period of four months after the effective date and continues perfected thereafter if appropriate action to perfect under this article is taken within that period. If a security interest is perfected at the date this article takes effect and the security interest can be perfected by filing under this article, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.

(Apr. 9, 1997, D.C. Law 11-240, § 2, 44 DCR 1087.)

Cross references. — Fraudulent conveyances, defenses, liability, transferee protection, see § 28-3108.

Prior Codifications. — 1981 Ed., § 28:8-601.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

References in text. — The phrase "before this subtitle takes effect," which appears in subsection (a), is a reference to the effective date of the Act of December 30, 1963, 77 Stat. 631, Pub. L. 88-243. Pursuant to § 16 of Pub. L. 88-243, the act became effective on January 1, 1965.

UNIFORM COMMERCIAL CODE COMMENT

The revision of Article 8 should present few significant transition problems. Although the revision involves significant changes in terminology and analysis, the substantive rules are, in large measure, based upon the current practices and are consistent with results that could be reached, albeit at times with some struggle, by proper interpretation of the rules of present law. Thus, the new rules can be applied, without significant dislocations, to transactions and events that occurred prior to enactment.

The enacting provisions should not, whether by applicability, transition, or savings clause language, attempt to provide that old Article 8 continues to apply to "transactions," "events," "rights," "duties," "liabilities," or the like that occurred or accrued before the effective date and that new Article 8 applies to those that occur or accrue after the effective date. The reason for revising Article 8 and corresponding provisions of Article 9 is the concern that the provisions of old Article 8 could be interpreted or misinterpreted to yield results that impede the safe and efficient operation of the national system for the clearance and settlement of securities transactions. Accordingly, it is not the case that any effort should be made to preserve the applicability of old Article 8 to transactions and events that occurred before the effective date.

Only two circumstances seem to warrant continued application of rules of old Article 8. First, to avoid disruption in the conduct of litigation, it may make sense to provide for continued application of the old Article 8 rules to lawsuits pending before the effective date. Second, there are some limited circumstances in which prior law permitted perfection of security interests by methods that are not provided for in the revised version. Section 8-313(1)(h) (1978) permitted perfection of security interests in securities held through intermediaries by notice to the intermediary. Under Revised Articles 8 and 9, security interests can be perfected in such cases by control, which requires the agreement of the intermediary, or by filing. It is likely that secured parties who relied strongly on such collateral under prior law did not simply send notices but obtained agreements from the intermediaries that would suffice for control under the new rules. However, it seems appropriate to include a provision that gives a secured creditor some opportunity after the effective date to perfect in this or any other case in which there is doubt whether the method of perfection used under prior law would be sufficient under the new version.

Article 9. Secured Transactions.

Part 1. General Provisions.

Subpart 1. Short Title, Definitions, and General Concepts.

§ 28:9-101. Short title.

This article may be cited as Uniform Commercial Code—Secured Transactions.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 1-308.07 and § 28-3108.

Legislative history of Law 13-201. — Law 13-201, the "Uniform Commercial Code Secured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

Effective date. — Section 501 of D.C. Law 13-201 provided: "Except for section 301(j) [amending § 28:9-402 by adding subsecs. (9) to (11)], this act shall apply as of July 1, 2001. Section 301(j) shall take effect in accordance with section 601."

UNIFORM COMMERCIAL CODE COMMENT

1. Source. This Article supersedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. In addition to describing many aspects of the operation and interpretation of this Article, these Comments explain the material changes that this Article makes to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

Citations to "Bankruptcy Code Section _______" in these Comments are to Title 11 of the United States Code as in effect on July 1, 2010.

2. Background and History. In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study Article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This Article was approved by its sponsors in 1998. This Article was conformed to revised Article 1 in 2001 and to amendments to Article 7 in 2003. The sponsors approved amendments to selected sections of this Article in 2010.

3. Reorganization and Renumbering; Captions; Style. This Article reflects a substantial reorganization of former Article 9 and renumbering of most sections. New Part 4 deals with several aspects of third-party rights and duties that are unrelated to perfection and priority. Some of these were covered by Part 3 of former Article 9. Part 5 deals with filing (covered by former Part 4) and Part 6 deals with default and enforcement (covered by former Part 5). Appendix I contains conforming revisions to other articles of the UCC, and Appendix II contains model provisions for production-money priority.

This Article also includes headings for the subsections as an aid to readers. Unlike section captions, which are part of the UCC, see Section 1-107, subsection headings are not a part of the official text itself and have not been approved by the sponsors. Each jurisdiction in which this Article is introduced may consider whether to adopt the headings as a part of the statute and whether to adopt a provision clarifying the effect, if any, to be given to the headings. This Article also has been conformed to current style conventions.

4. Summary of Revisions. Following is a brief summary of some of the more significant revi-

sions of Article 9 that are included in the 1998 revision of this Article.

a. Scope of Article 9. This Article expands the scope of Article 9 in several respects.

Deposit accounts. Section 9-109 includes within this Article's scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 dealt with deposit accounts only as proceeds of other collateral.

Sales of payment intangibles and promissory notes. Section 9-109 also includes within the scope of this Article most sales of "payment intangibles" (defined in Section 9-102 as general intangibles under which an account debtor's principal obligation is monetary) and "promissory notes" (also defined in Section 9-102). Former Article 9 included sales of accounts and chattel paper, but not sales of payment intangibles or promissory notes. In its inclusion of sales of payment intangibles and promissory notes, this Article continues the drafting convention found in former Article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a "security interest." The definition of "account" in Section 9-102 also has been expanded to include various rights to payment that were general intangibles under former Article 9.

Health-care-insurance receivables. Section 9-109 narrows Article 9's exclusion of transfers of interests in insurance policies by carving out of the exclusion "health-care-insurance receivables" (defined in Section 9-102). A health-care-insurance receivable is included within the definition of "account" in Section 9-102.

Nonpossessory statutory agricultural liens. Section 9-109 also brings nonpossessory statutory agricultural liens within the scope of Article 9.

Consignments. Section 9-109 provides that "true" consignments-bailments for the purpose of sale by the bailee-are security interests covered by Article 9, with certain exceptions. See Section 9-102 (defining "consignment"). Currently, many consignments are subject to Article 9's filing requirements by operation of former Section 2-326.

Supporting obligations and property securing rights to payment. This Article also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

Commercial tort claims. Section 9-109 expands the scope of Article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, this Article continues to exclude tort claims for bodily injury and other non-business tort claims of a natural person. See Section 9-102 (defining "commercial tort claim").

Transfers by States and governmental units of States. Section 9-109 narrows the exclusion of transfers by States and their governmental units. It excludes only transfers covered by another statute (other than a statute generally applicable to security interests) to the extent the statute governs the creation, perfection, priority, or enforcement of security interests.

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. This Article enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. This Article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

Subject to Sections 9-408 and 9-409 and two other exceptions (Sections 9-406, concerning accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in leased goods), Section 9-401 establishes a baseline rule that the inclusion of transactions and collateral within the scope of Article 9 has no effect on non-Article 9 law dealing with the alienability or inalienability of property. For example, if a commercial tort claim is nonassignable under other applicable law, the fact that a security interest in the claim is within the scope of Article 9 does not override the other applicable law's effective prohibition of assignment.

b. Duties of Secured Party. This Article provides for expanded duties of secured parties.

Release of control. Section 9-208 imposes upon a secured party having control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 expands a secured party's duties to provide the debtor with information concerning collateral and the obligations that it secures.

Default and enforcement. Part 6 also includes some additional duties of secured parties in connection with default and enforcement. See, e.g., Section 9-616 (duty to explain calculation of deficiency or surplus in a consumer-goods transaction).

c. Choice of Law. The choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found

in Part 3, Subpart 1 (Sections 9-301 through 9-307). See also Section 9-316.

Where to file: Location of debtor. This Article changes the choice-of-law rule governing perfection (i.e., where to file) for most collateral to the law of the jurisdiction where the debtor is located. See Section 9-301. Under former Article 9, the jurisdiction of the debtor's location governed only perfection and priority of a security interest in accounts, general intangibles, mobile goods, and, for purposes of perfection by filing, chattel paper and investment property.

Determining debtor's location. As a baseline rule, Section 9-307 follows former Section 9-103, under which the location of the debtor is the debtor's place of business (or chief executive office, if the debtor has more than one place of business). Section 9-307 contains three major exceptions. First, a "registered organization," such as a corporation or limited liability company, is located in the State under whose law the debtor is organized, e.g., a corporate debtor's State of incorporation. Second, an individual debtor is located at his or her principal residence. Third, there are special rules for determining the location of the United States and registered organizations organized under the law of the United States.

Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is located in a jurisdiction whose law does not require public notice as a condition of perfection of a nonpossessory security interest, the entity is deemed located in the District of Columbia. See Section 9-307. Thus, to the extent that this Article applies to non-U.S. debtors, perfection could be accomplished in many cases by a domestic filing.

Priority. For tangible collateral such as goods and instruments, Section 9-301 provides that the law applicable to priority and the effect of perfection or nonperfection will remain the law of the jurisdiction where the collateral is located, as under former Section 9-103 (but without the confusing "last event" test). For intangible collateral, such as accounts, the applicable law for priority will be that of the jurisdiction in which the debtor is located.

Possessory security interests; agricultural liens. Perfection, the effect of perfection or nonperfection, and priority of a possessory security interest or an agricultural lien are governed by the law of the jurisdiction where the collateral subject to the security interest or lien is located. See Sections 9-301, 9-302.

Goods covered by certificates of title; deposit accounts; letter-of-credit rights; investment property. This Article includes several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. See Section 9-303. It also provides special choice-of-law rules, similar to those for investment property under current Articles 8 and 9, for deposit accounts (Section 9-304), investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

Change in applicable law. Section 9-316 addresses perfection following a change in applicable law.

d. Perfection. The rules governing perfection of security interests and agricultural liens are found in Part 3, Subpart 2 (Sections 9-308 through 9-316).

Deposit accounts; letter-of-credit rights. With certain exceptions, this Article provides that a security interest in a deposit account or a letter-of-credit right may be perfected only by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depositary bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositary bank.

The control requirements are patterned on Section 8-106, which specifies the requirements for control of investment property. Under Section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

Electronic chattel paper. Section 9-102 includes a new defined term: "electronic chattel paper." Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (sui generis definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control).

Investment property. The perfection requirements for "investment property" (defined in Section 9-102), including perfection by control under Section 9-106, remain substantially unchanged. However, a new provision in Section 9-314 is designed to ensure that a secured party retains control in "repledge" transactions that are typical in the securities markets.

Instruments, agricultural liens, and commercial tort claims. This Article expands the types of collateral in which a security interest may be perfected by filing to include instruments. See Section 9-312. Agricultural liens and security interests in commercial tort claims also are perfected by filing, under this Article. See Sections 9-308, 9-310.

Sales of payment intangibles and promissory notes. Although former Article 9 covered the outright sale of accounts and chattel paper, sales of most other types of receivables also are financing transactions to which Article 9 should apply. Accordingly, Section 9-102 expands the definition of "account" to include many types of

receivables (including "health-care-insurance receivables," defined in Section 9-102) that former Article 9 classified as "general intangibles." It thereby subjects to Article 9's filing system sales of more types of receivables than did former Article 9. Certain sales of payment intangibles-primarily bank loan participation transactions-should not be subject to the Article 9 filing rules. These transactions fall in a residual category of collateral, "payment intangibles" (general intangibles under which the account debtor's principal obligation is monetary), the sale of which is exempt from the filing requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon attachment). The perfection rules for sales of promissory notes are the same as those for sales of payment intangibles.

Possessory security interests. Several provisions of this Article address aspects of security interests involving a secured party or a third party who is in possession of the collateral. In particular, Section 9-313 resolves a number of uncertainties under former Section 9-305. It provides that a security interest in collateral in the possession of a third party is perfected when the third party acknowledges in an authenticated record that it holds for the secured party's benefit. Section 9-313 also provides that a third party need not so acknowledge and that its acknowledgment does not impose any duties on it, unless it otherwise agrees. A special rule in Section 9-313 provides that if a secured party already is in possession of collateral, its security interest remains perfected by possession if it delivers the collateral to a third party and the collateral is accompanied by instructions to hold it for the secured party or to redeliver it to the secured party. Section 9-313 also clarifies the limited circumstances under which a security interest in goods covered by a certificate of title may be perfected by the secured party's taking possession.

Automatic perfection. Section 9-309 lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable to a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308 provides that a perfected security interest in collateral supported by a "supporting obligation" (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real-property mortgage) also is a perfected security interest in the security interest or lien.

e. Priority; Special Rules for Banks and Deposit Accounts. The rules governing priority of security interests and agricultural liens are found in Part 3, Subpart 3 (Sections 9-317 through 9-342). This Article includes several new priority rules and some special rules relating to banks and deposit accounts (Sections 9-340 through 9-342).

Purchase-money security interests: General; consumer-goods transactions; inventory. Section 9-103 substantially rewrites the definition of purchase-money security interest (PMSI) (although the term is not formally "defined"). The substantive changes, however, apply only to non-consumer-goods transactions. (Consumer transactions and consumer-goods transactions are discussed below in Comment 4.j.) For non-consumer-goods transactions, Section 9-103 makes clear that a security interest in collateral may be (to some extent) both a PMSI as well as a non-PMSI, in accord with the "dual status" rule applied by some courts under former Article 9 (thereby rejecting the "transformation" rule). The definition provides an even broader conception of a PMSI in inventory, yielding a result that accords with private agreements entered into in response to the uncertainty under former Article 9. It also treats consignments as purchase-money security interests in inventory. Section 9-324 revises the PMSI priority rules, but for the most part without material change in substance. Section 9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

Purchase-money security interests in livestock; agricultural liens. Section 9-324 provides a special PMSI priority, similar to the inventory PMSI priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-or-perfect priority rule) also recognizes special non-Article 9 priority rules for agricultural liens, which can override the baseline first-in-time rule.

Purchase-money security interests in software. Section 9-324 contains a new priority rule for a software purchase-money security interest. (Section 9-102 includes a definition of "software.") Under Section 9-103, a software PMSI includes a PMSI in software that is used in goods that are also subject to a PMSI. (Note also that the definition of "chattel paper" has been expanded to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods.)

Investment property. The priority rules for investment property are substantially similar to the priority rules found in former Section 9-115, which was added in conjunction with the 1994 revisions to UCC Article 8. Under Section 9-328, if a secured party has control of invest-

ment property (Sections 8-106, 9-106), its security interest is senior to a security interest perfected in another manner (e.g., by filing). Also under Section 9-328, security interests perfected by control generally rank according to the time that control is obtained or, in the case of a security entitlement or a commodity contract carried in a commodity account, the time when the control arrangement is entered into. This is a change from former Section 9-115, under which the security interests ranked equally. However, as between a securities intermediary's security interest in a security entitlement that it maintains for the debtor and a security interest held by another secured party, the securities intermediary's security interest is senior.

Deposit accounts. This Article's priority rules applicable to deposit accounts are found in Section 9-327. They are patterned on and are similar to those for investment property in former Section 9-115 and Section 9-328 of this Article. Under Section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest perfected in another manner (i.e., as cash proceeds). Also under Section 9-327, security interests perfected by control rank according to the time that control is obtained, but as between a depositary bank's security interest and one held by another secured party, the depositary bank's security interest is senior. A corresponding rule in Section 9-340 makes a depositary bank's right of set-off generally senior to a security interest held by another secured party. However, if the other secured party becomes the depositary bank's customer with respect to the deposit account, then its security interest is senior to the depositary bank's security interest and right of set-off. Sections 9-327, 9-340.

Letter-of-credit rights. The priority rules for security interests in letter-of-credit rights are found in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained. However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114. See Section 9-109(c)(4).

Chattel paper and instruments. Section 9-330 is the successor to former Section 9-308. As under former Section 9-308, differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a conflicting security interest in the collateral is claimed merely as proceeds. The principal change relates to the role of knowledge and the effect of an indication of a previous assignment of the collateral. Section 9-330 also affords priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of business.

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in Sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).

Miscellaneous priority provisions. This Article also includes (i) clarifications of selected good-faith-purchase and similar issues (Sections 9-317, 9-331); (ii) new priority rules to deal with the "double debtor" problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (Section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor's after-acquired property agreement (Section 9-326); (iv) a provision enabling most transferees of funds from a deposit account or money to take free of a security interest (Section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (Sections 9-335, 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (Section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise "clog" the payments system (Sections 9-341, 9-342).

Model provisions relating to production-money security interests. Appendix II to this Article contains model definitions and priority rules relating to "production-money security interests" held by secured parties who give new value used in the production of crops. Because no consensus emerged on the wisdom of these provisions during the drafting process, the sponsors make no recommendation on whether these model provisions should be enacted.

f. Proceeds. Section 9-102 contains an expanded definition of "proceeds" of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes

collections on account of "supporting obligations," such as guarantees.

g. Part 4: Additional Provisions Relating to Third-Party Rights. New Part 4 contains several provisions relating to the relationships between certain third parties and the parties to secured transactions. It contains new Sections 9-401 (replacing former Section 9-311) (alienability of debtor's rights), 9-402 (replacing former Section 9-317) (secured party not obligated on debtor's contracts), 9-403 (replacing former Section 9-206) (agreement not to assert defenses against assignee), 9-404, 9-405, and 9-406 (replacing former Section 9-318) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), 9-407 (replacing some provisions of former Section 2A-303) (restrictions on creation or enforcement of security interest in leasehold interest or lessor's residual interest ineffective). It also contains new Sections 9-408 (restrictions on assignment of promissory notes, health-care-insurance receivables ineffective, and certain general intangibles ineffective) and 9-409 (restrictions on assignment of letter-of-credit rights ineffective), which are discussed above.

h. Filing. Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

Medium-neutrality. This Article is "medium-neutral"; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

Identity of person who files a record; authorization. Part 5 is largely indifferent as to the person who effects a filing. Instead, it addresses whose authorization is necessary for a person to file a record with a filing office. The filing scheme does not contemplate that the identity of a "filer" will be a part of the searchable records. This approach is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system (except to the extent that filing offices may choose to employ authentication procedures in connection with electronic communications). As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is largely insignificant whether the secured party or another person files any given record.

Section 9-509 collects in one place most of the rules that determine when a record may be filed. In general, the debtor's authorization is required for the filing of an initial financing statement or an amendment that adds collateral. With one further exception, a secured party of record's authorization is required for the filing of other amendments. The exception arises if a secured party has failed to provide a termination statement that is required because there is no outstanding secured obligation or commitment to give value. In that situation, a debtor is authorized to file a termination statement indicating that it has been filed by the debtor.

Financing statement formal requisites. The formal requisites for a financing statement are set out in Section 9-502. A financing statement must provide the name of the debtor and the secured party and an indication of the collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a name provided on a financing statement and clarify when a debtor's name is correct and when an incorrect name is insufficient. Section 9-504 addresses the indication of collateral covered. Under Section 9-504, a super-generic description (e.g.,"all assets" or "all personal property") in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate electronic filing, this Article does not require that the debtor's signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See Sections 9-509, 9-626.

Filing-office operations. Part 5 contains several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few that are specified. See Sections 9-520, 9-516. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See Section 9-519. Third, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See Sections 9-515, 9-519, 9-522.

Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, Part 5 mandates performance standards for filing offices. See Sections 9-519, 9-520, 9-523. Fifth, it provides for the promulgation of filing-office rules to deal with details best left out of the statute and requires the filing office to submit periodic reports. See Sections 9-526, 9-527.

Defaulting or missing secured parties and fraudulent filings. In some areas of the country, serious problems have arisen from fraudulent financing statements that are filed against public officials and other persons. This Article addresses the fraud problem by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuses or fails to provide a termination statement. See Section 9-509. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, Section 9-518 affords a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files, albeit without affecting the efficacy, if any, of the challenged record.

Extended period of effectiveness for certain financing statements. Section 9-515 contains an exception to the usual rule that financing statements are effective for five years unless a continuation statement is filed to continue the effectiveness for another five years. Under that section, an initial financing statement filed in connection with a "public-finance transaction" or a "manufactured-home transaction" (terms defined in Section 9-102) is effective for 30 years.

National form of financing statement and related forms. Section 9-521 provides for uniform, national written forms of financing statements and related written records that must be accepted by a filing office that accepts written records.

i. Default and Enforcement. Part 6 of Article 9 extensively revises former Part 5. Provisions relating to enforcement of consumer-goods transactions and consumer transactions are discussed in Comment 4.j.

Debtor, secondary obligor; waiver. Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under Part 6. Under that section, the rights and duties are enjoyed by and run to the "debtor," defined in Section 9-102 to mean any person with a non-lien property interest in collateral, and to any "obligor." However, with one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect non-debtor obligors only if they are "secondary obligors." "Secondary obligor" is defined in Section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under Section 9-628, the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or obligor. Resolving an issue on which courts disagreed under former Article 9, this Article generally prohibits waiver by a secondary obligor of its rights and a secured party's duties under Part 6. See Section 9-602. However, Section 9-624 permits a secondary obligor or debtor to waive the right to notification of disposition of collateral and, in a non-consumer transaction, the right to redeem collateral, if the secondary obligor or debtor agrees to do so after default.

Rights of collection and enforcement of collateral. Section 9-607 explains in greater detail than former 9-502 the rights of a secured party who seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. Section 9-607 relates solely to the rights of a secured party vis-a-vis a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., Section 9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

Disposition of collateral: Warranties of title. Section 9-610 imposes on a secured party who disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law. It also provides rules for the exclusion or modification of those warranties.

Disposition of collateral: Notification, application of proceeds, surplus and deficiency, other effects. Section 9-611 requires a secured party to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor covering the collateral. (That duty was eliminated by the 1972 revisions to Article 9.) However, that section relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the results is unreasonably delayed. Section 9-613, which applies only to non-consumer transactions, specifies the contents of a sufficient notification of disposition and provides that a notification sent 10 days or more before the earliest time for disposition is sent within a reasonable time. Section 9-615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Section 9-619 clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.

Rights and duties of secondary obligor. Section 9-618 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party's rights and duties upon a transfer to it of collateral, or becomes

subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under Section 9-610, but it does relieve the former secured party of further duties. Former Section 9-504(5) did not address whether a secured party was relieved of its duties in this situation.

Transfer of record or legal title. Section 9-619 contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under Part 6. This rule applies regardless of the circumstances under which the transfer of title occurs.

Strict foreclosure. Section 9-620, unlike former Section 9-505, permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts-deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations-in the case of a secured party's unreasonable delay in the disposition of collateral. Instead, unreasonable delay is relevant when determining whether a disposition under Section 9-610 is commercially reasonable.

Effect of noncompliance: "Rebuttable presumption" test. Section 9-626 adopts the "rebuttable presumption" test for the failure of a secured party to proceed in accordance with certain provisions of Part 6. (As discussed in Comment 4.j., the test does not necessarily apply to consumer transactions.) Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with Part 6 (e.g., in a commercially reasonable manner). For non-consumer transactions, Section 9-626 rejects the "absolute bar" test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

"Low-price" dispositions: Calculation of deficiency and surplus. Section 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low price. Subsection (f) provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.“ ("Person related to“ is defined in Section 9-102.) In these situations there is reason to suspect that there may be inadequate incentives to obtain a better price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) would be calculated based on the proceeds that would have been received in a disposition to person other than the secured party, a person related to the secured party, or a secondary obligor.

j. Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions. This Article (including the accompanying conforming revisions (see Appendix I)) includes several special rules for "consumer goods," "consumer transactions," and "consumer-goods transactions.“ Each term is defined in Section 9-102.

(i) Revised Sections 2-502 and 2-716 provide a buyer of consumer goods with enhanced rights to possession of the goods, thereby accelerating the opportunity to achieve "buyer in ordinary course of business" status under Section 1-201.

(ii) Section 9-103(e) (allocation of payments for determining extent of purchase-money status), (f) (purchase-money status not affected by cross-collateralization, refinancing, restructuring, or the like), and (g) (secured party has burden of establishing extent of purchase-money status) do not apply to consumer-goods transactions. Sections 9-103 also provides that the limitation of those provisions to transactions other than consumer-goods transactions leaves to the courts the proper rules for consumer-goods transactions and prohibits the courts from drawing inferences from that limitation.

(iii) Section 9-108 provides that in a consumer transaction a description of consumer goods, a security entitlement, securities account, or commodity account "only by [UCC-defined] type of collateral" is not a sufficient collateral description in a security agreement.

(iv) Sections 9-403 and 9-404 make effective the Federal Trade Commission's anti-holder-in-due-course rule (when applicable), 16 C.F.R. Part 433, even in the absence of the required legend.

(v) The 10-day safe-harbor for notification of a disposition provided by Section 9-612 does not apply in a consumer transaction.

(vi) Section 9-613 (contents and form of notice of disposition) does not apply to a consumer-goods transaction.

(vii) Section 9-614 contains special requirements for the contents of a notification of disposition and a safe-harbor, "plain English“ form of notification, for consumer-goods transactions.

(viii) Section 9-616 requires a secured party in a consumer-goods transaction to provide a debtor with a notification of how it calculated a

deficiency at the time it first undertakes to collect a deficiency.

(ix) Section 9-620 prohibits partial strict foreclosure with respect to consumer goods collateral and, unless the debtor agrees to waive the requirement in an authenticated record after default, in certain cases requires the secured party to dispose of consumer goods collateral which has been repossessed.

(x) Section 9-626 ("rebuttable presumption" rule) does not apply to a consumer transaction. Section 9-626 also provides that its limitation to transactions other than consumer transactions leaves to the courts the proper rules for consumer transactions and prohibits the courts from drawing inferences from that limitation.

k. Good Faith. Section 9-102 contains a new definition of "good faith" that includes not only "honesty in fact" but also "the observance of reasonable commercial standards of fair dealing." The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.

l. Transition Provisions. Part 7 (Sections 9-701 through 9-707) contains transition provisions. Transition from former Article 9 to this Article will be particularly challenging in view of its expanded scope, its modification of choice-of-law rules for perfection and priority, and its expansion of the methods of perfection.

m. Conforming and Related Amendments to Other UCC Articles. Appendix I contains several proposed revisions to the provisions and Comments of other UCC articles. For the most part the revisions are explained in the Comments to the proposed revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.

Article 1. Revised Section 1-201 contains revisions to the definitions of "buyer in ordinary course of business," "purchaser," and "security interest."

Articles 2 and 2A. Sections 2-210, 2-326, 2-502, 2-716, 2A-303, and 2A-307 have been revised to address the intersection between Articles 2 and 2A and Article 9.

Article 5. New Section 5-118 is patterned on Section 4-210. It provides for a security interest in documents presented under a letter of credit in favor of the issuer and a nominated person on the letter of credit.

Article 8. Revisions to Section 8-106, which deals with "control" of securities and security entitlements, conform it to Section 8-302, which deals with "delivery." Revisions to Section 8-110, which deals with a "securities intermediary's jurisdiction," conform it to the revised treatment of a "commodity intermediary's jurisdiction" in Section 9-305. Sections 8-301 and 8-302 have been revised for clarification. Section 8-510 has been revised to conform it to the revised priority rules of Section 9-328. Several Comments in Article 8 also have been revised.

CASE NOTES

ANALYSIS

Construction and application.

It is only where secured creditor ignores rights against the collateral and elects to proceed on the underlying debt that subsequent disposal of collateral is not governed by requirements of Uniform Commercial Code. D.C. Code § 28:9-101 et seq. Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Deficiency judgment.

The Uniform Commercial Code and Title 5AA of District of Columbia rules and regulations preclude a deficiency judgment when proper notice of a public or private sale has not been given; no legal basis exists for award of a deficiency judgment when only the second requirement of the rule, resale at "a fair and reasonable price," is met. D.C. Code SCR, Civil Rules 55, 55-II(b), 55-II comment; D.C. Code § 28:9-101 et seq. Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Waiver.

Secured creditor does not waive its right in collateral by initially suing on debt instead of seeking immediate repossession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Secured creditor's decision to rely on its suit for monetary judgment as essential means of recovering debt and its subsequent decision to repossess collateral as additional means of satisfying debt, did not mean that secured creditor waived its rights in remaining collateral in debtor's possession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Except in cases where estoppel or laches may apply, secured creditor's mere inaction does not constitute implied waiver of its rights. Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

§ 28:9-102. Definitions and index of definitions.

(a) In this article:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) "Account" except as used in "account for" means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (f) for the use or hire of a vessel under a charter or other contract, (vi) arising out of the use of a credit or charge card or information contained on or for use with the card, or (vii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting", except as used in "accounting for", means a record:

(A) Authenticated by a secured party;

(B) Indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and

(C) Identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest in farm products:

(A) Which secures payment or performance of an obligation for:

(i) Goods or services furnished in connection with a debtor's farming operation; or

(ii) Rent on real property leased by a debtor in connection with its farming operation;

(B) Which is created by statute in favor of a person that:

(i) In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) Leased real property to a debtor in connection with the debtor's farming operation; and

(C) Whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) Oil, gas, or other minerals that are subject to a security interest that:

(i) Is created by a debtor having an interest in the minerals before extraction; and

(ii) Attaches to the minerals as extracted; or

(B) Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) To sign; or

(B) With present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. The term includes another record maintained as an alternative to a certificate of title by the governmental unit that issues certificates of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the sue or a credit or charge card or information contained on or for use with the card. If a transaction is evidenced both by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) Proceeds to which a security interest attaches;

(B) Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) Goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) The claimant is an organization; or

(B) The claimant is an individual and the claim:

(i) Arose in the course of the claimant's business or profession; and

(ii) Does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

(A) Is registered as a futures commission merchant under federal commodities law; or

(B) In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) "Communicate" means:

(A) To send a written or other tangible record;

(B) To transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.

(19) "Consignee" means a merchant to which goods are delivered in a consignment.

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) The merchant:

(i) Deals in goods of that kind under a name other than the name of the person making delivery;

(ii) Is not an auctioneer; and

(iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) With respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery;

(C) The goods are not consumer goods immediately before delivery; and

(D) The transaction does not create a security interest that secures an obligation.

(21) "Consignor" means a person that delivers goods to a consignee in a consignment.

(22) "Consumer debtor" means a debtor in a consumer transaction.

(23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) "Consumer-goods transaction" means a consumer transaction in which:

(A) An individual incurs an obligation primarily for personal, family, or household purposes; and

(B) A security interest in consumer goods secures the obligation.

(25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:

(A) A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) A consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in § 28:7-201(b).

(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products, or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) Crops grown, growing, or to be grown, including:

(i) Crops produced on trees, vines, and bushes; and

(ii) Aquatic goods produced in aquacultural operations;

(B) Livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) Supplies used or produced in a farming operation; or

(D) Products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to § 28:9-519(a).

(37) "Filing office" means an office designated in § 28:9-501 as the place to file a financing statement.

(38) "Filing-office rule" means a rule adopted pursuant to § 28:9-526.

(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying § 28:9-502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(43) Repealed.

(44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a State, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided or to be provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a

security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(48) "Inventory" means goods, other than farm products, which:

(A) Are leased by a person as lessor;

(B) Are held by a person for sale or lease or to be furnished under a contract of service;

(C) Are furnished by a person under a contract of service; or

(D) Consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(50) "Jurisdiction of organization", with respect to a registered organization means the jurisdiction under whose law the organization is organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

(A) A creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) An assignee for benefit of creditors from the time of assignment;

(C) A trustee in bankruptcy from the date of the filing of the petition; or

(D) A receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is 8 body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

(54) "Manufactured-home transaction" means a secured transaction:

(A) That creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or

(B) In which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) “New debtor” means a person that becomes bound as debtor under § 28:9-203(d) by a security agreement previously entered into by another person.

(57) “New value” means (i) money, (ii) money’s worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) “Noncash proceeds” means proceeds other than cash proceeds.

(59) “Obligor” means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) “Original debtor”, except as used in § 28:9-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under § 28:9-203(d).

(61) “Payment intangible” means a general intangible under which the account debtor’s principal obligation is a monetary obligation.

(62) “Person related to,” with respect to an individual, means:

(A) The spouse of the individual;

(B) A brother, brother-in-law, sister, or sister-in-law of the individual;

(C) An ancestor or lineal descendant of the individual or the individual’s spouse; or

(D) Any other relative, by blood or marriage, of the individual or the individual’s spouse who shares the same home with the individual.

(63) “Person related to,” with respect to an organization, means:

(A) A person directly or indirectly controlling, controlled by, or under common control with, the organization;

(B) An officer or director of, or a person performing similar functions with respect to, the organization;

(C) An officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A) of this paragraph;

(D) The spouse of an individual described in subparagraph (A), (B), or (C) of this paragraph; or

(E) An individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) of this paragraph and shares the same home with the individual.

(64) “Proceeds”, except as used in § 28:9-609(b), means the following property:

(A) Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) Whatever is collected on, or distributed on account of, collateral;

(C) Rights arising out of collateral;

(D) To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to §§ 28:9-620, 28:9-621, and 28:9-622.

(67) "Public-finance transaction" means a secured transaction in connection with which:

(A) Debt securities are issued;

(B) All or a portion of the securities issued have an initial stated maturity of at least 20 years; and

(C) The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a State or a governmental unit of a State.

(68) "Public organic record" means a record that is available to the public for inspection and is:

(A) A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States which amends or restates the initial record;

(B) An organic record of a business trust consisting of the record initially filed with a state and any record filed with the state which amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or

(C) A record consisting of legislation enacted by the legislature of a state or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or the United States which amends or restates the name of the organization.

(69) "Pursuant to commitment," with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(70) "Record," except as used in "for record," "of record," "record or legal title," and "record owner," means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(71) "Registered organization" means an organization formed or organized solely under the law of a single state or the United States by the filing of a public organic record with the issuance of a public organic record by, or the

enactment of legislation by, the state or the United States. The term includes a business trust that is formed or organized under the law of a single state if a statute of the state governing business trusts requires that the business trust's organic record be filed with the state.

(72) "Secondary obligor" means an obligor to the extent that:

(A) The obligor's obligation is secondary; or

(B) The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(73) "Secured party" means:

(A) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) A person that holds an agricultural lien;

(C) A consignor;

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) A person that holds a security interest arising under § 28:2-401, 2-505, 2-711(3), 2A-508(5), 4-210, or 5-118.

(74) "Security agreement" means an agreement that creates or provides for a security interest.

(75) "Send," in connection with a record or notification, means:

(A) To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) To cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A) of this paragraph.

(76) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(77) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(78) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(79) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(80) "Termination statement" means an amendment of a financing statement which:

(A) Identifies, by its file number, the initial financing statement to which it relates; and

(B) Indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(81) "Transmitting utility" means a person primarily engaged in the business of:

(A) Operating a railroad, subway, street railway, or trolley bus;

(B) Transmitting communications electrically, electromagnetically, or by light;

(C) Transmitting goods by pipeline or sewer; or

(D) Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) "Control" as provided in § 28:7-106 and the following definitions in other articles apply to this article:

"Applicant"	§ 28:5-102.
"Beneficiary"	§ 28:5-102.
"Broker"	§ 28:8-102.
"Certificated security"	§ 28:8-102.
"Check"	§ 28:3-104.
"Clearing corporation"	§ 28:8-102.
"Contract for sale"	§ 28:2-106.
"Customer"	§ 28:4-104.
"Entitlement holder"	§ 28:8-102.
"Financial asset"	§ 28:8-102.
"Holder in due course"	§ 28:3-302.
"Issuer" (with respect to a letter of credit or letter-of-credit right)	§ 28:5-102.
"Issuer" (with respect to a security)	§ 28:8-201.
"Issuer" (with respect to documents of title)	§ 28:7-102.
"Lease"	§ 28:2A-103.
"Lease agreement"	§ 28:2A-103.
"Lease contract"	§ 28:2A-103.
"Leasehold interest"	§ 28:2A-103.
"Lessee"	§ 28:2A-103.
"Lessee in ordinary course of business"	§ 28:2A-103.
"Lessor"	§ 28:2A-103.
"Lessor's residual interest"	§ 28:2A-103.
"Letter of credit"	§ 28:5-102.
"Merchant"	§ 28:2-104.
"Negotiable instrument"	§ 28:3-104.
"Nominated person"	§ 28:5-102.
"Note"	§ 28:3-104.
"Proceeds of a letter of credit"	§ 28:5-114.
"Prove"	§ 28:3-103.
"Sale"	§ 28:2-106.
"Securities account"	§ 28:8-501.
"Securities intermediary"	§ 28:8-102.
"Security"	§ 28:8-102.
"Security certificate"	§ 28:8-102.
"Security entitlement"	§ 28:8-102.

"Uncertificated security" § 28:8-102.

(c) Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(a), 60 DCR 2634; May 1, 2013, D.C. Law 19-302, § 2(b), 60 DCR 2688.)

Section references. — This section is referenced in § 28:2-103, § 28:2A-103, § 28:6-102, § 28:8-103, § 50-601, and § 50-1201.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 deleted "other than a security interest" following "interest" in the opening language of (a)(5); substituted "§ 28:7-201(b)" for "§ 28:7-201(2)" in (a)(30); repealed (a)(43) defining "Good faith"; added "or to be provided" at the end of (a)(46); in (b), added "'Control' as provided in § 28:7-106 and" at the beginning of the introductory language, and added the definition of "Issuer" (with respect to documents of title)"; and made related changes.

The 2013 amendment by D.C. Law 19-302 rewrote (a)(7)(B); added the last sentence in (a)(10); added (a)(68); redesignated former (a)(68) through (a)(80) as (a)(69) through (a)(81), respectively; and rewrote (a)(71) defining "Registered organization".

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

Legislative history of Law 19-302. — Law 19-302, the "Uniform Commercial Code Article 9 Amendments Act of 2012," was introduced in Council and assigned Bill No. 19-222. The Bill was adopted on first and second readings on December 4, 2012, and December 18, 2012, respectively. Signed by the Mayor on February 5, 2013, it was assigned Act No. 19-669 and transmitted to Congress for its review. D.C. Law 19-302 became effective on May 1, 2013.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. All terms that are defined in Article 9 and used in more than one section are consolidated in this section. Note that the definition of "security interest" is found in Section 1-201, not in this Article, and has been revised. See Appendix I. Many of the definitions in this section are new; many others derive from those in former Section 9-105. The following Comments also indicate other sections of former Article 9 that defined (or explained) terms.

2. Parties to Secured Transactions.

a. "Debtor"; "Obligor"; "Secondary Obligor." Determining whether a person was a "debtor" under former Section 9-105(1)(d) required a close examination of the context in which the term was used. To reduce the need for this examination, this Article redefines "debtor" and adds new defined terms, "secondary obligor" and "obligor." In the context of Part 6 (default and enforcement), these definitions distinguish among three classes of persons: (i) those persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral, (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt, and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest. Persons in the first class are debtors. Persons in the second class are secondary obligors if any portion of the obligation is secondary or if the obligor has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty s 1 (1996), contains a useful explanation of the concept. Obligors in the third class are neither debtors nor secondary obligors. With one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties provided by Part 6 affect non-debtor obligors only if they are "secondary obligors."

By including in the definition of "debtor" all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee's identity. Exculpatory provisions in Part 6 protect the secured

party in that circumstance. See Sections 9-605 and 9-628. The definition renders unnecessary former Section 9-112, which governed situations in which collateral was not owned by the debtor. The definition also includes a "consignee," as defined in this section, as well as a seller of accounts, chattel paper, payment intangibles, or promissory notes.

Secured parties and other lienholders are excluded from the definition of "debtor" because the interests of those parties normally derive from and encumber a debtor's interest. However, if in a separate secured transaction a secured party grants, as debtor, a security interest in its own interest (i.e., its security interest and any obligation that it secures), the secured party is a debtor in that transaction. This typically occurs when a secured party with a security interest in specific goods assigns chattel paper.

Consider the following examples:

Example 1: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Behnfeldt is a debtor and an obligor.

Example 2: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno co-signs a negotiable note as maker. As before, Behnfeldt is the debtor and an obligor. As an accommodation party (see Section 3-419), Bruno is a secondary obligor. Bruno has this status even if the note states that her obligation is a primary obligation and that she waives all suretyship defenses.

Example 3: Behnfeldt borrows money on an unsecured basis. Bruno co-signs the note and grants a security interest in her Honda to secure her obligation. Inasmuch as Behnfeldt does not have a property interest in the Honda, Behnfeldt is not a debtor. Having granted the security interest, Bruno is the debtor. Because Behnfeldt is a principal obligor, she is not a secondary obligor. Whatever the outcome of enforcement of the security interest against the Honda or Bruno's secondary obligation, Bruno will look to Behnfeldt for her losses. The enforcement will not affect Behnfeldt's aggregate obligations.

When the principal obligor (borrower) and the secondary obligor (surety) each has granted a security interest in different collateral, the status of each is determined by the collateral involved.

Example 4: Behnfeldt borrows money and grants a security interest in her Miata to secure the debt. Bruno co-signs the note and grants a security interest in her Honda to secure her obligation. When the secured party enforces the security interest in Behnfeldt's Miata, Behnfeldt is the debtor, and Bruno is a secondary obligor. When the secured party enforces the security interest in the Honda, Bruno is the "debtor." As in Example 3, Behnfeldt is an obligor, but not a secondary obligor.

b. "Secured Party." The secured party is the person in whose favor the security interest has been created, as determined by reference to the security agreement. This definition controls, among other things, which person has the duties and potential liability that Part 6 imposes upon a secured party. The definition of "secured party" also includes a "consignee," a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold, and the holder of an agricultural lien.

The definition of "secured party" clarifies the status of various types of representatives. Consider, for example, a multi-bank facility under which Bank A, Bank B, and Bank C are lenders and Bank A serves as the collateral agent. If the security interest is granted to the banks, then they are the secured parties. If the security interest is granted to Bank A as collateral agent, then Bank A is the secured party.

c. Other Parties. A "consumer obligor" is defined as the obligor in a consumer transaction. Definitions of "new debtor" and "original debtor" are used in the special rules found in Sections 9-326 and 9-508.

3. Definitions Relating to Creation of a Security Interest.

a. "Collateral." As under former Section 9-105, "collateral" is the property subject to a security interest and includes accounts and chattel paper that have been sold. It has been expanded in this Article. The term now explicitly includes proceeds subject to a security interest. It also reflects the broadened scope of the Article. It includes property subject to an agricultural lien as well as payment intangibles and promissory notes that have been sold.

b. "Security Agreement." The definition of "security agreement" is substantially the same as under former Section 9-105-an agreement that creates or provides for a security interest. However, the term frequently was used colloquially in former Article 9 to refer to the document or writing that contained a debtor's security agreement. This Article eliminates that usage, reserving the term for the more precise meaning specified in the definition.

Whether an agreement creates a security interest depends not on whether the parties intend that the law characterize the transaction as a security interest but rather on whether the transaction falls within the definition of "security interest" in Section 1-201. Thus, an agreement that the parties characterize as a "lease" of goods may be a "security agreement," notwithstanding the parties' stated intention that the law treat the transaction as a lease and not as a secured transaction.

4. Goods-Related Definitions.

a. "Goods"; "Consumer Goods"; "Equipment"; "Farm Products"; "Farming Operation"; "Inventory." The definition of "goods" is substantially the same as the definition in former Section

9-105. This Article also retains the four mutually-exclusive "types" of collateral that consist of goods: "consumer goods," "equipment," "farm products," and "inventory." The revisions are primarily for clarification.

The classes of goods are mutually exclusive. For example, the same property cannot simultaneously be both equipment and inventory. In borderline cases-a physician's car or a farmer's truck that might be either consumer goods or equipment-the principal use to which the property is put is determinative. Goods can fall into different classes at different times. For example, a radio may be inventory in the hands of a dealer and consumer goods in the hands of a consumer. As under former Article 9, goods are "equipment" if they do not fall into another category.

The definition of "consumer goods" follows former Section 9-109. The classification turns on whether the debtor uses or bought the goods for use "primarily for personal, family, or household purposes."

Goods are inventory if they are leased by a lessor or held by a person for sale or lease. The revised definition of "inventory" makes clear that the term includes goods leased by the debtor to others as well as goods held for lease. (The same result should have obtained under the former definition.) Goods to be furnished or furnished under a service contract, raw materials, and work in process also are inventory. Implicit in the definition is the criterion that the sales or leases are or will be in the ordinary course of business. For example, machinery used in manufacturing is equipment, not inventory, even though it is the policy of the debtor to sell machinery when it becomes obsolete or worn. Inventory also includes goods that are consumed in a business (e.g., fuel used in operations). In general, goods used in a business are equipment if they are fixed assets or have, as identifiable units, a relatively long period of use, but are inventory, even though not held for sale or lease, if they are used up or consumed in a short period of time in producing a product or providing a service.

Goods are "farm products" if the debtor is engaged in farming operations with respect to the goods. Animals in a herd of livestock are covered whether the debtor acquires them by purchase or as a result of natural increase. Products of crops or livestock remain farm products as long as they have not been subjected to a manufacturing process. The terms "crops" and "livestock" are not defined. The new definition of "farming operations" is for clarification only.

Crops, livestock, and their products cease to be "farm products" when the debtor ceases to be engaged in farming operations with respect to them. If, for example, they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory. Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not specified in this Article. At one end of the spectrum, some processes are so closely connected with farming-such as pasteurizing milk or boiling sap to produce maple syrup or sugar-that they would not constitute manufacturing. On the other hand an extensive canning operation would be manufacturing. Once farm products have been subjected to a manufacturing operation, they normally become inventory.

The revised definition of "farm products" clarifies the distinction between crops and standing timber and makes clear that aquatic goods produced in aquacultural operations may be either crops or livestock. Although aquatic goods that are vegetable in nature often would be crops and those that are animal would be livestock, this Article leaves the courts free to classify the goods on a case-by-case basis. See Section 9-324, Comment 11.

The definitions of "goods" and "software" are also mutually exclusive. Computer programs usually constitute "software," and, as such, are not "goods" as this Article uses the terms. However, under the circumstances specified in the definition of "goods," computer programs embedded in goods are part of the "goods" and are not "software."

b. "Accession"; "Manufactured Home"; "Manufactured-Home Transaction." Other specialized definitions of goods include "accession" (see the special priority and enforcement rules in Section 9-335), and "manufactured home" (see Section 9-515, permitting a financing statement in a "manufactured-home transaction" to be effective for 30 years). The definition of "manufactured home" borrows from the federal Manufactured Housing Act, 42 U.S.C. §§ 5401 et seq., and is intended to have the same meaning.

c. "As-Extracted Collateral." Under this Article, oil, gas, and other minerals that have not been extracted from the ground are treated as real property, to which this Article does not apply. Upon extraction, minerals become personal property (goods) and eligible to be collateral under this Article. See the definition of "goods," which excludes "oil, gas, and other minerals before extraction." To take account of financing practices reflecting the shift from real to personal property, this Article contains special rules for perfecting security interests in minerals which attach upon extraction and in accounts resulting from the sale of minerals at the wellhead or minehead. See, e.g., Sections 9-301(4) (law governing perfection and prior-

ity); 9-501 (place of filing), 9-502 (contents of financing statement), 9-519 (indexing of records). The new term, "as-extracted collateral," refers to the minerals and related accounts to which the special rules apply. The term "at the wellhead" encompasses arrangements based on a sale of the produce at the moment that it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" of a well, the far side of a gathering tank, or at some other point. The term "at ... the minehead" is comparable.

The following examples explain the operation of these provisions.

Example 5: Debtor owns an interest in oil that is to be extracted. To secure Debtor's obligations to Lender, Debtor enters into an authenticated agreement granting Lender an interest in the oil. Although Lender may acquire an interest in the oil under real-property law, Lender does not acquire a security interest under this Article until the oil becomes personal property, i.e., until is extracted and becomes "goods" to which this Article applies. Because Debtor had an interest in the oil before extraction and Lender's security interest attached to the oil as extracted, the oil is "as-extracted collateral."

Example 6: Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In an authenticated agreement, Debtor agrees to sell to Lender the right to payment from Buyer. This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the account to Financer, Financer acquires a security interest. However, inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil before extraction, Financer's collateral (the account it owns) is not "as-extracted collateral."

Example 7: Under the facts of Example 6, before extraction, Buyer grants a security interest in the oil to Bank. Although Bank's security interest attaches when the oil is extracted, Bank's security interest is not in "as-extracted collateral," inasmuch as its debtor, Buyer, did not have an interest in the oil before extraction.

5. Receivables-related Definitions.

a. "Account"; "Health-Care-Insurance Receivable"; "As-Extracted Collateral." The definition of "account" has been expanded and reformulated. It is no longer limited to rights to payment relating to goods or services. Many categories of rights to payment that were classified as general intangibles under former Article 9 are accounts under this Article. Thus, if they are sold, a financing statement must be filed to perfect the buyer's interest in them. Among the types of property that are expressly excluded from the definition is "a right to payment for money or funds advanced or sold." As defined in Section 1-201, "money" is limited essentially to currency. As used in the exclusion from the definition of "account," however, "funds" is a broader concept (although the term is not defined). For example, when a bank-lender credits a borrower's deposit account for the amount of a loan, the bank's advance of funds is not a transaction giving rise to an account.

The definition of "health-care-insurance receivable" is new. It is a subset of the definition of "account." However, the rules generally applicable to account debtors on accounts do not apply to insurers obligated on health-care-insurance receivables. See Sections 9-404(e), 9-405(d), 9-406(i).

Note that certain accounts also are "as-extracted collateral." See Comment 4.c., Examples 6 and 7.

b. "Chattel Paper"; "Electronic Chattel Paper"; "Tangible Chattel Paper." "Chattel paper" consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by "a record or records." The definition has been expanded from that found in former Article 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. The expanded definition covers transactions in which the debtor's or lessee's monetary obligation includes amounts owed with respect to software used in the goods. The monetary obligation with respect to the software need not be owed under a license from the secured party or lessor, and the secured party or lessor need not be a party to the license transaction itself. Among the types of monetary obligations that are included in "chattel paper" are amounts that have been advanced by the secured party or lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software used in the goods. The definition also makes clear that rights to payment arising out of credit-card transactions are not chattel paper.

Charters of vessels are expressly excluded from the definition of chattel paper; they are accounts. The term "charter" as used in this section includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use of vessels.

Under former Section 9-105, only if the evidence of an obligation consisted of "a writing or writings" could an obligation qualify as chattel paper. In this Article, traditional, written chattel paper is included in the definition of "tangible chattel paper." "Electronic chattel paper" is chattel paper that is stored in an electronic medium instead of in tangible form. The con-

cept of an electronic medium should be construed liberally to include electrical, digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.

The definition of electronic chattel paper does not dictate that it be created in any particular fashion. For example, a record consisting of a tangible writing may be converted to electronic form (e.g., by creating electronic images of a signed writing). Or, records may be initially created and executed in electronic form (e.g., a lessee might authenticate an electronic record of a lease that is then stored in electronic form). In either case the resulting records are electronic chattel paper.

c. "Instrument"; "Promissory Note." The definition of "instrument" includes a negotiable instrument. As under former Section 9-105, it also includes any other right to payment of a monetary obligation that is evidenced by a writing of a type that in ordinary course of business is transferred by delivery (and, if necessary, an indorsement or assignment). Except in the case of chattel paper, the fact that an instrument is secured by a security interest or encumbrance on property does not change the character of the instrument as such or convert the combination of the instrument and collateral into a separate classification of personal property. The definition makes clear that rights to payment arising out of credit-card transactions are not instruments. The definition of "promissory note" is new, necessitated by the inclusion of sales of promissory notes within the scope of Article 9. It explicitly excludes obligations arising out of "orders" to pay (e.g., checks) as opposed to "promises" to pay. See Section 3-104.

d. "General Intangible"; "Payment Intangible." "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in the definition of "general intangible," "things in action" includes rights that arise under a license of intellectual property, including the right to exploit the intellectual property without liability for infringement. The definition has been revised to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral.

One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not "account debtors" having the rights and obligations set forth in Sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in Section 9-404(a). See Comment 5.h. Another important consequence relates to the adequacy of the description in the security agreement. See Section 9-108.

"Payment intangible" is a subset of the definition of "general intangible." The sale of a payment intangible is subject to this Article. See Section 9-109(a)(3). Virtually any intangible right could give rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term "payment intangible," however, embraces only those general intangibles "under which the account debtor's principal obligation is a monetary obligation."

(Emphasis added.)

In classifying intangible collateral, a court should begin by identifying the particular rights that have been assigned. The account debtor (promisor) under a particular contract may owe several types of monetary obligations as well as other, nonmonetary obligations. If the promisee's right to payment of money is assigned separately, the right is an account or payment intangible, depending on how the account debtor's obligation arose. When all the promisee's rights are assigned together, an account, a payment intangible, and a general intangible all may be involved, depending on the nature of the rights.

A right to the payment of money is frequently buttressed by ancillary covenants, such as covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. This Article does not treat these ancillary rights separately from the rights to payment to which they relate. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or payment intangible, also carries these ancillary rights.

Every "payment intangible" is also a "general intangible." Likewise, "software" is a "general intangible" for purposes of this Article. See Comment 25. Accordingly, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software.

e. "Letter-of-Credit Right." The term "letter-of-credit right" embraces the rights to payment and performance under a letter of credit (defined in Section 5-102). However, it does not include a beneficiary's right to demand payment or performance. Transfer of those rights to a transferee beneficiary is governed by Article 5. See Sections 9-107, Comment 4, and 9-329, Comments 3 and 4.

f. "Supporting Obligation." This new term covers the most common types of credit enhancements-suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition. As explained in Comment 2.a., suretyship law determines whether an obligation is "secondary" for purposes of this definition. Section 9-109 generally excludes from this Article transfers of interests in insurance policies. However, the regulation of a secondary obligation as an insurance product does not necessarily mean that it is a "policy of insurance" for purposes of the exclusion in Section 9-109. Thus, this Article may cover a secondary obligation (as a supporting obligation), even if the obligation is issued by a regulated insurance company and the obligation is subject to regulation as an "insurance" product.

This Article contains rules explicitly governing attachment, perfection, and priority of security interests in supporting obligations. See Sections 9-203, 9-308, 9-310, and 9-322. These provisions reflect the principle that a supporting obligation is an incident of the collateral it supports.

Collections of or other distributions under a supporting obligation are "proceeds" of the supported collateral as well as "proceeds" of the supporting obligation itself. See Section 9-102 (defining "proceeds") and Comment 13.b. As such, the collections and distributions are subject to the priority rules applicable to proceeds generally. See Section 9-322. However, under the special rule governing security interests in a letter-of-credit right, a secured party's failure to obtain control (Section 9-107) of a letter-of-credit right supporting collateral may leave its security interest exposed to a priming interest of a party who does take control. See Section 9-329 (security interest in a letter-of-credit right perfected by control has priority over a conflicting security interest).

g. "Commercial Tort Claim." This term is new. A tort claim may serve as original collateral under this Article only if it is a "commercial tort claim." See Section 9-109(d). Although security interests in commercial tort claims are within its scope, this Article does not override other applicable law restricting the assignability of a tort claim. See Section 9-401. A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral.

h. "Account Debtor." An "account debtor" is a person obligated on an account, chattel paper, or general intangible. The account debtor's obligation often is a monetary obligation; however, this is not always the case. For example, if a franchisee uses its rights under a franchise agreement (a general intangible) as collateral, then the franchisor is an "account debtor." As a general matter, Article 3, and not Article 9, governs obligations on negotiable instruments. Accordingly, the definition of "account debtor" excludes obligors on negotiable instruments constituting part of chattel paper. The principal effect of this change from the definition in former Article 9 is that the rules in Sections 9-403, 9-404, 9-405, and 9-406, dealing with the rights of an assignee and duties of an account debtor, do not apply to an assignment of chattel paper in which the obligation to pay is evidenced by a negotiable instrument. (Section 9-406(d), however, does apply to promissory notes, including negotiable promissory notes.) Rather, the assignee's rights are governed by Article 3. Similarly, the duties of an obligor on a nonnegotiable instrument are governed by non-Article 9 law unless the nonnegotiable instrument is a part of chattel paper, in which case the obligor is an account debtor.

i. Receivables Under Government Entitlement Programs. This Article does not contain a defined term that encompasses specifically rights to payment or performance under the many and varied government entitlement programs. Depending on the nature of a right under a program, it could be an account, a payment intangible, a general intangible other than a payment intangible, or another type of collateral. The right also might be proceeds of collateral (e.g., crops).

6. Investment-Property-Related Definitions: "Commodity Account"; "Commodity Contract"; "Commodity Customer"; "Commodity Intermediary"; "Investment Property." These definitions are substantially the same as the corresponding definitions in former Section 9-115. "Investment property" includes securities, both certificated and uncertificated, securities accounts, security entitlements, commodity accounts, and commodity contracts. The term investment property includes a "securities account" in order to facilitate transactions in which a debtor wishes to create a security interest in all of the investment positions held through a particular account rather than in particular positions carried in the account. Former Section 9-115 was added in conjunction with Revised Article 8 and contained a variety of rules applicable to security interests in investment property. These rules have been relocated to the appropriate sections of Article 9. See, e.g., Sections 9-203 (attachment), 9-314 (perfection by control), 9-328 (priority).

The terms "security," "security entitlement," and related terms are defined in Section 8-102, and the term "securities account" is defined in Section 8-501. The terms "commodity account," "commodity contract," "commodity customer," and "commodity intermediary" are defined in this section. Commodity contracts are not "securities" or "financial assets" under Article 8. See Section 8-103(f). Thus, the relationship between commodity intermediaries and com-

modity customers is not governed by the indirect-holding-system rules of Part 5 of Article 8. For securities, Article 9 contains rules on security interests, and Article 8 contains rules on the rights of transferees, including secured parties, on such matters as the rights of a transferee if the transfer was itself wrongful and gives rise to an adverse claim. For commodity contracts, Article 9 establishes rules on security interests, but questions of the sort dealt with in Article 8 for securities are left to other law.

The indirect-holding-system rules of Article 8 are sufficiently flexible to be applied to new developments in the securities and financial markets, where that is appropriate. Accordingly, the definition of "commodity contract" is narrowly drafted to ensure that it does not operate as an obstacle to the application of the Article 8 indirect-holding-system rules to new products. The term "commodity contract" covers those contracts that are traded on or subject to the rules of a designated contract market and foreign commodity contracts that are carried on the books of American commodity intermediaries. The effect of this definition is that the category of commodity contracts that are excluded from Article 8 but governed by Article 9 is essentially the same as the category of contracts that fall within the exclusive regulatory jurisdiction of the federal Commodity Futures Trading Commission.

Commodity contracts are different from securities or other financial assets. A person who enters into a commodity futures contract is not buying an asset having a certain value and holding it in anticipation of increase in value. Rather the person is entering into a contract to buy or sell a commodity at set price for delivery at a future time. That contract may become advantageous or disadvantageous as the price of the commodity fluctuates during the term of the contract. The rules of the commodity exchanges require that the contracts be marked to market on a daily basis; that is, the customer pays or receives any increment attributable to that day's price change. Because commodity customers may incur obligations on their contracts, they are required to provide collateral at the outset, known as "original margin," and may be required to provide additional amounts, known as "variation margin," during the term of the contract.

The most likely setting in which a person would want to take a security interest in a commodity contract is where a lender who is advancing funds to finance an inventory of a physical commodity requires the borrower to enter into a commodity contract as a hedge against the risk of decline in the value of the commodity. The lender will want to take a security interest in both the commodity itself and the hedging commodity contract. Typically, such arrangements are structured as security interests in the entire commodity account in which the borrower carries the hedging contracts, rather than in individual contracts.

One important effect of including commodity contracts and commodity accounts in Article 9 is to provide a clearer legal structure for the analysis of the rights of commodity clearing organizations against their participants and futures commission merchants against their customers. The rules and agreements of commodity clearing organizations generally provide that the clearing organization has the right to liquidate any participant's positions in order to satisfy obligations of the participant to the clearing corporation. Similarly, agreements between futures commission merchants and their customers generally provide that the futures commission merchant has the right to liquidate a customer's positions in order to satisfy obligations of the customer to the futures commission merchant.

The main property that a commodity intermediary holds as collateral for the obligations that the commodity customer may incur under its commodity contracts is not other commodity contracts carried by the customer but the other property that the customer has posted as margin. Typically, this property will be securities. The commodity intermediary's security interest in such securities is governed by the rules of this Article on security interests in securities, not the rules on security interests in commodity contracts or commodity accounts.

Although there are significant analytic and regulatory differences between commodities and securities, the development of commodity contracts on financial products in the past few decades has resulted in a system in which the commodity markets and securities markets are closely linked. The rules on security interests in commodity contracts and commodity accounts provide a structure that may be essential in times of stress in the financial markets. Suppose, for example that a firm has a position in a securities market that is hedged by a position in a commodity market, so that payments that the firm is obligated to make with respect to the securities position will be covered by the receipt of funds from the commodity position. Depending upon the settlement cycles of the different markets, it is possible that the firm could find itself in a position where it is obligated to make the payment with respect to the securities position before it receives the matching funds from the commodity position. If cross-margining arrangements have not been developed between the two markets, the firm may need to borrow funds temporarily to make the earlier payment. The rules on security interests in investment property would facilitate the use of positions in one market as collateral for loans needed to cover obligations in the other market.

7. Consumer-Related Definitions: "Consumer Debtor"; "Consumer Goods"; "Consumer-goods transaction"; "Consumer Obligor"; "Consumer Transaction." The definition of "consumer goods" (discussed above) is substantially the same as the definition in former Section 9-109. The definitions of "consumer debtor," "consumer obligor," "consumer-goods transaction," and "consumer transaction" have been added in connection with various new (and old) consumer-related provisions and to designate certain provisions that are inapplicable in consumer transactions.

"Consumer-goods transaction" is a subset of "consumer transaction." Under each definition, both the obligation secured and the collateral must have a personal, family, or household purpose. However, "mixed" business and personal transactions also may be characterized as a consumer-goods transaction or consumer transaction. Subparagraph (A) of the definition of consumer-goods transactions and clause (i) of the definition of consumer transaction are primary purposes tests. Under these tests, it is necessary to determine the primary purpose of the obligation or obligations secured. Subparagraph (B) and clause (iii) of these definitions are satisfied if any of the collateral is consumer goods, in the case of a consumer-goods transaction, or "is held or acquired primarily for personal, family, or household purposes," in the case of a consumer transaction. The fact that some of the obligations secured or some of the collateral for the obligation does not satisfy the tests (e.g., some of the collateral is acquired for a business purpose) does not prevent a transaction from being a "consumer transaction" or "consumer-goods transaction."

8. Filing-Related Definitions: "Continuation Statement"; "File Number"; "Filing Office"; "Filing-office Rule"; "Financing Statement"; "Fixture Filing"; "Manufactured-Home Transaction"; "New Debtor"; "Original Debtor"; "Public-Finance Transaction"; "Termination Statement"; "Transmitting Utility." These definitions are used exclusively or primarily in the filing-related provisions in Part 5. Most are self-explanatory and are discussed in the Comments to Part 5. A financing statement filed in a manufactured-home transaction or a public-finance transaction may remain effective for 30 years instead of the 5 years applicable to other financing statements. See Section 9-515(b). The definitions relating to medium neutrality also are significant for the filing provisions. See Comment 9.

The definition of "transmitting utility" has been revised to embrace the business of transmitting communications generally to take account of new and future types of communications technology. The term designates a special class of debtors for whom separate filing rules are provided in Part 5, thereby obviating the many local fixture filings that would be necessary under the rules of Section 9-501 for a far-flung public-utility debtor. A transmitting utility will not necessarily be regulated by or operating as such in a jurisdiction where fixtures are located. For example, a utility might own transmission lines in a jurisdiction, although the utility generates no power and has no customers in the jurisdiction.

9. Definitions Relating to Medium Neutrality.

a. "Record." In many, but not all, instances, the term "record" replaces the term "writing" and "written." A "record" includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written on paper). Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be "written," "in writing," or otherwise in tangible form do not necessarily reflect or aid commercial practices.

A "record" need not be permanent or indestructible, but the term does not include any oral or other communication that is not stored or preserved by any means. The information must be stored on paper or in some other medium. Information that has not been retained other than through human memory does not qualify as a record. Examples of current technologies commercially used to communicate or store information include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, electronic mail, audio tapes, and photographic media, as well as paper. "Record" is an inclusive term that includes all of these methods of storing or communicating information. Any "writing" is a record. A record may be authenticated. See Comment 9.b. A record may be created without the knowledge or intent of a particular person.

Like the terms "written" or "in writing," the term "record" does not establish the purposes, permitted uses, or legal effect that a record may have under any particular provision of law. Whatever is filed in the Article 9 filing system, including financing statements, continuation statements, and termination statements, whether transmitted in tangible or intangible form, would fall within the definition. However, in some instances, statutes or filing-office rules may require that a paper record be filed. In such cases, even if this Article permits the filing of an electronic record, compliance with those statutes or rules is necessary. Similarly, a filer must comply with a statute or rule that requires a particular type of encoding or formatting for an electronic record.

This Article sometimes uses the terms "for record," "of record," "record or legal title," and "record owner." Some of these are terms traditionally used in real-property law. The definition of "record" in this Article now explicitly excepts these usages from the defined term.

Also, this Article refers to a record that is filed or recorded in real-property recording systems to record a mortgage as a "record of a mortgage." This usage recognizes that the defined term "mortgage" means an interest in real property; it does not mean the record that evidences, or is filed or recorded with respect to, the mortgage.

b. "Authenticate"; "Communicate"; "Send." The terms "authenticate" and "authenticated" generally replace "sign" and "signed." "Authenticated" replaces and broadens the definition of "signed," in Section 1-201, to encompass authentication of all records, not just writings. (References to authentication of, e.g., an agreement, demand, or notification mean, of course, authentication of a record containing an agreement, demand, or notification.) The terms "communicate" and "send" also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The definition of "send" replaces, for purposes of this Article, the corresponding term in Section 1-201. The reference to "usual means of communication" in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved.

10. Scope-Related Definitions.

a. Expanded Scope of Article: "Agricultural Lien"; "Consignment"; "Payment Intangible"; "Promissory Note." These new definitions reflect the expanded scope of Article 9, as provided in Section 9-109(a).

b. Reduced Scope of Exclusions: "Governmental Unit"; "Health-Care-Insurance Receivable"; "Commercial Tort Claims." These new definitions reflect the reduced scope of the exclusions, provided in Section 9-109(c) and (d), of transfers by governmental debtors and assignments of interests in insurance policies and commercial tort claims.

11. Choice-of-Law-Related Definitions: "Certificate of Title"; "Governmental Unit"; "Jurisdiction of Organization"; "Registered Organization"; "State." These new definitions reflect the changes in the law governing perfection and priority of security interests and agricultural liens provided in Part 3, Subpart 1.

Not every organization that may provide information about itself in the public records is a "registered organization." For example, a general partnership is not a "registered organization," even if it files a statement of partnership authority under Section 303 of the Uniform Partnership Act (1994) or an assumed name ("dba") certificate. This is because the State under whose law the partnership is organized is not required to maintain a public record showing that the partnership has been organized. In contrast, corporations, limited liability companies, and limited partnerships are "registered organizations."

12. Deposit-Account-Related Definitions: "Deposit Account"; "Bank." The revised definition of "deposit account" incorporates the definition of "bank," which is new. The definition derives from the definitions of "bank" in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is "engaged in the business of banking."

Deposit accounts evidenced by Article 9 "instruments" are excluded from the term "deposit account." In contrast, former Section 9-105 excluded from the former definition "an account evidenced by a certificate of deposit." The revised definition clarifies the proper treatment of nonnegotiable or uncertificated certificates of deposit. Under the definition, an uncertificated certificate of deposit would be a deposit account (assuming there is no writing evidencing the bank's obligation to pay) whereas a nonnegotiable certificate of deposit would be a deposit account only if it is not an "instrument" as defined in this section (a question that turns on whether the nonnegotiable certificate of deposit is "of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment.")

A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such an instrument cannot be perfected by "control" (see Section 9-104), and the special priority rules applicable to deposit accounts (see Sections 9-327 and 9-340) do not apply.

The term "deposit account" does not include "investment property," such as securities and security entitlements. Thus, the term also does not include shares in a money-market mutual fund, even if the shares are redeemable by check.

13. Proceeds-Related Definitions: "Cash Proceeds"; "Noncash Proceeds"; "Proceeds." The revised definition of "proceeds" expands the definition beyond that contained in former Section 9-306 and resolves ambiguities in the former section.

a. Distributions on Account of Collateral. The phrase "whatever is collected on, or distributed on account of, collateral," in subparagraph (B), is broad enough to cover cash or stock dividends distributed on account of securities or other investment property that is original collateral. Compare former Section 9-306 ("Any payments or distributions made with respect to investment property collateral are proceeds."). This section rejects the holding of Hastie v. FDIC, 2 F.3d 1042 (10th Cir.1993) (postpetition cash dividends on stock subject to a prepetition pledge are not "proceeds" under Bankruptcy Code Section 552(b)), to the extent the holding relies on the Article 9 definition of "proceeds."

b. Distributions on Account of Supporting Obligations. Under subparagraph (B), collections on and distributions on account of collateral consisting of various credit-support arrangements ("supporting obligations," as defined in Section 9-102) also are proceeds. Consequently, they are afforded treatment identical to proceeds collected from or distributed by the obligor on the underlying (supported) right to payment or other collateral. Proceeds of supporting obligations also are proceeds of the underlying rights to payment or other collateral.

c. Proceeds of Proceeds. The definition of "proceeds" no longer provides that proceeds of proceeds are themselves proceeds. That idea is expressed in the revised definition of "collateral" in Section 9-102. No change in meaning is intended.

d. Proceeds Received by Person Who Did Not Create Security Interest. When collateral is sold subject to a security interest and the buyer then resells the collateral, a question arose under former Article 9 concerning whether the "debtor" had "received" what the buyer received on resale and, therefore, whether those receipts were "proceeds" under former Section 9-306(2). This Article contains no requirement that property be "received" by the debtor for the property to qualify as proceeds. It is necessary only that the property be traceable, directly or indirectly, to the original collateral.

e. Cash Proceeds and Noncash Proceeds. The definition of "cash proceeds" is substantially the same as the corresponding definition in former Section 9-306. The phrase "and the like" covers property that is functionally equivalent to "money, checks, or deposit accounts," such as some money-market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.

14. Consignment-Related Definitions: "Consignee"; "Consignment"; "Consignor." The definition of "consignment" excludes, in subparagraphs (B) and (C), transactions for which filing would be inappropriate or of insufficient benefit to justify the costs. A consignment excluded from the application of this Article by one of those subparagraphs may still be a true consignment; however, it is governed by non-Article 9 law. The definition also excludes, in subparagraph (D), what have been called "consignments intended for security." These "consignments" are not bailments but secured transactions. Accordingly, all of Article 9 applies to them. See Sections 1-201(37), 9-109(a)(1). The "consignor" is the person who delivers goods to the "consignee" in a consignment.

The definition of "consignment" requires that the goods be delivered "to a merchant for the purpose of sale." If the goods are delivered for another purpose as well, such as milling or processing, the transaction is a consignment nonetheless because a purpose of the delivery is "sale." On the other hand, if a merchant-processor-bailee will not be selling the goods itself but will be delivering to buyers to which the owner-bailor agreed to sell the goods, the transaction would not be a consignment.

15. "Accounting." This definition describes the record and information that a debtor is entitled to request under Section 9-210.

16. "Document." The definition of "document" is unchanged in substance from the corresponding definitions in former Section 9-105. See Section 1-201(15) and Comment 15.

17. "Encumbrance"; "Mortgage." The definitions of "encumbrance" and "mortgage" are unchanged in substance from the corresponding definitions in former Section 9-105. They are used primarily in the special real-property-related priority and other provisions relating to crops, fixtures, and accessions.

18. "Fixtures." This definition is unchanged in substance from the corresponding definition in former Section 9-313. See Section 9-334 (priority of security interests in fixtures and crops).

19. "Good Faith." This Article expands the definition of "good faith" to include "the observance of reasonable commercial standards of fair dealing." The definition in this section applies when the term is used in this Article, and the same concept applies in the context of this Article for purposes of the obligation of good faith imposed by Section 1-203. See subsection (c).

20. "Lien Creditor" This definition is unchanged in substance from the corresponding definition in former Section 9-301.

21. "New Value." This Article deletes former Section 9-108. Its broad formulation of new value, which embraced the taking of after-acquired collateral for a pre-existing claim, was unnecessary, counterintuitive, and ineffective for its original purpose of sheltering after-acquired collateral from attack as a voidable preference in bankruptcy. The new definition derives from Bankruptcy Code Section 547(a). The term is used with respect to temporary perfection of security interests in instruments, certificated securities, or negotiable documents under Section 9-312(e) and with respect to chattel paper priority in Section 9-330.

22. "Person Related To." Section 9-615 provides a special method for calculating a deficiency or surplus when "the secured party, a person related to the secured party, or a secondary obligor" acquires the collateral at a foreclosure disposition. Separate definitions of the term are provided with respect to an individual secured party and with respect to a secured party that is an organization. The definitions are patterned on the corresponding definition

in Section 1.301(32) of the Uniform Consumer Credit Code (1974).

23. "Proposal." This definition describes a record that is sufficient to propose to retain collateral in full or partial satisfaction of a secured obligation. See Sections 9-620, 9-621, 9-622.

24. "Pursuant to Commitment." This definition is unchanged in substance from the corresponding definition in former Section 9-105. It is used in connection with special priority rules applicable to future advances. See Section 9-323.

25. "Software." The definition of "software" is used in connection with the priority rules applicable to purchase-money security interests. See Sections 9-103, 9-324. Software, like a payment intangible, is a type of general intangible for purposes of this Article. See Comment 4.a., above, regarding the distinction between "goods" and "software."

26. Terminology: "Assignment" and "Transfer." In numerous provisions, this Article refers to the "assignment" or the "transfer" of property interests. These terms and their derivatives are not defined. This Article generally follows common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term "transfer" to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.

CASE NOTES

ANALYSIS

Classification of goods, generally.

Under Uniform Commercial Code, classification of goods is mutually exclusive. Code Md.1957, art. 95B, §§ 1-101 et seq., 9-109, 9-307, 9-307(2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

As between the same parties and at the same point in time, a product cannot be classified as both "inventory" and "consumer goods." Code Md.1957, art. 95B,§§ 9-109, 9-109(1, 4), 9-307, 9-307(1, 2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Manner in which product is classified under secured transactions provisions of Uniform Commercial Code is determined at time of agreement between parties giving rise to security interest, and, as to them, categorization remains unaffected by later transfer of product in question. Code Md.1957, art. 95B,§§ 1-101 et seq., 9-109, 9-307. Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Common law liens.

A common-law lien, in contrast to a statutory lien, arises by implication of law and bestows a privilege to retain property in possession as security for owner's debt or obligation. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

Construction and application.

Issues in suit by buyer of automobile against chattel mortgagee, which held mortgage created by seller and which repossessed automobile, were governed by provisions of Uniform Commercial Code, so that determination of issues in accordance with theory of estoppel constituted error; however, where judgment of trial judge was correct, such error did not require reversal. Code Md.1957, art. 95B, § 1-101 et seq. Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Uniform Commercial Code provisions governing assignment of accounts applied to assignment of taxpayer's right to receive contractual payments pursuant to factoring agreement. D.C. Code 1981, §§ 28:1-103, 28:9-102, 28:9-102(1), 28:9-106. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Consumer goods.

Under District of Columbia law, "consumer goods" which come within exception to rule that implied warranty of merchantability can be deleted by parties to sale of goods through exclusion clause are products used or bought for use primarily for personal, family, or household purposes. D.C. Code 1981, §§ 28:2-316.1(1), 28:9-109. Potomac Plaza Terraces v. QSC Prods., 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Debtor.

In context of financing statement used by

obligor to encumber property owned by another, "debtor" refers to both owner of collateral and obligor. D.C. Code 1981, § 28:9-105(1)(d). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

The guarantor of a secured loan was a "debtor" entitled to notice of sale by the secured party, even though she did not own the collateral, and, thus, the guaranty was unenforceable for the deficiency judgment. HEW Federal Credit Union v. Battle, 772 A.2d 252, 2001 D.C. App. LEXIS 109 (2001).

Equitable lien.

Although agreement between debtor and creditor stated that creditor was granted security interest in named newsletter since formal steps mandated by Uniform Commercial Code to perfect that security interest were never taken, trustee was able to avoid creditor's security interest by reason of his status as judgment lien creditor and the plaintiff was not entitled to have an equitable lien imposed on proceeds of sale of newsletter. Bankr.Code, 11 U.S.C. §§ 101 et seq., 544(a), 546(b), 547; D.C. Code §§ 28:9-105(1)(h), 28:9-106, 28:9-203(1)(b), 28:9-302, 28:9-402, 28:9-403. In re Washington Communications Group, Inc., 10 B.R. 676, 1981 Bankr. LEXIS 3903 (1981).

Instrument.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

Inventory.

Automobile held by used car dealer for purpose of sale to buying public in ordinary course of business was "inventory" and remained so despite subsequent sale of automobile, and, thus, under provision of Uniform Commercial Code buyer of automobile in ordinary course of business bought free of security interest of dealer's chattel mortgagee. Code Md.1957, art. 95B, §§ 9-109(1, 4), 9-306, 9-307(1, 2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Punitive damages.

In action by buyer against assignee of installment sales contract for wrongful repossession and sale of automobile, evidence on issues of malice and on whether acts were approved by corporate assignee was sufficient to support jury award of punitive damages. Franklin Inv. Co. v. Smith, 383 A.2d 355, 1978 D.C. App. LEXIS 430 (1978).

Security interest.

To satisfy Uniform Commercial Code's underlying requirement of signed, written security agreement, all that is required is writing or writings, regardless of label, which adequately describes collateral, carries signature of debtor, and establishes that in fact security interest was agreed upon. U.C.C. §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; N.Y. C.L.S. Uniform Commercial Code §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; D.C. Code 1981, §§ 28:1-201(3), 28:9-105(1)(l), 28:9-203(1)(a). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

§ 28:9-103. Purchase-money security interest; application of payments; burden of establishing.

(a) In this section:

(1) "Purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) "Purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-

money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(1) The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) In accordance with any reasonable method of application to which the parties agree;

(2) In the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) In the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) To obligations that are not secured; and

(B) If more than one obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) The purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) Collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) The purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) The limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:11-106.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-107.

2. Scope of This Section. Under Section 9-309(1), a purchase-money security interest in consumer goods is perfected when it attaches. Sections 9-317 and 9-324 provide special priority rules for purchase-money security interests in a variety of contexts.

This section explains when a security interest enjoys purchase-money status.

3. "Purchase-Money Collateral"; "Purchase-Money Obligation"; "Purchase-Money Security Interest." Subsection (a) defines "purchase-money collateral" and "purchase-money obligation." These terms are essential to the description of what constitutes a purchase-money security interest under subsection (b). As used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

The concept of "purchase-money security interest" requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.

4. Cross-Collateralization of Purchase-Money Security Interests in Inventory. Subsection (b)(2) deals with the problem of cross-collateralized purchase-money security interests in inventory. Consider a simple example:

Example: Seller (S) sells an item of inventory (Item-1) to Debtor (D), retaining a security interest in Item-1 to secure Item-1's price and all other obligations, existing and future, of D to S. S then sells another item of inventory to D (Item-2), again retaining a security interest in Item-2 to secure Item-2's price as well as all other obligations of D to S. D then pays to S Item-1's price. D then sells Item-2 to a buyer in ordinary course of business, who takes Item-2 free of S's security interest.

Under subsection (b)(2), S's security interest in Item-1 securing Item-2's unpaid price would be a purchase-money security interest. This is so because S has a purchase-money security interest in Item-1, Item-1 secures the price of (a "purchase-money obligation incurred with respect to") Item-2 ("other inventory"), and Item-2 itself was subject to a purchase-money security interest. Note that, to the extent Item-1 secures the price of Item-2, S's security interest in Item-1 would not be a purchase-money security interest under subsection (b)(1). The security interest in Item-1 is a purchase-money security interest under subsection (b)(1) only to the extent that Item-1 is "purchase-money collateral," i.e., only to the extent that Item-1 "secures a purchase-money obligation incurred with respect to that collateral" (i.e., Item-1). See subsection (a)(1).

5. Purchase-Money Security Interests in Goods and Software. Subsections (b) and (c) limit purchase-money security interests to security interests in goods, including fixtures, and software. Otherwise, no change in meaning from former Section 9-107 is intended. The second sentence of former Section 9-115(5)(f) made the purchase-money priority rule (former Section 9-312(4)) inapplicable to investment property. This section's limitation makes that provision unnecessary.

Subsection (c) describes the limited circumstances under which a security interest in goods may be accompanied by a purchase-money security interest in software. The software must be acquired by the debtor in a transaction integrated with the transaction in which the debtor acquired the goods, and the debtor must acquire the software for the principal purpose of using the software in the goods. "Software" is defined in Section 9-102.

6. Consignments. Under former Section 9-114, the priority of the consignor's interest is similar to that of a purchase-money security interest. Subsection (d) achieves this result more directly, by defining the interest of a "consignor," defined in Section 9-102, to be a purchase-money security interest in inventory for purposes of this Article. This drafting convention obviates any need to set forth special priority rules applicable to the interest of a consignor. Rather, the priority of the consignor's interest as against the rights of lien creditors of the consignee, competing secured parties, and purchasers of the goods from the consignee can be determined by reference to the priority rules generally applicable to inventory, such as Sections 9-317, 9-320, 9-322, and 9-324. For other purposes, including the rights and duties of the consignor and consignee as between themselves, the consignor would remain

the owner of goods under a bailment arrangement with the consignee. See Section 9-319.

7. Provisions Applicable Only to Non-Consumer-Goods Transactions.

a. "Dual-Status" Rule. For transactions other than consumer-goods transactions, this Article approves what some cases have called the "dual-status" rule, under which a security interest may be a purchase-money security interest to some extent and a non-purchase-money security interest to some extent. (Concerning consumer-goods transactions, see subsection (h) and Comment 8.) Some courts have found this rule to be explicit or implicit in the words "to the extent," found in former Section 9-107 and continued in subsections (b)(1) and (b)(2). The rule is made explicit in subsection (e). For non-consumer-goods transactions, this Article rejects the "transformation" rule adopted by some cases, under which any cross-collateralization, refinancing, or the like destroys the purchase-money status entirely.

Consider, for example, what happens when a $10,000 loan secured by a purchase-money security interest is refinanced by the original lender, and, as part of the transaction, the debtor borrows an additional $2,000 secured by the collateral. Subsection (f) resolves any doubt that the security interest remains a purchase-money security interest. Under subsection (b), however, it enjoys purchase-money status only to the extent of $10,000.

b. Allocation of Payments. Continuing with the example, if the debtor makes a $1,000 payment on the $12,000 obligation, then one must determine the extent to which the security interest remains a purchase-money security interest-$9,000 or $10,000. Subsection (e)(1) expresses the overriding principle, applicable in cases other than consumer-goods transactions, for determining the extent to which a security interest is a purchase-money security interest under these circumstances: freedom of contract, as limited by principle of reasonableness. An unconscionable method of application, for example, is not a reasonable one and so would not be given effect under subsection (e)(1). In the absence of agreement, subsection (e)(2) permits the obligor to determine how payments should be allocated. If the obligor fails to manifest its intention, obligations that are not secured will be paid first. (As used in this Article, the concept of "obligations that are not secured" means obligations for which the debtor has not created a security interest. This concept is different from and should not be confused with the concept of an "unsecured claim" as it appears in Bankruptcy Code Section 506(a).) The obligor may prefer this approach, because unsecured debt is likely to carry a higher interest rate than secured debt. A creditor who would prefer to be secured rather than unsecured also would prefer this approach.

After the unsecured debt is paid, payments are to be applied first toward the obligations secured by purchase-money security interests. In the event that there is more than one such obligation, payments first received are to be applied to obligations first incurred. See subsection (e)(3). Once these obligations are paid, there are no purchase-money security interests and no additional allocation rules are needed.

Subsection (f) buttresses the dual-status rule by making it clear that (in a transaction other than a consumer-goods transaction) cross-collateralization and renewals, refinancings, and restructurings do not cause a purchase-money security interest to lose its status as such. The statutory terms "renewed," "refinanced," and "restructured" are not defined. Whether the terms encompass a particular transaction depends upon whether, under the particular facts, the purchase-money character of the security interest fairly can be said to survive. Each term contemplates that an identifiable portion of the purchase-money obligation could be traced to the new obligation resulting from a renewal, refinancing, or restructuring.

c. Burden of Proof. As is the case when the extent of a security interest is in issue, under subsection (g) the secured party claiming a purchase-money security interest in a transaction other than a consumer-goods transaction has the burden of establishing whether the security interest retains its purchase-money status. This is so whether the determination is to be made following a renewal, refinancing, or restructuring or otherwise.

8. Consumer-Goods Transactions; Characterization Under Other Law. Under subsection (h), the limitation of subsections (e), (f), and (g) to transactions other than consumer-goods transactions leaves to the court the determination of the proper rules in consumer-goods transactions. Subsection (h) also instructs the court not to draw any inference from this limitation as to the proper rules for consumer-goods transactions and leaves the court free to continue to apply established approaches to those transactions.

This section addresses only whether a security interest is a "purchase-money security interest" under this Article, primarily for purposes of perfection and priority. See, e.g., Sections 9-317, 9-324. In particular, its adoption of the dual-status rule, allocation of payments rules, and burden of proof standards for non-consumer-goods transactions is not intended to affect or influence characterizations under other statutes. Whether a security interest is a "purchase-money security interest" under other law is determined by that law. For example, decisions under Bankruptcy Code

Section 522(f) have applied both the dual-status and the transformation rules. The Bankruptcy Code does not expressly adopt the state law definition of "purchase-money security interest." Where federal law does not defer to this Article, this Article does not, and could not, determine a question of federal law.

§ 28:9-104. Control of deposit account.

(a) A secured party has control of a deposit account if:

(1) The secured party is the bank with which the deposit account is maintained;

(2) The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor; or

(3) The secured party becomes the bank's customer with respect to the deposit account.

(b) A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-203, § 28:9-207, § 28:9-208, § 28:9-314, § 28:9-327, § 28:9-340, § 28:9-342, § 28:9-601, and § 28:9-607.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived from Section 8-106.

2. Why "Control" Matters. This section explains the concept of "control" of a deposit account. "Control" under this section may serve two functions. First, "control ... pursuant to the debtor's agreement" may substitute for an authenticated security agreement as an element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See Section 9-312(b)(1).

3. Requirements for "Control." This section derives from Section 8-106 of Revised Article 8, which defines "control" of securities and certain other investment property. Under subsection (a)(1), the bank with which the deposit account is maintained has control. The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary; all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.

Under subsection (a)(2), a secured party may obtain control by obtaining the bank's authenticated agreement that it will comply with the secured party's instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party's instructions suffices for "control" of a deposit account under this section even if the bank's agreement is subject to specified conditions, e.g., that the secured party's instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the debtor's further consent, the statute explicitly provides that the agreement would not confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank's "customer," as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, subsection (b) makes clear that the debtor's ability to reach the funds is not inconsistent with "control."

Perfection by control is not available for bank accounts evidenced by an instrument (e.g., cer-

tain certificates of deposit), which by definition are "instruments" and not "deposit accounts." See Section 9-102 (defining "deposit account" and "instrument").

§ 28:9-105. Control of electronic chattel paper.

(a) A secured party has control of electronic chattel paper if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned.

(b) A system satisfies subsection (a) of this section if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the secured party as the assignee of the record or records;

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the secured party;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(c), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-203, § 28:9-207, § 28:9-208, § 28:9-314, § 28:9-330, § 28:9-601, § 40-102, § 50-601, and § 50-1201.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote the section.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. "Control" of Electronic Chattel Paper. This Article covers security interests in "electronic chattel paper," a new term defined in Section 9-102. This section governs how "control" of electronic chattel paper may be obtained. A secured party's control of electronic chattel paper (i) may substitute for an authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred, assigned, or possessed in the same manner as tangible chattel paper, a special definition of control is necessary. In descriptive terms, this section provides that control of electronic chattel paper is the functional equivalent of possession of "tangible chattel paper" (a term also defined in Section 9-102).

3. "Authoritative Copy" of Electronic Chattel Paper. One requirement for establishing control is that a particular copy be an "authoritative copy. " Although other copies may exist, they must be distinguished from the authoritative copy. This may be achieved, for example, through the methods of authentication that are used or by business practices involving the marking of any additional copies. When tangible chattel paper is converted to electronic chattel paper, in order to establish that a copy

of the electronic chattel paper is the authoritative copy it may be necessary to show that the tangible chattel paper no longer exists or has been permanently marked to indicate that it is not the authoritative copy.

4. Development of Control Systems. This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. However, achieving control under this section requires more than the agreement of interested persons that the elements of control are satisfied. For example, paragraph (4) contemplates that control requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to approach practical impossibility) to add or change an identified assignee without the participation of the secured party (or its authorized representative). It would not be enough for the assignor merely to agree that it will not change the identified assignee without the assignee-secured party's consent. However, the standards applied to determine whether a party is in control of electronic chattel paper should not be more stringent than the standards now applied to determine whether a party is in possession of tangible chattel paper. Control of electronic chattel paper contemplates systems or procedures such that the secured party must take some action (either directly or through its designated custodian) to effect a change or addition to the authoritative copy. But just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf could wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party's interest could be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. However, this section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of investment property (Section 9-106), and letter-of-credit rights (Section 9-107). The rules for control of that collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

§ 28:9-106. Control of investment property.

(a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in § 28:8-106.

(b) A secured party has control of a commodity contract if:

(1) The secured party is the commodity intermediary with which the commodity contract is carried; or

(2) The commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-203, § 28:9-207, § 28:9-208, § 28:9-314, § 28:9-328, and § 28:9-601.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-115(e).

2. "Control" Under Article 8. For an explanation of "control" of securities and certain other investment property, see Section 8-106, Comments 4 and 7.

3. "Control" of Commodity Contracts. This section, as did former Section 9-115(1)(e), contains provisions relating to control of commodity contracts which are analogous to those in Section 8-106 for other types of investment property.

4. Securities Accounts and Commodity Accounts. For drafting convenience, control with respect to a securities account or commodity account is defined in terms of obtaining control over the security entitlements or commodity contracts. Of course, an agreement that provides that (without further consent of the debtor) the securities intermediary or commodity intermediary will honor instructions from the secured party concerning a securities account or commodity account described as such is sufficient. Such an agreement necessarily implies that the intermediary will honor instructions concerning all security entitlements or commodity contracts carried in the account and thus affords the secured party control of all the security entitlements or commodity contracts.

§ 28:9-107. Control of letter-of-credit right.

A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under § 28:5-114(c) or otherwise applicable law or practice.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-203, § 28:9-207, § 28:9-208, § 28:9-314, § 28:9-329, and § 28:9-601.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. "Control" of Letter-of-Credit Right. Whether a secured party has control of a letter-of-credit right may determine the secured party's priority as against competing secured parties. See Section 9-329. This section provides that a secured party acquires control of a letter-of-credit right by receiving an assignment if the secured party obtains the consent of the issuer or any nominated person, such as a confirmer or negotiating bank, under Section 5-114 or other applicable law or practice. Because both issuers and nominated persons may give or be obligated to give value under a letter of credit, this section contemplates that a secured party obtains control of a letter-of-credit right with respect to the issuer or a particular nominated person only to the extent that the issuer or that nominated person consents to the assignment. For example, if a secured party obtains control to the extent of an issuer's obligation but fails to obtain the consent of a nominated person, the secured party does not have control to the extent that the nominated person gives value. In many cases the person or persons who will give value under a letter of credit will be clear from its terms. In other cases, prudence may suggest obtaining consent from more than one person. The details of the consenting issuer's or nominated person's duties to pay or otherwise render performance to the secured party are left to the agreement of the parties.

3. "Proceeds of a Letter of Credit." Section 5-114 follows traditional banking terminology by referring to a letter of credit beneficiary's assignment of its right to receive payment thereunder as an assignment of the "proceeds of a letter of credit." However, as the seller of goods can assign its right to receive payment (an "account") before it has been earned by delivering the goods to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. See Section 5-114(b). If the assignment creates a security interest, the security interest can be perfected at the time it is created. An assignment of, including the creation of a security interest in, a letter-of-credit right is an assignment of a present interest.

4. "Transfer" vs. "Assignment." Letter-of-credit law and practice distinguish the "transfer" of a letter of credit from an "assignment." Under a transfer, the transferee itself becomes the beneficiary and acquires the right to draw.

Whether a new, substitute credit is issued or the issuer advises the transferee of its status as such, the transfer constitutes a novation under which the transferee is the new, substituted beneficiary (but only to the extent of the transfer, in the case of a partial transfer).

Section 5-114(e) provides that the rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds. For this reason, transfer does not appear in this Article as a means of control or perfection. Section 9-109(c)(4) recognizes the independent and superior rights of a transferee beneficiary under Section 5-114(e); this Article does not apply to the rights of a transferee beneficiary or nominated person to the extent that those rights are independent and superior under Section 5-114.

5. Supporting Obligation: Automatic Attachment and Perfection. A letter-of-credit right is a type of "supporting obligation," as defined in Section 9-102. Under Sections 9-203 and 9-308, a security interest in a letter-of-credit right automatically attaches and is automatically perfected if the security interest in the supported obligation is a perfected security interest. However, unless the secured party has control of the letter-of-credit right or itself becomes a transferee beneficiary, it cannot obtain any rights against the issuer or a nominated person under Article 5. Consequently, as a practical matter, the secured party's rights would be limited to its ability to locate and identify proceeds distributed by the issuer or nominated person under the letter of credit.

§ 28:9-108. Sufficiency of description.

(a) Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) Specific listing;

(2) Category;

(3) Except as otherwise provided in subsection (e), a type of collateral defined in Subtitle I of Title 28;

(4) Quantity;

(5) Computational or allocational formula or procedure; or

(6) Except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) Except as otherwise provided in subsection (e), a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) The collateral by those terms or as investment property; or

(2) The underlying financial asset or commodity contract.

(e) A description only by type of collateral defined in Subtitle I of Title 28 is an insufficient description of:

(1) A commercial tort claim; or

(2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-504.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-110, 9-115(3).

2. General Rules. Subsection (a) retains substantially the same formulation as former Section 9-110. Subsection (b) expands upon subsection (a) by indicating a variety of ways in which a description might reasonably identify collateral. Whereas a provision similar to subsection (b) was applicable only to investment property under former Section 9-115(3), subsection (b) applies to all types of collateral, subject to the limitation in subsection (d). Subsection (b) is subject to subsection (c), which follows prevailing case law and adopts the view that an "all assets" or "all personal property" description for purposes of a security agreement is not sufficient. Note, however, that under Section 9-504, a financing statement sufficiently indicates the collateral if it "covers all assets or all personal property."

The purpose of requiring a description of collateral in a security agreement under Section 9-203 is evidentiary. The test of sufficiency of a description under this section, as under former Section 9-110, is that the description do the job assigned to it: make possible the identification of the collateral described. This section rejects any requirement that a description is insufficient unless it is exact and detailed (the so-called "serial number" test).

3. After-Acquired Collateral. Much litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. This question is one of contract interpretation and is not susceptible to a statutory rule (other than a rule to the effect that it is a question of contract interpretation). Accordingly, this section contains no reference to descriptions of after-acquired collateral.

4. Investment Property. Under subsection (d), the use of the wrong Article 8 terminology does not render a description invalid (e.g., a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities"). Note also that given the broad definition of "securities account" in Section 8-501, a security interest in a securities account also includes all other rights of the debtor against the securities intermediary arising out of the securities account. For example, a security interest in a securities account would include credit balances due to the debtor from the securities intermediary, whether or not they are proceeds of a security entitlement. Moreover, describing collateral as a securities account is a simple way of describing all of the security entitlements carried in the account.

5. Consumer Investment Property; Commercial Tort Claims. Subsection (e) requires greater specificity of description in order to prevent debtors from inadvertently encumbering certain property. Subsection (e) requires that a description by defined "type" of collateral alone of a commercial tort claim or, in a consumer transaction, of a security entitlement, securities account, or commodity account, is not sufficient. For example, "all existing and after-acquired investment property" or "all existing and after-acquired security entitlements," without more, would be insufficient in a consumer transaction to describe a security entitlement, securities account, or commodity account. The reference to "only by type" in subsection (e) means that a description is sufficient if it satisfies subsection (a) and contains a descriptive component beyond the "type" alone. Moreover, if the collateral consists of a securities account or commodity account, a description of the account is sufficient to cover all existing and future security entitlements or commodity contracts carried in the account. See Section 9-203(h), (i).

Under Section 9-204, an after-acquired collateral clause in a security agreement will not reach future commercial tort claims. It follows that when an effective security agreement covering a commercial tort claim is entered into the claim already will exist.

Subsection (e) does not require a description to be specific. For example, a description such as "all tort claims arising out of the explosion of debtor's factory" would suffice, even if the exact amount of the claim, the theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed, those facts may not be known at the time.)

Subpart 2. Applicability of Article.

§ 28:9-109. Scope.

(a) Except as otherwise provided in subsections (c) and (d), this article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under § 28:2-401, 2-505, 2-711(3), or 2A-508(5), as provided in § 28:9-110; and

(6) A security interest arising under § 28:4-210 or 5-118.

(b) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(c) This article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this article;

(2) Another statute of the District expressly governs the creation, perfection, priority, or enforcement of a security interest created by the District or a governmental unit of the District;

(3) A statute of another State, a foreign country, or a governmental unit of another State or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit; or

(4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under § 28:5-114.

(d) This article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

(2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but § 28:9-333 applies with respect to priority of the lien;

(3) An assignment of a claim for wages, salary, or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but §§ 28:9-315 and 28:9-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or set-off, but:

(A) § 28:9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) § 28:9-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) Liens on real property in §§ 28:9-203 and 28:9-308;

(B) Fixtures in § 28:9-334;

(C) Fixture filings in §§ 28:9-501, 28:9-502, 28:9-512, 28:9-516, and 28:9-519; and

(D) Security agreements covering personal and real property in § 28:9-604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but §§ 28:9-315 and 28:9-322 apply with respect to proceeds and priorities in proceeds; or

(13) An assignment of a deposit account in a consumer transaction, but §§ 28:9-315 and 28:9-322 apply with respect to proceeds and priorities in proceeds.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:2-316.01 and § 28:2A-303.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-102, 9-104.

2. Basic Scope Provision. Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a "security interest," the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it.

3. Agricultural Liens. Subsection (a)(2) is new. It expands the scope of this Article to cover agricultural liens, as defined in Section 9-102.

4. Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes, and Other Receivables. Under subsection (a)(3), as under former Section 9-102, this Article applies to sales of accounts and chattel paper. This approach generally has been successful in avoiding difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred.

Subsection (a)(3) expands the scope of this Article by including the sale of a "payment intangible" (defined in Section 9-102 as "a general intangible under which the account debtor's principal obligation is a monetary obligation") and a "promissory note" (also defined in Section 9-102). To a considerable extent, this Article affords these transactions treatment identical to that given sales of accounts and chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently from sales of other receivables. See, e.g., Sections 9-309 (automatic perfection upon attachment), 9-408 (effect of restrictions on assignment). By virtue of the expanded definition of "account" (defined in Section 9-102), this Article now covers sales of (and other security interests in) "health-care-insurance receivables" (also defined in Section 9-102). Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of "security interest" (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.

5. Transfer of Ownership in Sales of Receivables. A "sale" of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes the sale of an enforcement right. For example, a "[p]erson entitled to enforce" a ne-

gotiable promissory note (Section 3-301) may sell its ownership rights in the instrument. See Section 3-203, Comment 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203."). Also, the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., Dennis Joslin Co. v. Robinson Broadcasting, 977 F.Supp. 491 (D.D.C.1997).

Nothing in this section or any other provision of Article 9 prevents the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This Article applies to both types of transactions. The principal effect of this coverage is to apply this Article's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

Following a debtor's outright sale and transfer of ownership of a receivable, the debtor-seller retains no legal or equitable rights in the receivable that has been sold. See Section 9-318(a). This is so whether or not the buyer's security interest is perfected. (A security interest arising from the sale of a promissory note or payment intangible is perfected upon attachment without further action. See Section 9-309.) However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under Section 9-317. This is so not because the seller of a receivable retains rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under this Article (they are). It is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so, as did former Sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller, under Section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

6. Consignments. Subsection (a)(4) is new. This Article applies to every "consignment." The term, defined in Section 9-102, includes many but not all "true" consignments (i.e., bailments for the purpose of sale). If a transaction is a "sale or return," as defined in revised Section 2-326, it is not a "consignment." In a "sale or return" transaction, the buyer becomes the owner of the goods, and the seller may obtain an enforceable security interest in the goods only by satisfying the requirements of Section 9-203.

Under common law, creditors of a bailee were unable to reach the interest of the bailor (in the case of a consignment, the consignor-owner). Like former Section 2-326 and former Article 9, this Article changes the common-law result; however, it does so in a different manner. For purposes of determining the rights and interests of third-party creditors of, and purchasers of the goods from, the consignee, but not for other purposes, such as remedies of the consignor, the consignee is deemed to acquire under this Article whatever rights and title the consignor had or had power to transfer. See Section 9-319. The interest of a consignor is defined to be a security interest under revised Section 1-201(37), more specifically, a purchase-money security interest in the consignee's inventory. See Section 9-103(d). Thus, the rules pertaining to lien creditors, buyers, and attachment, perfection, and priority of competing security interests apply to consigned goods. The relationship between the consignor and consignee is left to other law. Consignors also have no duties under Part 6. See Section 9-601(g).

Sometimes parties characterize transactions that secure an obligation (other than the bailee's obligation to returned bailed goods) as "consignments." These transactions are not "consignments" as contemplated by Section 9-109(a)(4). See Section 9-102. This Article applies also to these transactions, by virtue of Section 9-109(a)(1). They create a security interest within the meaning of the first sentence of Section 1-201(37).

This Article does not apply to bailments for sale that fall outside the definition of "consignment" in Section 9-102 and that do not create a security interest that secures an obligation.

7. Security Interest in Obligation Secured by Non-Article 9 Transaction. Subsection (b) is unchanged in substance from former Section 9-102(3). The following example provides an illustration.

Example 1: O borrows $10,000 from M and secures its repayment obligation, evidenced by

a promissory note, by granting to M a mortgage on O's land. This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected. See Sections 9-203, 9-308.

It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective. Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. This Article rejects cases such as In re Maryville Savings & Loan Corp., 743 F.2d 413 (6th Cir.1984), clarified on reconsideration, 760 F.2d 119 (1985).

8. Federal Preemption. Former Section 9-104(a) excluded from Article 9 "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. Subsection (c)(1) recognizes explicitly that this Article defers to federal law only when and to the extent that it must-i.e., when federal law preempts it.

9. Governmental Debtors. Former Section 9-104(e) excluded transfers by governmental debtors. It has been revised and replaced by the exclusions in new paragraphs (2) and (3) of subsection (c). These paragraphs reflect the view that Article 9 should apply to security interests created by a State, foreign country, or a "governmental unit" (defined in Section 9-102) of either except to the extent that another statute governs the issue in question. Under paragraph (2), this Article defers to all statutes of the forum State. (A forum cannot determine whether it should consult the choice-of-law rules in the forum's UCC unless it first determines that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of another State or a foreign country only to the extent that those statutes contain rules applicable specifically to security interests created by the governmental unit in question.

Example 2: A New Jersey state commission creates a security interest in favor of a New York bank. The validity of the security interest is litigated in New York. The relevant security agreement provides that it is governed by New York law. To the extent that a New Jersey statute contains rules peculiar to creation of security interests by governmental units generally, to creation of security interests by state commissions, or to creation of security interests by this particular state commission, then that law will govern. On the other hand, to the extent that New Jersey law provides that security interests created by governmental units, state commissions, or this state commission are governed by the law generally applicable to secured transactions (i.e., New Jersey's Article 9), then New York's Article 9 will govern.

Example 3: An airline that is an instrumentality of a foreign country creates a security interest in favor of a New York bank. The analysis used in the previous example would apply here. That is, if the matter is litigated in New York, New York law would govern except to the extent that the foreign country enacted a statute applicable to security interests created by governmental units generally or by the airline specifically.

The fact that New York law applies does not necessarily mean that perfection is accomplished by filing in New York. Rather, it means that the court should apply New York's Article 9, including its choice-of-law provisions. Under New York's Section 9-301, perfection is governed by the law of the jurisdiction in which the debtor is located. Section 9-307 determines the debtor's location for choice-of-law purposes.

If a transaction does not bear an appropriate relation to the forum State, then that State's Article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

Example 4: A Belgian governmental unit grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New Mexico state court. Inasmuch as the transaction bears no "appropriate relation" to New Mexico, New Mexico's UCC, including its Article 9, is inapplicable. See Section 1-105(1). New Mexico's Section 9-109(c) on excluded transactions should not come into play. Even if the parties agreed that New Mexico law would govern, the parties' agreement would not be effective because the transaction does not bear a "reasonable relation" to New Mexico. See Section 1-105(1).

Conversely, Article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice-of-law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security inter-

est granted by a foreign airline to a New York bank are litigated overseas, the court may be bound to apply the law of the debtor's jurisdiction and not New York's Article 9.

10. Certain Statutory and Common-Law Liens; Interests in Real Property. With few exceptions (nonconsensual agricultural liens being one), this Article applies only to consensual security interests in personal property. Following former Section 9-104(b) and (j), paragraphs (1) and (11) of subsection (d) exclude landlord's liens and leases and most other interests in or liens on real property. These exclusions generally reiterate the limitations on coverage (i.e., "by contract," "in personal property and fixtures") made explicit in subsection (a)(1). Similarly, most jurisdictions provide special liens to suppliers of many types of services and materials, either by statute or by common law. With the exception of agricultural liens, it is not necessary for this Article to provide general codification of this lien structure, which is determined in large part by local conditions and which is far removed from ordinary commercial financing. As under former Section 9-104(c), subsection (d)(2) excludes these suppliers' liens (other than agricultural liens) from this Article. However, Section 9-333 provides a rule for determining priorities between certain possessory suppliers' liens and security interests covered by this Article.

11. Wage and Similar Claims. As under former Section 9-104(d), subsection (d)(3) excludes assignments of claims for wages and the like from this Article. These assignments present important social issues that other law addresses. The Federal Trade Commission has ruled that, with some exceptions, the taking of an assignment of wages or other earnings is an unfair act or practice under the Federal Trade Commission Act. See 16 C.F.R. Part 444. State statutes also may regulate such assignments.

12. Certain Sales and Assignments of Receivables; Judgments. In general this Article covers security interests in (including sales of) accounts, chattel paper, payment intangibles, and promissory notes. Paragraphs (4), (5), (6), and (7) of subsection (d) exclude from the Article certain sales and assignments of receivables that, by their nature, do not concern commercial financing transactions. These paragraphs add to the exclusions in former Section 9-104(f) analogous sales and assignments of payment intangibles and promissory notes. For similar reasons, subsection (d)(9) retains the exclusion of assignments of judgments under former Section 9-104(h) (other than judgments taken on a right to payment that itself was collateral under this Article).

13. Insurance. Subsection (d)(8) narrows somewhat the broad exclusion of interests in insurance policies under former Section 9-104(g). This Article now covers assignments by or to a health-care provider of "health-care-insurance receivables" (defined in Section 9-102).

14. Set-Off. Subsection (d)(10) adds two exceptions to the general exclusion of set-off rights from Article 9 under former Section 9-104(i). The first takes account of new Section 9-340, which regulates the effectiveness of a set-off against a deposit account that stands as collateral. The second recognizes Section 9-404, which affords the obligor on an account, chattel paper, or general intangible the right to raise claims and defenses against an assignee (secured party).

15. Tort Claims. Subsection (d)(12) narrows somewhat the broad exclusion of transfers of tort claims under former Section 9-104(k). This Article now applies to assignments of "commercial tort claims" (defined in Section 9-102) as well as to security interests in tort claims that constitute proceeds of other collateral (e.g., a right to payment for negligent destruction of the debtor's inventory). Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.

This Article contains two special rules governing creation of a security interest in tort claims. First, a description of collateral in a security agreement as "all tort claims" is insufficient to meet the requirement for attachment. See Section 9-108(e). Second, no security interest attaches under an after-acquired property clause to a tort claim. See Section 9-204(b). In addition, this Article does not determine whom the tortfeasor must pay to discharge its obligation. Inasmuch as a tortfeasor is not an "account debtor," the rules governing waiver of defenses and discharge of an obligation by an obligor (Sections 9-403, 9-404, 9-405, and 9-406) are inapplicable to tort-claim collateral.

16. Deposit Accounts. Except in consumer transactions, deposit accounts may be taken as original collateral under this Article. Under former Section 9-104(l), deposit accounts were excluded as original collateral, leaving security interests in deposit accounts to be governed by the common law. The common law is nonuniform, often difficult to discover and comprehend, and frequently costly to implement. As a consequence, debtors who wished to use deposit accounts as collateral sometimes were precluded from doing so as a practical matter. By excluding deposit accounts from the Article's scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this Article. However, in both consumer and non-consumer transactions, sections 9-315 and 9-322 apply to deposit accounts as proceeds and with respect to priorities in proceeds.

This Article contains several safeguards to protect debtors against inadvertently encumbering deposit accounts and to reduce the likelihood that a secured party will realize a windfall from a debtor's deposit accounts. For example, because "deposit account" is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts. Rather, a security agreement must reasonably identify the deposit accounts that are the subject of a security interest, e.g., by using the term "deposit accounts." See Section 9-108. To perfect a security interest in a deposit account as original collateral, a secured party (other than the bank with which the deposit account is maintained) must obtain "control" of the account either by obtaining the bank's authenticated agreement or by becoming the bank's customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of these steps requires the debtor's consent.

This Article also contains new rules that determine which State's law governs perfection and priority of a security interest in a deposit account (Section 9-304), priority of conflicting security interests in and set-off rights against a deposit account (Sections 9-327, 9-340), the rights of transferees of funds from an encumbered deposit account (Section 9-332), the obligations of the bank (Section 9-341), enforcement of security interests in a deposit account (Section 9-607(c)), and the duty of a secured party to terminate control of a deposit account (Section 9-208(b)).

CASE NOTES

ANALYSIS

Assignments of accounts.

Under Uniform Commercial Code provisions governing assignment of accounts, if account debtor continues to pay assignor after receiving notification that amount due has been assigned, debtor will remain liable to assignee for same amount. D.C. Code 1981, §§ 28:9-102, 28:9-104(f), 28:9-318(3); U.C.C. §§ 9-102, 9-102 comment, 9-104, 9-104 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). Heller v. Buchbinder, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

Construction and application.

Amendment of section governing when article of District of Columbia code governing secured transactions applies, which amendments were made in early 1982, represented merely clarification, not change, in the law. D.C. Code 1981, § 28:9-104(f); Bankr.Code, 11 U.S.C. § 547. Goldstein v. Madison Nat'l Bank, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

Uniform Commercial Code provisions governing assignment of accounts applied to assignment of taxpayer's right to receive contractual payments pursuant to factoring agreement. D.C. Code 1981, §§ 28:1-103, 28:9-102, 28:9-102(1), 28:9-106. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Deficiency judgments.

The Uniform Commercial Code and Title 5AA of District of Columbia rules and regulations preclude a deficiency judgment when proper notice of a public or private sale has not been given; no legal basis exists for award of a deficiency judgment when only the second requirement of the rule, resale at "a fair and reasonable price," is met. D.C. Code SCR, Civil Rules 55, 55-II(b), 55-II comment; D.C. Code § 28:9-101 et seq. Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Priority of tax liens.

The perfected security interest of the Small

Business Administration did not take priority over the claim of the District of Columbia government for unpaid taxes, despite fact that the SBA security interest arose prior to the sales tax lien of the District of Columbia, since District of Columbia law makes the District's claim for taxes absolute in priority. D.C. Code 1973, § 28:9-102(2); § 47-2609 (now § 47-2012). In re Sardis, Inc., 17 B.R. 660, 1982 Bankr. LEXIS 4831 (1982), reversed by 27 B.R. 153, 1982 U.S. Dist. LEXIS 17308, 11 Bankr. Ct. Dec. (LRP) 544, Bankr. L. Rep. (CCH) P68912, 8 Collier Bankr. Cas. 2d (MB) 267, 9 Collier Bankr. Cas. 2d (MB) 1134, 35 U.C.C. Rep. Serv. (CBC) 1280 (D.D.C. 1982).

Principle of "first in time, first in right" prevails as the general rule in contests between Department of Finance and Revenue and private secured parties, but the legislature may, by statute, declare that District of Columbia's claims for taxes shall be liens preferred over all other liens or security interests of whatever kind and however created, and whether attaching or perfected before or after the tax lien arises. Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

"Super-priority" may be conferred upon government's bare claim for taxes, whether or not they are also made liens, but legislative intent to make claims or liens for taxes absolutely preferred must clearly appear from a strict construction of the statute. Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

Statute, which provided in effect that if there were any sales taxes due, it would be duty of officer to first pay to the Collector the amount of such taxes out of proceeds of sale before making any payment to judgment creditor or other claimants, gave District of Columbia's claims for sales taxes absolute priority over all other incumbrances, and thus, such a claim took precedence over a prior protected security interest. D.C. Code 1973, § 47-2609. Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

Rights under insurance policies.

It was unnecessary to file financial statement to perfect security interest in unearned insurance premiums, since right to refund of unearned insurance premiums was a right arising in or under policy of insurance within exclusionary language of Uniform Commercial Code, and since District of Columbia Code specifically exempted premium finance agreements from filing requirements. D.C. Code §§ 28:9-104(g), 28:9-302, 35-1372. In re Auto-Train Corp., 9 B.R. 159, 1981 Bankr. LEXIS 4893 (1981).

§ 28:9-110. Security interests arising under Article 2 or 2A.

A security interest arising under § 28:2-401, 2-505, 2-711(3), or 2A-508(5) is subject to this article. However, until the debtor obtains possession of the goods:

(1) The security interest is enforceable, even if § 28:9-203(b)(3) has not been satisfied;

(2) Filing is not required to perfect the security interest;

(3) The rights of the secured party after default by the debtor are governed by Article 2 or 2A; and

(4) The security interest has priority over a conflicting security interest created by the debtor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109, § 28:9-203, and § 28:9-322.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-113.

2. Background. Former Section 9-113, from which this section derives, referred generally to security interests "arising solely under the Article on Sales (Article 2) or the Article on Leases (Article 2A)." Views differed as to the precise scope of that section. In contrast, Section 9-110 specifies the security interests to which it applies.

3. Security Interests Under Articles 2 and 2A. Section 2-505 explains how a seller of goods may reserve a security interest in them. Section 2-401 indicates that a reservation of title by the seller of goods, despite delivery to the

buyer, is limited to reservation of a security interest. As did former Article 9, this Article governs a security interest arising solely under one of those sections; however, until the buyer obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the seller-secured party's rights on the buyer's default are governed by Article 2.

Sections 2-711(3) and 2A-508(5) create a security interest in favor of a buyer or lessee in possession of goods that were rightfully rejected or as to which acceptance was justifiably revoked. As did former Article 9, this Article governs a security interest arising solely under one of those sections; however, until the seller or lessor obtains possession of the goods, the security interest is enforceable even in the absence of a security agreement, filing is not necessary to perfect the security interest, and the secured party's (buyer's or lessee's) rights on the debtor's (seller's or lessor's) default are governed by Article 2 or 2A, as the case may be.

4. Priority. This section adds to former Section 9-113 a priority rule. Until the debtor obtains possession of the goods, a security interest arising under one of the specified sections of Article 2 or 2A has priority over conflicting security interests created by the debtor. Thus, a security interest arising under Section 2-401 or 2-505 has priority over a conflicting security interest in the buyer's after-acquired goods, even if the goods in question are inventory. Arguably, the same result would obtain under Section 9-322, but even if it would not, a purchase-money-like priority is appropriate. Similarly, a security interest under Section 2-711(3) or 2A-508(5) has priority over security interests claimed by the seller's or lessor's secured lender. This result is appropriate, inasmuch as the payments giving rise to the debt secured by the Article 2 or 2A security interest are likely to be included among the lender's proceeds.

Example: Seller owns equipment subject to a security interest created by Seller in favor of Lender. Buyer pays for the equipment, accepts the goods, and then justifiably revokes acceptance. As long as Seller does not recover possession of the equipment, Buyer's security interest under Section 2-711(3) is senior to that of Lender.

In the event that a security interest referred to in this section conflicts with a security interest that is created by a person other than the debtor, Section 9-325 applies. Thus, if Lender's security interest in the example was created not by Seller but by the person from whom Seller acquired the goods, Section 9-325 would govern.

5. Relationship to Other Rights and Remedies Under Articles 2 and 2A. This Article does not specifically address the conflict between (i) a security interest created by a buyer or lessee and (ii) the seller's or lessor's right to withhold delivery under Section 2-702(1), 2-703(a), or 2A-525, the seller's or lessor's right to stop delivery under Section 2-705 or 2A-526, or the seller's right to reclaim under Section 2-507(2) or 2-702(2). These conflicts are governed by the first sentence of Section 2-403(1), under which the buyer's secured party obtains no greater rights in the goods than the buyer had or had power to convey, or Section 2A-307(1), under which creditors of the lessee take subject to the lease contract.

Part 2. Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement.

Subpart 1. Effectiveness and Attachment.

§ 28:9-201. General effectiveness of security agreement.

(a) Except as otherwise provided in Subtitle I of Title 28, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and §§ 28-3301 to 28-3314.

(c) In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b), the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) has only the effect the statute or regulation specifies.

(d) This article does not:

(1) Validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b); or

(2) Extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-201, 9-203(4).

2. Effectiveness of Security Agreement. Subsection (a) provides that a security agreement is generally effective. With certain exceptions, a security agreement is effective between the debtor and secured party and is likewise effective against third parties.

Note that "security agreement" is used here (and elsewhere in this Article) as it is defined in Section 9-102: "an agreement that creates or provides for a security interest." It follows that subsection (a) does not provide that every term or provision contained in a record that contains a security agreement or that is so labeled is effective. Properly read, former Section 9-201 was to the same effect. Exceptions to the general rule of subsection (a) arise where there is an overriding provision in this Article or any other Article of the UCC. For example, Section 9-317 subordinates unperfected security interests to lien creditors and certain buyers, and several provisions in Part 3 subordinate some security interests to other security interests and interests of purchasers.

3. Law, Statutes, and Regulations Applicable to Certain Transactions. Subsection (b) makes clear that certain transactions, although subject to this Article, also are subject to other applicable laws relating to consumers or specified in that subsection. Subsection (c) provides that the other law is controlling in the event of a conflict, and that a violation of other law does not ipso facto constitute a violation of this Article. Subsection (d) provides that this Article does not validate violations under or extend the application of the other applicable laws.

§ 28:9-202. Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this article with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-202.

2. Title Immaterial. The rights and duties of parties to a secured transaction and affected third parties are provided in this Article without reference to the location of "title" to the collateral. For example, the characteristics of a security interest that secures the purchase price of goods are the same whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed title or a lien to the secured party.

3. When Title Matters.

a. Under This Article. This section explicitly acknowledges two circumstances in which the effect of certain Article 9 provisions turns on ownership (title). First, in some respects sales of accounts, chattel paper, payment intangibles, and promissory notes receive special treatment. See, e.g., Sections 9-207(a), 9-210(b), 9-615(e). Buyers of receivables under former Article 9 were treated specially, as well. See, e.g., former Section 9-502(2). Second, the remedies of a consignor under a true consignment and, for the most part, the remedies of a

buyer of accounts, chattel paper, payment intangibles, or promissory notes are determined by other law and not by Part 6. See Section 9-601(g).

b. Under Other Law. This Article does not determine which line of interpretation (e.g., title theory or lien theory, retained title or conveyed title) should be followed in cases in which the applicability of another rule of law depends upon who has title. If, for example, a revenue law imposes a tax on the "legal" owner of goods or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this Article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determines the location and source of title for those purposes.

§ 28:9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under § 28:9-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under § 28:8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under § 28:7-106, § 28:9-104, § 28:9-105, § 28:9-106, or § 28:9-107 pursuant to the debtor's security agreement.

(c) Subsection (b) is subject to § 28:4-210 on the security interest of a collecting bank, § 28:5-118 on the security interest of a letter-of-credit issuer or nominated person, § 28:9-110 on a security interest arising under Article 2 or 2A, and § 28:9-206 on security interests in investment property.

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 28:9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(b), 60 DCR 2634.)

Section references. — This section is referenced in § 28:4-210, § 28:5-120, § 28:9-102, § 28:9-109, § 28:9-110, § 28:9-316, § 28:9-317, § 28:9-508, § 28:9-703, § 28:9-704, and § 28:9-709.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 rewrote (b)(3)(D), which read: "The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under § 28:9-104, 28:9-105, 28:9-106, or 28:9-107 pursuant to the debtor's security agreement."

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-203, 9-115(2), (6).

2. Creation, Attachment, and Enforceability. Subsection (a) states the general rule that a security interest attaches to collateral only when it becomes enforceable against the debtor. Subsection (b) specifies the circumstances under which a security interest becomes enforceable. Subsection (b) states three basic prerequisites to the existence of a security interest: value (paragraph (1)), rights or power to transfer rights in collateral (paragraph (2)), and agreement plus satisfaction of an evidentiary requirement (paragraph (3)). When all of these elements exist, a security interest becomes enforceable between the parties and attaches under subsection (a). Subsection (c) identifies certain exceptions to the general rule of subsection (b).

3. Security Agreement; Authentication. Under subsection (b)(3), enforceability requires the debtor's security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives, under which the debtor must authenticate a security agreement that provides a description of the collateral. Under Section 9-102, a "security agreement" is "an agreement that creates or provides for a security interest."

Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in fact to have been given as security. Under this Article, as under prior law, a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-styled "lease" may serve as a security agreement if the agreement creates a security interest. See Section 1-201(37) (distinguishing security interest from lease).

4. Possession, Delivery, or Control Pursuant to Security Agreement. The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party's possession substitutes for the debtor's authentication under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security agreement." That phrase refers to the debtor's agreement to the secured party's possession for the purpose of creating a security interest. The phrase should not be confused with the phrase "debtor has authenticated a security agreement," used in paragraph (3)(A), which contemplates the debtor's authentication of a record. In the unlikely event that possession is obtained without the debtor's agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a transferee). Possession as contemplated by Section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's agreement" and consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under Section 8-301 pursuant to the debtor's security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, or a letter-of-credit right satisfies the evidentiary test if control is pursuant to the debtor's security agreement.

5. Collateral Covered by Other Statute or Treaty. One evidentiary purpose of the formal requisites stated in subsection (b) is to minimize the possibility of future disputes as to the terms of a security agreement (e.g., as to the property that stands as collateral for the obligation secured). One should distinguish the evidentiary functions of the formal requisites of attachment and enforceability (such as the requirement that a security agreement contain a description of the collateral) from the more limited goals of "notice filing" for financing statements under Part 5, explained in Section 9-502, Comment 2. When perfection is achieved by compliance with the requirements of a statute or treaty described in Section 9-311(a), such as a federal recording act or a certificate-of-title statute, the manner of describing the collateral in a registry imposed by the statute or treaty may or may not be adequate for purposes of this section and Section 9-108. However, the description contained in the security agreement, not the description in a public registry or on a certificate of title, controls for purposes of this section.

6. Debtor's Rights; Debtor's Power to Transfer Rights. Subsection (b)(2) conditions attachment on the debtor's having "rights in the collateral or the power to transfer rights in the collateral to a secured party." A debtor's limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. However, in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be.

Certain exceptions to the baseline rule enable a debtor to transfer, and a security interest to attach to, greater rights than the debtor has. See Part 3, Subpart 3 (priority rules). The phrase, "or the power to transfer rights in the collateral to a secured party," accommodates those exceptions. In some cases, a debtor may have power to transfer another person's rights only to a class of transferees that excludes secured parties. See, e.g., Section 2-403(2) (giving certain merchants power to transfer an entruster's rights to a buyer in ordinary course of business). Under those circumstances, the debtor would not have the power to create a security interest in the other person's rights, and the condition in subsection (b)(2) would not be satisfied.

7. New Debtors. Subsection (e) makes clear that the enforceability requirements of subsection (b)(3) are met when a new debtor becomes bound under an original debtor's security agreement. If a new debtor becomes bound as debtor by a security agreement entered into by another person, the security agreement satisfies the requirement of subsection (b)(3) as to the existing and after-acquired property of the new debtor to the extent the property is described in the agreement.

Subsection (d) explains when a new debtor becomes bound. Persons who become bound under paragraph (2) are limited to those who both become primarily liable for the original debtor's obligations and succeed to (or acquire) its assets. Thus, the paragraph excludes sureties and other secondary obligors as well as

persons who become obligated through veil piercing and other non-successorship doctrines. In many cases, paragraph (2) will exclude successors to the assets and liabilities of a division of a debtor. See also Section 9-508, Comment 3.

8. Supporting Obligations. Under subsection (f), a security interest in a "supporting obligation" (defined in Section 9-102) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This Article does not contain provisions dealing with competing claims to a limited supporting obligation. As under former Article 9, the law of suretyship and the agreements of the parties will control.

9. Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) s 5.4(a) (1997). See also Section 9-308(e) (analogous rule for perfection).

10. Investment Property. Subsections (h) and (i) make clear that attachment of a security interest in a securities account or commodity account is also attachment in security entitlements or commodity contracts carried in the accounts.

CASE NOTES

ANALYSIS

Possession by secured party.
Security agreements.
Unperfected security interests.

Possession by secured party.

Transaction by which bank in possession of debtor's fund-raising proceeds pursuant to security interest simultaneously credited and debited funds to debtor's account, for purposes of record keeping and compliance with federal election laws, was not lapse in possession and thus did not destroy bank's perfected security interest; funds only momentarily passed through debtor's account, never left bank and were never made available for debtor's use and thus could not have misled third parties to believe that debtor had control of funds. Federal Election Campaign Act of 1971, § 302(h)(1), 2 U.S.C. § 432(h)(1); D.C. Code 1981, §§ 28:1-101 to 28:10-104, 28:9-203(1)(a), 28:9-304(1). Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc., 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

Under District of Columbia law, by taking possession of security deposit posted by restaurant to secure its performance under restaurant lease, hotel both created and perfected a security interest in funds deposited. Timothy Dean's, Inc. v. White (In re Timothy Dean Rest. & Bar), 342 B.R. 1, 2006 Bankr. LEXIS 729 (2006).

Security agreements.

Once the District of Columbia issues a certificate of title to a motor vehicle, a security interest can be perfected in that vehicle only by its being noted on the certificate of title, but, beforehand, the rule of first in time, first in right, prevails. In re Drake, 363 B.R. 1, 2006 Bankr. LEXIS 3561 (2006).

Creditor's security interest in Chapter 13 debtor's vehicle was established by debtor's schedules, which treated creditor as having secured claim to the extent of vehicle's scheduled value, and security agreement attached to proof of claim, which, though signed only by debtor, evidenced enforceable security interest under District of Columbia's version of Uniform Commercial Code (UCC). In re Drake, 363 B.R. 1, 2006 Bankr. LEXIS 3561 (2006).

Documents executed before ethanol was delivered to Chapter 11 debtor consisting of facility letter from bank to debtor and corporate resolution by debtor's board of directors indicating that financing facility was accepted, approved and ratified on terms and conditions specified in facility letter were sufficient to constitute binding security agreement in favor of bank with respect to ethanol, where both documents indicated acceptance of facility letter's conditions, thereby satisfying statute of frauds while facility letter fulfilled evidentiary purpose of identifying collateral and parties did, in fact, follow through with financing arrangement established in facility letter. U.C.C. §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; N.Y. C.L.S. Uniform Commercial Code §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; D.C. Code 1981, §§ 28:1-201(3), 28:9-105(1)(l), 28:9-203(1)(a). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

To satisfy Uniform Commercial Code's underlying requirement of signed, written security agreement, all that is required is writing or writings, regardless of label, which adequately describes collateral, carries signature of debtor, and establishes that in fact security interest was agreed upon. U.C.C. §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; N.Y. C.L.S. Uniform Commercial Code §§ 1-201(3), 9-105(1)(l), 9-203(1)(a), 9-203 comment; D.C. Code 1981, §§ 28:1-201(3), 28:9-105(1)(l), 28:9-203(1)(a). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

Unperfected security interests.

Although agreement between debtor and creditor stated that creditor was granted security interest in named newsletter since formal steps mandated by Uniform Commercial Code to perfect that security interest were never taken, trustee was able to avoid creditor's security interest by reason of his status as judgment lien creditor and the plaintiff was not entitled to have an equitable lien imposed on proceeds of sale of newsletter. Bankr.Code, 11 U.S.C. §§ 101 et seq., 544(a), 546(b), 547; D.C. Code §§ 28:9-105(1)(h), 28:9-106, 28:9-203(1)(b), 28:9-302, 28:9-402, 28:9-403. In re Washington Communications Group, Inc., 10 B.R. 676, 1981 Bankr. LEXIS 3903 (1981).

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-204. After-acquired property; future advances.

(a) Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral.

(b) A security interest does not attach under a term constituting an after-acquired property clause to:

(1) Consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value; or

(2) A commercial tort claim.

(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-204.

2. After-Acquired Property; Continuing General Lien. Subsection (a) makes clear that a security interest arising by virtue of an after-acquired property clause is no less valid than a security interest in collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party-such as a supplemental agreement covering the new collateral-is required. This section adopts the principle of a "continuing general lien" or "floating lien." It validates a security interest in the debtor's existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. See Section 9-205. Subsection (a), together with subsection (c), also validates "cross-collateral" clauses under which collateral acquired at any time secures advances whenever made.

3. After-Acquired Consumer Goods. Subsection (b)(1) makes ineffective an after-acquired property clause covering consumer goods (defined in Section 9-109), except as accessions (see Section 9-335), acquired more than 10 days after the secured party gives value. Subsection

(b)(1) is unchanged in substance from the corresponding provision in former Section 9-204(2).

4. Commercial Tort Claims. Subsection (b)(2) provides that an after-acquired property clause in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with greater specificity than simply "all tort claims." See Section 9-108(e).

5. Future Advances; Obligations Secured. Under subsection (c) collateral may secure future as well as past or present advances if the security agreement so provides. This is in line with the policy of this Article toward security interests in after-acquired property under subsection (a). Indeed, the parties are free to agree that a security interest secures any obligation whatsoever. Determining the obligations secured by collateral is solely a matter of construing the parties' agreement under applicable law. This Article rejects the holdings of cases decided under former Article 9 that applied other tests, such as whether a future advance or other subsequently incurred obligation was of the same or a similar type or class as earlier advances and obligations secured by the collateral.

6. Sales of Receivables. Subsections (a) and (c) expressly validate after-acquired property and future advance clauses not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes .. This result was implicit under former Article 9.

7. Financing Statements. The effect of after-acquired property and future advance clauses as components of a security agreement should not be confused with the requirements applicable to financing statements under this Article's system of perfection by notice filing. The references to after-acquired property clauses and future advance clauses in this section are limited to security agreements. There is no need to refer to after-acquired property or future advances or other obligations secured in a financing statement. See Section 9-502, Comment 2.

CASE NOTES

Priority of security interests.

Generally, party who first notifies public of his security interest in property, either through possession of collateral or filing of his financing treatment, prevails over all other parties with security interest in same collateral, regardless of which party first acquired security interest itself. D.C. Code 1973, §§ 28:9-204(1), 28:9-301(1), 28:9-302, 28:9-303, 28:9-305, 28:9-312(5). Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

§ 28:9-205. Use or disposition of collateral permissible.

(a) A security interest is not invalid or fraudulent against creditors solely because:

(1) The debtor has the right or ability to:

(A) Use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;

(B) Collect, compromise, enforce, or otherwise deal with collateral;

(C) Accept the return of collateral or make repossessions; or

(D) Use, commingle, or dispose of proceeds; or

(2) The secured party fails to require the debtor to account for proceeds or replace collateral.

(b) This section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-205.

2. Validity of Unrestricted "Floating Lien." This Article expressly validates the "floating lien" on shifting collateral. See Sections 9-201, 9-204 and Comment 2. This section provides that a security interest is not invalid or fraudulent by reason of the debtor's liberty to dispose of the collateral without being required to account to the secured party for proceeds or substitute new collateral. As did former Section 9-205, this section repeals the rule of Benedict v. Ratner, 268 U.S. 353 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over collateral. The Benedict rule did not effectively discourage or eliminate security transactions in inventory and receivables. Instead, it forced financing arrangements to be self-liquidating. Although this section repeals Benedict, the filing and other perfection requirements (see Part 3, Subpart 2, and Part 5) provide for public notice that overcomes any potential misleading effects of a debtor's use and control of collateral. Moreover, nothing in this section prevents the debtor and secured party from agreeing to procedures by which the secured party polices or monitors collateral or to restrictions on the debtor's dominion. However, this Article leaves these matters to agreement based on business considerations, not on legal requirements.

3. Possessory Security Interests. Subsection (b) makes clear that this section does not relax the requirements for perfection by possession under Section 9-315. If a secured party allows the debtor access to and control over collateral its security interest may be or become unperfected.

4. Permissible Freedom for Debtor to Enforce Collateral. Former Section 9-205 referred to a debtor's "liberty. . to collect or compromise accounts or chattel paper." This section recognizes the broader rights of a debtor to "enforce," as well as to "collect" and "compromise" collateral. This section's reference to collecting, compromising, and enforcing "collateral" instead of "accounts or chattel paper" contemplates the many other types of collateral that a debtor may wish to "collect, compromise, or enforce": e.g., deposit accounts, documents, general intangibles, instruments, investment property, and letter-of-credit rights.

§ 28:9-206. Security interest arising in purchase or delivery of financial asset.

(a) A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(1) The person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) The securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) The security interest described in subsection (a) secures the person's obligation to pay for the financial asset.

(c) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) The security or other financial asset:

(A) In the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

(B) Is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) The agreement calls for delivery against payment.

(d) The security interest described in subsection (c) secures the obligation to make payment for the delivery.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-203 and § 28:9-309.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former 9-116.

2. Codification of "Broker's Lien." Depending upon a securities intermediary's arrangements with its entitlement holders, the securities intermediary may treat the entitlement holder as entitled to financial assets before the entitlement holder has actually made payment for them. For example, many brokers permit retail customers to pay for financial assets by check. The broker may not receive final payment of the check until several days after the broker has credited the customer's securities account for the financial assets. Thus, the customer will have acquired a security entitlement prior to payment. Subsection (a) provides that, in such circumstances, the securities intermediary has a security interest in the entitlement holder's security entitlement. Under subsection (b) the security interest secures the customer's obligation to pay for the financial asset in question. Subsections (a) and (b) codify and adapt to the indirect holding system the so-called "broker's lien," which has long been recognized. See Restatement, Security s 12.

3. Financial Assets Delivered Against Payment. Subsection (c) creates a security interest in favor of persons who deliver certificated securities or other financial assets in physical form, such as money market instruments, if the agreed payment is not received. In some arrangements for settlement of transactions in physical financial assets, the seller's securities custodian will deliver physical certificates to the buyer's securities custodian and receive a time-stamped delivery receipt. The buyer's securities custodian will examine the certificate to ensure that it is in good order, and that the delivery matches a trade in which the buyer has instructed the seller to deliver to that custodian. If all is in order, the receiving custodian will settle with the delivering custodian through whatever funds settlement system has been agreed upon or is used by custom and usage in that market. The understanding of the trade, however, is that the delivery is conditioned upon payment, so that if payment is not made for any reason, the security will be returned to the deliverer. Subsection (c) clarifies the rights of persons making deliveries in such circumstances. It provides the person making delivery with a security interest in the securities or other financial assets; under subsection (d), the security interest secures the seller's right to receive payment for the delivery. Section 8-301 specifies when delivery of a certificated security occurs; that section should be applied as well to other financial assets as well for purposes of this section.

4. Automatic Attachment and Perfection. Subsections (a) and (c) refer to attachment of a security interest. Attachment under this section has the same incidents (enforceability, right to proceeds, etc.) as attachment under Section 9-203. This section overrides the general attachment rules in Section 9-203. See Section 9-203(c). A securities intermediary's security interest under subsection (a) is perfected by control without further action. See Section 8-106 (control); 9-314 (perfection). Security interests arising under subsection (c) are automatically perfected. See Section 9-309(9).

Subpart 2. Rights and Duties.

§ 28:9-207. Rights and duties of secured party having possession or control of collateral.

(a) Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Except as otherwise provided in subsection (d), if a secured party has possession of collateral:

(1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) The secured party may use or operate the collateral:

(A) For the purpose of preserving the collateral or its value;

(B) As permitted by an order of a court having competent jurisdiction; or

(C) Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under § 28:7-106, 28:9-104, 28:9-105, 28:9-106, or 28:9-107:

(1) May hold as additional security any proceeds, except money or funds, received from the collateral;

(2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) May create a security interest in the collateral.

(d) If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) Subsection (a) does not apply unless the secured party is entitled under an agreement:

(A) To charge back uncollected collateral; or

(B) Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) Subsections (b) and (c) do not apply.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(c), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-601 and § 28:9-602.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "28:7-106" following "under § " in (c).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-203.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-207.

2. Duty of Care for Collateral in Secured Party's Possession. Like former section 9-207, subsection (a) imposes a duty of care, similar to that imposed on a pledgee at common law, on a secured party in possession of collateral. See Restatement, Security §§ 17, 18. In many cases a secured party in possession of collateral may satisfy this duty by notifying the debtor of action that should be taken and allowing the debtor to take the action itself. If the secured party itself takes action, its reasonable expenses may be added to the secured obligation. The revised definitions of "collateral," "debtor," and "secured party" in Section 9-102 make this section applicable to collateral subject to an agricultural lien if the collateral is in the lienholder's possession. Under Section 1-102 the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement standards that are not manifestly unreasonable as to what constitutes reasonable care. Unless otherwise agreed, for a secured party in possession of chattel paper or an instrument, reasonable care includes the preservation of rights against prior parties. The secured party's right to have instruments or

documents indorsed or transferred to it or its order is dealt with in the relevant sections of Articles 3, 7, and 8. See Sections 3-201, 7-506, 8-304(d).

3. Specific Rules When Secured Party in Possession or Control of Collateral. Subsections (b) and (c) provide rules following common-law precedents which apply unless the parties otherwise agree. The rules in subsection (b) apply to typical issues that may arise while a secured party is in possession of collateral, including expenses, insurance, and taxes, risk of loss or damage, identifiable and fungible collateral, and use or operation of collateral. Subsection (c) contains rules that apply in certain circumstances that may arise when a secured party is in either possession or control of collateral. These circumstances include the secured party's receiving proceeds from the collateral and the secured party's creation of a security interest in the collateral.

4. Applicability Following Default. This section applies when the secured party has possession of collateral either before or after default. See Sections 9-601(b), 9-609. Subsection (b)(4)(C) limits agreements concerning the use or operation of collateral to collateral other than consumer goods. Under Section 9-602(1), a debtor cannot waive or vary that limitation.

5. "Repledges" and Right of Redemption. Subsection (c)(3) eliminates the qualification in former Section 9-207 to the effect that the terms of a "repledge" may not "impair" a debtor's "right to redeem" collateral. The change is primarily for clarification. There is no basis on which to draw from subsection (c)(3) any inference concerning the debtor's right to redeem the collateral. The debtor enjoys that right under Section 9-623; this section need not address it. For example, if the collateral is a negotiable note that the secured party (SP-1) repledges to SP-2, nothing in this section suggests that the debtor (D) does not retain the right to redeem the note upon payment to SP-1 of all obligations secured by the note. But, as explained below, the debtor's unimpaired right to redeem as against the debtor's original secured party nevertheless may not be enforceable as against the new secured party.

In resolving questions that arise from the creation of a security interest by SP-1, one must take care to distinguish D's rights against SP-1 from D's rights against SP-2. Once D discharges the secured obligation, D becomes entitled to the note; SP-1 has no legal basis upon which to withhold it. If, as a practical matter, SP-1 is unable to return the note because SP-2 holds it as collateral for SP-1's unpaid debt, then SP-1 is liable to D under the law of conversion.

Whether SP-2 would be liable to D depends on the relative priority of SP-2's security interest and D's interest. By permitting SP-1 to create a security interest in the collateral (repledge), subsection (c)(3) provides a statutory power for SP-1 to give SP-2 a security interest (subject, of course, to any agreement by SP-1 not to give a security interest). In the vast majority of cases where repledge rights are significant, the security interest of the second secured party, SP-2 in the example, will be senior to the debtor's interest. By virtue of the debtor's consent or applicable legal rules, SP-2 typically would cut off D's rights in investment property or be immune from D's claims. See Sections 9-331, 3-306 (holder in due course), 8-303 (protected purchaser), 8-502 (acquisition of a security entitlement), 8-503(e) (action by entitlement holder). Moreover, the expectations and business practices in some markets, such as the securities markets, are such that D's consent to SP-2's taking free of D's rights inheres in D's creation of SP-1's security interest which gives rise to SP-1's power under this section. In these situations, D would have no right to recover the collateral or recover damages from SP-2. Nevertheless, D would have a damage claim against SP-1 if SP-1 had given a security interest to SP-2 in breach of its agreement with D. Moreover, if SP-2's security interest secures an amount that is less than the amount secured by SP-1's security interest (granted by D), then D's exercise of its right to redeem would provide value sufficient to discharge SP-1's obligations to SP-2.

For the most part this section does not change the law under former Section 9-207, although eliminating the reference to the debtor's right of redemption may alter the secured party's right to repledge in one respect. Former Section 9-207 could have been read to limit the secured party's statutory right to repledge collateral to repledge transactions in which the collateral did not secure a greater obligation than that of the original debtor. Inasmuch as this is a matter normally dealt with by agreement between the debtor and secured party, any change would appear to have little practical effect.

6. "Repledges" of Investment Property. The following example will aid the discussion of "repledges" of investment property.

Example. Debtor grants Alpha Bank a security interest in a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co. Alpha does not have an account with Able. Alpha uses Beta Bank as its securities custodian. Debtor instructs Able to transfer the shares to Beta, for the account of Alpha, and Able does so. Beta then credits Alpha's account. Alpha has control of the security entitlement for the 1000 shares under Section 8-106(d). (These are the facts of Example 2, Section 8-106, Comment 4.) Although, as between Debtor and Alpha, Debtor may have become the

beneficial owner of the new securities entitlement with Beta, Beta has agreed to act on Alpha's entitlement orders because, as between Beta and Alpha, Alpha has become the entitlement holder.

Next, Alpha grants Gamma Bank a security interest in the security entitlement with Beta that includes the 1000 shares of XYZ Co. stock. In order to afford Gamma control of the entitlement, Alpha instructs Beta to transfer the stock to Gamma's custodian, Delta Bank, which credits Gamma's account for 1000 shares. At this point Gamma holds its securities entitlement for its benefit as well as that of its debtor, Alpha. Alpha's derivative rights also are for the benefit of Debtor.

In many, probably most, situations and at any particular point in time, it will be impossible for Debtor or Alpha to "trace" Alpha's "repledge" to any particular securities entitlement or financial asset of Gamma or anyone else. Debtor would retain, of course, a right to redeem the collateral from Alpha upon satisfaction of the secured obligation. However, in the absence of a traceable interest, Debtor would retain only a personal claim against Alpha in the event Alpha failed to restore the security entitlement to Debtor. Moreover, even in the unlikely event that Debtor could trace a property interest, in the context of the financial markets, normally the operation of this section, Debtor's explicit agreement to permit Alpha to create a senior security interest, or legal rules permitting Gamma to cut off Debtor's rights or become immune from Debtor's claims would effectively subordinate Debtor's interest to the holder of a security interest created by Alpha. And, under the shelter principle, all subsequent transferees would obtain interests to which Debtor's interest also would be subordinate.

7. Buyers of Chattel Paper and Other Receivables; Consignors. This section has been revised to reflect the fact that a seller of accounts, chattel paper, payment intangibles, or promissory notes retains no interest in the collateral and so is not disadvantaged by the secured party's noncompliance with the requirements of this section. Accordingly, subsection (d) provides that subsection (a) applies only to security interests that secure an obligation and to sales of receivables in which the buyer has recourse against the debtor. (Of course, a buyer of accounts or payment intangibles could not have "possession" of original collateral, but might have possession of proceeds, such as promissory notes or checks.) The meaning of "recourse" in this respect is limited to recourse arising out of the account debtor's failure to pay or other default.

Subsection (d) makes subsections (b) and (c) inapplicable to buyers of accounts, chattel paper, payment intangibles, or promissory notes and consignors. Of course, there is no reason to believe that a buyer of receivables or a consignor could not, for example, create a security interest or otherwise transfer an interest in the collateral, regardless of who has possession of the collateral. However, this section leaves the rights of those owners to law other than Article 9.

CASE NOTES

In general.

Transaction, in which bank sold collateral consisting of 700 shares of taxpayers' stock, which was not authorized by taxpayer and which involved a wrongful conversion subsequently corrected by bank's repurchase of stock, was not a "taxable event" for capital gains purposes; expenses incurred by taxpayers in recovering the stock was deductible as an expense incurred in protection and maintenance of property. 26 U.S.C. (I.R.C.1954) §§ 1001(c), 1036(a); 26 U.S.C. (1970 Ed.) (I.R.C.1954) § 1002; D.C. Code§§ 28:9-207, 28:9-207(1, 3), 28-9-207 comment, 47-1557b(a)(4)(B), (a)(5), 47-1583a. Borden v. District of Columbia, 417 A.2d 402, 1980 D.C. App. LEXIS 322 (1980).

§ 28:9-208. Additional duties of secured party having control of collateral.

(a) This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within 10 days after receiving an authenticated demand by the debtor:

(1) A secured party having control of a deposit account under § 28:9-104(a)(2) shall send to the bank with which the deposit account is maintained

an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;

(2) A secured party having control of a deposit account under § 28:9-104(a)(3) shall:

(A) Pay the debtor the balance on deposit in the deposit account; or

(B) Transfer the balance on deposit into a deposit account in the debtor's name;

(3) A secured party, other than a buyer, having control of electronic chattel paper under § 28:9-105 shall:

(A) Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) A secured party having control of investment property under § 28:8-106(d)(2) or 28:9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party;

(5) A secured party having control of a letter-of-credit right under § 28:9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party; and

(6) A secured party having control of an electronic document shall:

(A) Give control of the electronic document to the debtor or its designated custodian;

(B) If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(d), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-625.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 added (b)(6); and made related changes.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-203.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Scope and Purpose. This section imposes duties on a secured party who has control of a deposit account, electronic chattel paper, investment property, or a letter-of-credit right. The duty to terminate the secured party's control is analogous to the duty to file a termination statement, imposed by Section 9-513. Under subsection (a), it applies only when there is no outstanding secured obligation and the secured party is not committed to give value. The requirements of this section can be varied by agreement under Section 1-102(3). For example, a debtor could by contract agree that the secured party may comply with subsection (b) by releasing control more than 10 days after demand. Also, duties under this section should not be read to conflict with the terms of the collateral itself. For example, if the collateral is a time deposit account, subsection (b)(2) should not require a secured party with control to make an early withdrawal of the funds (assuming that were possible) in order to pay them over to the debtor or put them in an account in the debtor's name.

3. Remedy for Failure to Relinquish Control. If a secured party fails to comply with the requirements of subsection (b), the debtor has the remedy set forth in Section 9-625(e). This remedy is identical to that applicable to failure to provide or file a termination statement under Section 9-513.

4. Duty to Relinquish Possession. Although Section 9-207 addresses directly the duties of a secured party in possession of collateral, that section does not require the secured party to relinquish possession when the secured party ceases to hold a security interest. Under common law, absent agreement to the contrary, the failure to relinquish possession of collateral upon satisfaction of the secured obligation would constitute a conversion. Inasmuch as problems apparently have not surfaced in the absence of statutory duties under former Article 9 and the common-law duty appears to have been sufficient, this Article does not impose a statutory duty to relinquish possession.

§ 28:9-209. Duties of secured party if account debtor has been notified of assignment.

(a) Except as otherwise provided in subsection (c), this section applies if:

(1) There is no outstanding secured obligation; and

(2) The secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within 10 days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under § 28:9-406(a) an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-625.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Scope and Purpose. Like Sections 9-208 and 9-513, which require a secured party to relinquish control of collateral and to file or provide a termination statement for a financing statement, this section requires a secured party to free up collateral when there no longer is any outstanding secured obligation or any commitment to give value in the future. This section addresses the case in which account debtors have been notified to pay a secured party to whom the receivables have been assigned. It requires the secured party (assignee) to inform the account debtors that they no longer are obligated to make payment to the secured party. See subsection (b). It does not apply to account debtors whose obligations on an account, chattel paper, or payment intangible have been sold. See subsection (c).

§ 28:9-210. Request for accounting; request regarding list of collateral or statement of account.

(a) In this section:

(1) "Request" means a record of a type described in paragraph (2), (3), or (4).

(2) "Request for an accounting" means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) "Request regarding a list of collateral" means a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) "Request regarding a statement of account" means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt:

(1) In the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) In the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within 14 days after receipt.

(d) A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the collateral; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an authenticated record:

(1) Disclaiming any interest in the obligations; and

(2) If known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) A debtor is entitled without charge to one response to a request under this section during any 6-month period. The secured party may require payment of a charge not exceeding $25 for each additional response.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-625.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-208.

2. Scope and Purpose. This section provides a procedure whereby a debtor may obtain from a secured party information about the secured obligation and the collateral in which the secured party may claim a security interest. It clarifies and resolves some of the issues that arose under former Section 9-208 and makes information concerning the secured indebtedness readily available to debtors, both before and after default. It applies to agricultural lien transactions (see the definitions of "debtor," "secured party," and "collateral" in Section 9-102), but generally not to sales of receivables. See subsection (b).

3. Requests by Debtors Only. A financing statement filed under Part 5 may disclose only that a secured party may have a security interest in specified types of collateral. In most cases the financing statement will contain no indication of the obligation (if any) secured, whether any security interest actually exists, or the particular property subject to a security interest. Because creditors of and prospective purchasers from a debtor may have legitimate needs for more detailed information, it is necessary to provide a procedure under which the secured party will be required to provide information. On the other hand, the secured party should not be under a duty to disclose any details of the debtor's financial affairs to any casual inquirer or competitor who may inquire. For this reason, this section gives the right to request information to the debtor only. The debtor may submit a request in connection with negotiations with subsequent creditors and purchasers, as well as for the purpose of determining the status of its credit relationship or demonstrating which of its assets are free of a security interest.

4. Permitted Types of Requests for Information. Subsection (a) contemplates that a debtor may request three types of information by submitting three types of "requests" to the secured party. First, the debtor may request the secured party to prepare and send an "accounting" (defined in Section 9-102). Second, the debtor may submit to the secured party a list of collateral for the secured party's approval or correction. Third, the debtor may submit to the secured party for its approval or correction a statement of the aggregate amount of unpaid secured obligations. Inasmuch as a secured party may have numerous transactions and relationships with a debtor, each request must identify the relevant transactions or relationships. Subsections (b) and (c) require the secured party to respond to a request within 14 days following receipt of the request.

5. Recipients Claiming No Interest in the Transaction. A debtor may be unaware that a creditor with whom it has dealt has assigned its security interest or the secured obligation. Subsections (d) and (e) impose upon recipients of requests under this section the duty to inform the debtor that they claim no interest in the collateral or secured obligation, respectively, and to inform the debtor of the name and mailing address of any known assignee or successor. As under subsections (b) and (c), a response to a request under subsection (d) or (e) is due 14 days following receipt.

6. Waiver; Remedy for Failure to Comply. The debtor's rights under this section may not be waived or varied. See Section 9-602(2). Section 9-625 sets forth the remedies for noncompliance with the requirements of this section.

7. Limitation on Free Responses to Requests. Under subsection (f), during a six-month period

a debtor is entitled to receive from the secured party one free response to a request. The debtor is not entitled to a free response to each type of request (i.e., three free responses) during a six-month period.

Part 3. Perfection and Priority.

Subpart 1. Law Governing Perfection and Priority.

§ 28:9-301. Law governing perfection and priority of security interests.

Except as otherwise provided in §§ 28:9-303 through 28:9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) Perfection of a security interest in the goods by filing a fixture filing;

(B) Perfection of a security interest in timber to be cut; and

(C) The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(e), 60 DCR 2634.)

Section references. — This section is referenced in § 28:1-301 and § 28:9-316.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "tangible" preceding "negotiable documents" in (3).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-103(1)(a), (b), 9-103(3)(a), (b), 9-103(5), substantially modified.

2. Scope of This Subpart. Part 3, Subpart 1 (Sections 9-301 through 9-307) contains choice-of-law rules similar to those of former Section 9-103. Former Section 9-103 generally addresses which State's law governs "perfection and the effect of perfection or non-perfection of" security interests. See, e.g., former Section 9-103(1)(b). This Article follows the broader and more precise formulation in former Section

9-103(6)(b), which was revised in connection with the promulgation of Revised Article 8 in 1994: "perfection, the effect of perfection or non-perfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in Part 3, including "cut off" or "take free" rules such as Sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement is governed by the rules in Section 1-105; that governing law typically is specified in the same agreement that contains the security agreement. And, another jurisdiction's law may govern other third-party matters addressed in this Article. See Section 9-401, Comment 3.

3. Scope of Referral. In designating the jurisdiction whose law governs, this Article directs the court to apply only the substantive ("local") law of a particular jurisdiction and not its choice-of-law rules.

Example 1: Litigation over the priority of a security interest in accounts arises in State X. State X has adopted the official text of this Article, which provides that priority is determined by the local law of the jurisdiction in which the debtor is located. See Section 9-301(1). The debtor is located in State Y. Even if State Y has retained former Article 9 or enacted a nonuniform choice-of-law rule (e.g., one that provides that perfection is governed by the law of State Z), a State X court should look only to the substantive law of State Y and disregard State Y's choice-of-law rule. State Y's substantive law (e.g., its Section 9-501) provides that financing statements should be filed in a filing office in State Y. Note, however, that if the identical perfection issue were to be litigated in State Y, the court would look to State Y's former Section 9-103 or nonuniform 9-301 and conclude that a filing in State Y is ineffective.

Example 2: In the preceding Example, assume that State X has adopted the official text of this Article, and State Y has adopted a nonuniform Section 9-301(1) under which perfection is governed by the whole law of State X, including its choice-of-law rules. If litigation occurs in State X, the court should look to the substantive law of State Y, which provides that financing statements are to be filed in a filing office in State Y. If litigation occurs in State Y, the court should look to the law of State X, whose choice-of-law rule requires that the court apply the substantive law of State Y. Thus, regardless of the jurisdiction in which the litigation arises, the financing statement should be filed in State Y.

4. Law Governing Perfection: General Rule. Paragraph (1) contains the general rule: the law governing perfection of security interests in both tangible and intangible collateral, whether perfected by filing or automatically, is the law of the jurisdiction of the debtor's location, as determined under Section 9-307.

Paragraph (1) substantially simplifies the choice-of-law rules. Former Section 9-103 contained different choice-of-law rules for different types of collateral. Under Section 9-301(1), the law of a single jurisdiction governs perfection with respect to most types of collateral, both tangible and intangible. Paragraph (1) eliminates the need for former Section 9-103(1)(c), which concerned purchase-money security interests in tangible collateral that is intended to move from one jurisdiction to the other. It is likely to reduce the frequency of cases in which the governing law changes after a financing statement is properly filed. (Presumably, debtors change their own location less frequently than they change the location of their collateral.) The approach taken in paragraph (1) also eliminates some difficult priority issues and the need to distinguish between "mobile" and "ordinary" goods, and it reduces the number of filing offices in which secured parties must file or search when collateral is located in several jurisdictions.

5. Law Governing Perfection: Exceptions. The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), or letter-of-credit rights (see Section 9-306). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)).

a. Possessory Security Interests. Paragraph (2) applies to possessory security interests and provides that perfection is governed by the local law of the jurisdiction in which the collateral is located. This is the rule of former Section 9-103(1)(b), except paragraph (2) eliminates the troublesome "last event" test of former law.

The distinction between nonpossessory and possessory security interests creates the potential for the same jurisdiction to apply two different choice-of-law rules to determine perfection in the same collateral. For example, were a secured party in possession of an instrument or document to relinquish possession in reliance on temporary perfection, the applicable law immediately would change from that of the location of the collateral to that of the location of the debtor. The applicability of two different choice-of-law rules for perfection is unlikely to lead to any material practical prob-

lems. The perfection rules of one Article 9 jurisdiction are likely to be identical to those of another. Moreover, under paragraph (3), the relative priority of competing security interests in tangible collateral is resolved by reference to the law of the jurisdiction in which the collateral is located, regardless of how the security interests are perfected.

b. Fixtures. Application of the general rule in paragraph (1) to perfection of a security interest in fixtures would yield strange results. For example, perfection of a security interest in fixtures located in Arizona and owned by a Delaware corporation would be governed by the law of Delaware. Although Delaware law would send one to a filing office in Arizona for the place to file a financing statement as a fixture filing, see Section 9-501, Delaware law would not take account of local, nonuniform, real-property filing and recording requirements that Arizona law might impose. For this reason, paragraph (3)(A) contains a special rule for security interests perfected by a fixture filing; the law of the jurisdiction in which the fixtures are located governs perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same law governs priority. Fixtures are "goods" as defined in Section 9-102.

c. Timber to Be Cut. Application of the general rule in paragraph (1) to perfection of a security interest in timber to be cut would yield undesirable results analogous to those described with respect to fixtures. Paragraph (3)(B) adopts a similar solution:

perfection is governed by the law of the jurisdiction in which the timber is located. As with fixtures, under paragraph (3)(C), the same law governs priority. Timber to be cut also is "goods" as defined in Section 9-102.

Paragraph (3)(B) applies only to "timber to be cut," not to timber that has been cut. Consequently, once the timber is cut, the general choice-of-law rule in paragraph (1) becomes applicable. To ensure continued perfection, a secured party should file in both the jurisdiction in which the timber to be cut is located and in the state where the debtor is located. The former filing would be with the office in which a real property mortgage would be filed, and the latter would be a central filing. See Section 9-501.

d. As-Extracted Collateral. Paragraph (4) adopts the rule of former Section 9-103(5) with respect to certain security interests in minerals and related accounts. Like security interests in fixtures perfected by filing a fixture filing, security interests in minerals that are as-extracted collateral are perfected by filing in the office designated for the filing or recording of a mortgage on the real property. For the same reasons, the law governing perfection and priority is the law of the jurisdiction in which the wellhead or minehead is located.

6. Change in Law Governing Perfection. When the debtor changes its location to another jurisdiction, the jurisdiction whose law governs perfection under paragraph (1) changes, as well. Similarly, the law governing perfection of a possessory security interest in collateral under paragraph (2) changes when the collateral is removed to another jurisdiction. Nevertheless, these changes will not result in an immediate loss of perfection. See Section 9-316(a), (b).

7. Law Governing Effect of Perfection and Priority: Goods, Documents, Instruments, Money, Negotiable Documents, and Tangible Chattel Paper. Under former Section 9-103, the law of a single jurisdiction governed both questions of perfection and those of priority. This Article generally adopts that approach. See paragraph (1). But the approach may create problems if the debtor and collateral are located in different jurisdictions. For example, assume a security interest in equipment located in Pennsylvania is perfected by filing in Illinois, where the debtor is located. If the law of the jurisdiction in which the debtor is located were to govern priority, then the priority of an execution lien on goods located in Pennsylvania would be governed by rules enacted by the Illinois legislature.

To address this problem, paragraph (3)(C) divorces questions of perfection from questions of "the effect of perfection or nonperfection and the priority of a security interest." Under paragraph (3)(C), the rights of competing claimants to tangible collateral are resolved by reference to the law of the jurisdiction in which the collateral is located. A similar bifurcation applied to security interests in investment property under former Section 9-103(6). See Section 9-305.

Paragraph (3)(C) applies the law of the situs to determine priority only with respect to goods (including fixtures), instruments, money, negotiable documents, and tangible chattel paper. Compare former Section 9-103(1), which applied the law of the location of the collateral to documents, instruments, and "ordinary" (as opposed to "mobile") goods. This Article does not distinguish among types of goods. The ordinary/mobile goods distinction appears to address concerns about where to file and search, rather than concerns about priority. There is no reason to preserve this distinction under the bifurcated approach.

Particularly serious confusion may arise when the choice-of-law rules of a given jurisdiction result in each of two competing security interests in the same collateral being governed by a different priority rule. The potential for this confusion existed under former Section 9-103(4) with respect to chattel paper: Perfec-

tion by possession was governed by the law of the location of the paper, whereas perfection by filing was governed by the law of the location of the debtor. Consider the mess that would have been created if the language or interpretation of former Section 9-308 were to differ in the two relevant States, or if one of the relevant jurisdictions (e.g., a foreign country) had not adopted Article 9. The potential for confusion could have been exacerbated when a secured party perfected both by taking possession in the State where the collateral is located (State A) and by filing in the State where the debtor is located (State B)-a common practice for some chattel paper financers. By providing that the law of the jurisdiction in which the collateral is located governs priority, paragraph (3) substantially diminishes this problem.

8. Non-U.S. Debtors. This Article applies the same choice-of-law rules to all debtors, foreign and domestic. For example, it adopts the bifurcated approach for determining the law applicable to security interests in goods and other tangible collateral. See Comment 5.a., above. The Article contains a new rule specifying the location of non-U.S. debtors for purposes of this Part. The rule appears in Section 9-307 and is explained in the Reporters' Comments following that section. Former Section 9-103(3)(c), which contained a special choice-of-law rule governing security interests created by debtors located in a non-U.S. jurisdiction, proved unsatisfactory and was deleted.

CASE NOTES

Analysis

Federal liens.

While state law determines nature of taxpayer's interest in the property to which a federal lien can attach, federal law determines the priority among competing liens asserted against the property. Streule v. Gulf Finance Corp., 265 A.2d 298, 1970 D.C. App. LEXIS 277 (App. 1970).

Corporation's lien was choate and perfected when automobile buyer (who secured a loan from corporation and executed a chattel mortgage on automobile as security) and the corporation entered into loan agreement, since at that time the lienor's identity, and subject property, and the lien's amount were all known; and since the corporation was a mortgagee whose lien became choate and perfected after the assessment but before the filing of notice of a federal tax lien against buyer, that tax lien attached to the automobile only to the extent of buyer's equity in the automobile above the amount owed the corporation; thus, plaintiff only acquired that interest at subsequent tax sale conducted by government in enforcement of its lien. 26 U.S.C. (I.R.C.1954) §§ 6323, 6339(a)(2). Streule v. Gulf Finance Corp., 265 A.2d 298, 1970 D.C. App. LEXIS 277 (App. 1970).

When government assesses its lien for unpaid taxes, it attaches to the taxpayer's property and has priority over all liens not choate and perfected as of the date of assessment, except that pledgees, mortgagees, judgment creditors and purchasers whose liens become choate and perfected between the date of assessment and the date of filing notice of the federal lien have priority over the federal lien. 26 U.S.C. (I.R.C.1954) §§ 6323, 6339(a)(2). Streule v. Gulf Finance Corp., 265 A.2d 298, 1970 D.C. App. LEXIS 277 (App. 1970).

Lien with priority over federal tax lien is not extinguished by a tax sale but continues to be a lien on the property. 26 U.S.C. (I.R.C.1954) §§ 6323, 6339(a)(2). Streule v. Gulf Finance Corp., 265 A.2d 298, 1970 D.C. App. LEXIS 277 (App. 1970).

Forfeitures.

Rather than creating statutory liens, statute authorizing owner or other duly authorized person to repossess or secure release of impounded vehicle allows substitution of collateral security for scofflaw's appearance in court. D.C. Code § 40-603(k)(3). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

A chattel mortgagee with a security interest in impounded vehicle has right to claim vehicle, and such right flows not from impoundment provisions, but from UCC provisions governing secured transactions. D.C. Code §§ 28:9-503, 40-603(k). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

In general.

Assignment to creditor of right to receive amount owed debtor by another as payment of past-due obligation did not create "security interest" so as to trigger applicability of article of District of Columbia code governing secured transactions; thus, section of that article directing court to apply law of jurisdiction where debtor was located, Maryland, did not apply and under District of Columbia's general choice of law provision, District of Columbia law was applicable, in that assignment was prepared

and executed in District of Columbia, debt was incurred and paid in District, and two of three parties to transactions were based on District. D.C. Code 1981, § 28:9-103. Goldstein v. Madison Nat'l Bank, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). Heller v. Buchbinder, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

Perfection, generally.

Lien is choate and perfected when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. 26 U.S.C. (I.R.C.1954) §§ 6323, 6339(a)(2). Streule v. Gulf Finance Corp., 265 A.2d 298, 1970 D.C. App. LEXIS 277 (App. 1970).

§ 28:9-302. Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:11-106.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Agricultural Liens. This section provides choice-of-law rules for agricultural liens on farm products. Perfection, the effect of perfection or nonperfection, and priority all are governed by the law of the jurisdiction in which the farm products are located. Other choice-of-law rules, including Section 1-105, determine which jurisdiction's law governs other matters, such as the secured party's rights on default. See Section 9-301, Comment 2. Inasmuch as no agricultural lien on proceeds arises under this Article, this section does not expressly apply to proceeds of agricultural liens. However, if another statute creates an agricultural lien on proceeds, it may be appropriate for courts to apply the choice-of-law rule in this section to determine priority in the proceeds.

§ 28:9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods

are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-301.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-103(2)(a), (b), substantially revised.

2. Scope of This Section. This section applies to "goods covered by a certificate of title." The new definition of "certificate of title" in Section 9-102 makes clear that this section applies not only to certificate-of-title statutes under which perfection occurs upon notation of the security interest on the certificate but also to those that contemplate notation but provide that perfection is achieved by another method, e.g., delivery of designated documents to an official. Subsection (a), which is new, makes clear that this section applies to certificates of a jurisdiction having no other contacts with the goods or the debtor.

This result comports with most of the reported cases on the subject and with contemporary business practices in the trucking industry.

3. Law Governing Perfection and Priority. Subsection (c) is the basic choice-of-law rule for goods covered by a certificate of title. Perfection and priority of a security interest are governed by the law of the jurisdiction under whose certificate of title the goods are covered from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

Normally, under the law of the relevant jurisdiction, the perfection step would consist of compliance with that jurisdiction's certificate-of-title statute and a resulting notation of the security interest on the certificate of title. See Section 9-311(b). In the typical case of an automobile or over-the-road truck, a person who wishes to take a security interest in the vehicle can ascertain whether it is subject to any security interests by looking at the certificate of title. But certificates of title cover certain types of goods in some States but not in others. A secured party who does not realize this may extend credit and attempt to perfect by filing in the jurisdiction in which the debtor is located. If the goods had been titled in another jurisdiction, the lender would be unperfected.

Subsection (b) explains when goods become covered by a certificate of title and when they cease to be covered. Goods may become covered by a certificate of title, even though no certificate of title has issued. Former Section 9-103(2)(b) provided that the law of the jurisdiction issuing the certificate ceases to apply upon "surrender" of the certificate. This Article eliminates the concept of "surrender." However, if the certificate is surrendered in conjunction with an appropriate application for a certificate to be issued by another jurisdiction, the law of the original jurisdiction ceases to apply because the goods became covered subsequently by a certificate of title from another jurisdiction. Alternatively, the law of the original jurisdiction ceases to apply when the certificate "ceases to be effective" under the law of that jurisdiction. Given the diversity in certificate-of-title statutes, the term "effective" is not defined.

4. Continued Perfection. The fact that the law of one State ceases to apply under subsection (b) does not mean that a security interest perfected under that law becomes unperfected automatically. In most cases, the security interest will remain perfected. See Section 9-316(d), (e). Moreover, a perfected security interest may be subject to defeat by certain buyers and secured parties.

See Section 9-337.

5. Inventory. Compliance with a certificate-of-title statute generally is not the method of perfecting security interests in inventory. Section 9-311(d) provides that a security interest created in inventory held by a person in the business of selling goods of that kind is subject to the normal filing rules; compliance with a certificate-of-title statute is not necessary or effective to perfect the security interest. Most certificate-of-title statutes are in accord.

The following example explains the subtle relationship between this rule and the choice-of-law rules in Section 9-303 and former Section 9-103(2):

Example: Goods are located in State A and covered by a certificate of title issued under the law of State A. The State A certificate of title is "clean"; it does not reflect a security interest. Owner takes the goods to State B and sells (trades in) the goods to Dealer, who is in the business of selling goods of that kind and is located (within the meaning of Section 9-307) in

State B. As is customary, Dealer retains the duly assigned State A certificate of title pending resale of the goods. Dealer's inventory financer, SP, obtains a security interest in the goods under its after-acquired property clause.

Under Section 9-311(d) of both State A and State B, Dealer's inventory financer, SP, must perfect by filing instead of complying with a certificate-of-title statute. If Section 9-303 were read to provide that the law applicable to perfection of SP's security interest is that of State A, because the goods are covered by a State A certificate, then SP would be required to file in State A under State A's Section 9-501. That result would be anomalous, to say the least, since the principle underlying Section 9-311(d) is that the inventory should be treated as ordinary goods.

Section 9-303 (and former Section 9-103(2)) should be read as providing that the law of State B, not State A, applies. A court looking to the forum's Section 9-303(a) would find that Section 9-303 applies only if two conditions are met: (i) the goods are covered by the certificate as explained in Section 9-303(b), i.e., application had been made for a State (here, State A) to issue a certificate of title covering the goods and (ii) the certificate is a "certificate of title" as defined in Section 9-102, i.e., "a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor." Stated otherwise, Section 9-303 applies only when compliance with a certificate-of-title statute, and not filing, is the appropriate method of perfection. Under the law of State A, for purposes of perfecting SP's security interest in the dealer's inventory, the proper method of perfection is filing-not compliance with State A's certificate-of-title statute. For that reason, the goods are not covered by a "certificate of title," and the second condition is not met. Thus, Section 9-303 does not apply to the goods. Instead, Section 9-301 applies, and the applicable law is that of State B, where the debtor (dealer) is located.

6. External Constraints on This Section. The need to coordinate Article 9 with a variety of nonuniform certificate-of-title statutes, the need to provide rules to take account of situations in which multiple certificates of title are outstanding with respect to particular goods, and the need to govern the transition from perfection by filing in one jurisdiction to perfection by notation in another all create pressure for a detailed and complex set of rules. In an effort to minimize complexity, this Article does not attempt to coordinate Article 9 with the entire array of certificate-of-title statutes. In particular, Sections 9-303, 9-311, and 9-316(d) and (e) assume that the certificate-of-title statutes to which they apply do not have relation-back provisions (i.e., provisions under which perfection is deemed to occur at a time earlier than when the perfection steps actually are taken). A Legislative Note to Section 9-311 recommends the elimination of relation-back provisions in certificate-of-title statutes affecting perfection of security interests.

Ideally, at any given time, only one certificate of title is outstanding with respect to particular goods. In fact, however, sometimes more than one jurisdiction issues more than one certificate of title with respect to the same goods. This situation results from defects in certificate-of-title laws and the interstate coordination of those laws, not from deficiencies in this Article. As long as the possibility of multiple certificates of title remains, the potential for innocent parties to suffer losses will continue. At best, this Article can identify clearly which innocent parties will bear the losses in familiar fact patterns.

§ 28:9-304. Law governing perfection and priority of security interests in deposit accounts.

(a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) The following rules determine a bank's jurisdiction for purposes of this part:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part, this article, or Subtitle I of Title 28, that jurisdiction is the bank's jurisdiction.

(2) If paragraph (1) of this subsection does not apply and an agreement between the bank and its customer governing the deposit account expressly

provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) of this subsection applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of the preceding paragraphs of this subsection applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of the preceding paragraphs of this subsection applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(f), 60 DCR 2634.)

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "its customer" for "the debtor" in (b)(1).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived from Section 8-110(e) and former Section 9-103(6).

2. Deposit Accounts. Under this section, the law of the "bank's jurisdiction" governs perfection and priority of a security interest in deposit accounts. Subsection (b) contains rules for determining the "bank's jurisdiction." The substance of these rules is substantially similar to that of the rules determining the "security intermediary's jurisdiction" under former Section 8-110(e), except that subsection (b)(1) provides more flexibility than the analogous provision in former Section 8-110(e)(1). Subsection (b)(1) permits the parties to choose the law of one jurisdiction to govern perfection and priority of security interests and a different governing law for other purposes. The parties' choice is effective, even if the jurisdiction whose law is chosen bears no relationship to the parties or the transaction. Section 8-110(e)(1) has been conformed to subsection (b)(1) of this section, and Section 9-305(b)(1), concerning a commodity intermediary's jurisdiction, makes a similar departure from former Section 9-103(6)(e)(i).

3. Change in Law Governing Perfection. When the bank's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, the change will not result in an immediate loss of perfection. See Section 9-316(f), (g).

§ 28:9-305. Law governing perfection and priority of security interests in investment property.

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in § 28:8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in § 28:8-110(e) governs perfection, the effect of perfection or nonperfection,

and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this article, or Subtitle I of Title 28, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) of this subsection does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) of this subsection applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs of this subsection applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) The local law of the jurisdiction in which the debtor is located governs:

(1) Perfection of a security interest in investment property by filing;

(2) Automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-316.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-103(6).

2. Investment Property: General Rules. This section specifies choice-of-law rules for perfection and priority of security interests in investment property. Subsection (a)(1) covers security interests in certificated securities. Subsection (a)(2) covers security interests in uncertificated securities. Subsection (a)(3) covers security interests in security entitlements and securities accounts. Subsection (a)(4) covers security interests in commodity contracts and commodity accounts. The approach of each of these paragraphs is essentially the same. They identify the jurisdiction's law that governs questions of

perfection and priority by using the same principles that Article 8 uses to determine other questions concerning that form of investment property.

Thus, for certificated securities, the law of the jurisdiction in which the certificate is located governs. Cf. Section 8-110(c).

For uncertificated securities, the law of the issuer's jurisdiction governs. Cf. Section 8-110(a). For security entitlements and securities accounts, the law of the securities intermediary's jurisdiction governs. Cf. Section 8-110(b). For commodity contracts and commodity accounts, the law of the commodity intermediary's jurisdiction governs. Because commodity contracts and commodity accounts are not governed by Article 8, subsection (b) contains rules that specify the commodity intermediary's jurisdiction. These are analogous to the rules in Section 8-110(e) specifying a securities intermediary's jurisdiction. Subsection (b)(1) affords the parties greater flexibility than did former Section 9-103(6)(3). See also Section 9-304(b) (bank's jurisdiction); Revised Section 8-110(e)(1) (securities intermediary's jurisdiction).

3. Investment Property: Exceptions. Subsection (c) establishes an exception to the general rules set out in subsection (a). It provides that perfection of a security interest by filing, automatic perfection of a security interest in investment property created by a debtor who is a broker or securities intermediary (see Section 9-309(10)), and automatic perfection of a security interest in a commodity contract or commodity account of a debtor who is a commodity intermediary (see Section 9-309(11) are governed by the law of the jurisdiction in which the debtor is located, as determined under Section 9-307.

4. Examples: The following examples illustrate the rules in this section:

Example 1: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law but expressly provides that the law of California is Able's jurisdiction for purposes of the Uniform Commercial Code. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a margin loan from Able. Subsection (a)(3) provides that California law-the law of the securities intermediary's jurisdiction-governs perfection and priority of the security interest, even if California has no other relationship to the parties or the transaction.

Example 2: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer obtains a loan from a lender located in Illinois. The lender takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of Section 8-106(d)(2) to give the lender control. Subsection (a)(3) provides that Pennsylvania law-the law of the securities intermediary's jurisdiction-governs perfection and priority of the security interest, even if Pennsylvania has no other relationship to the parties or the transaction.

Example 3: A customer residing in New Jersey maintains a securities account with Able & Co. The agreement between the customer and Able specifies that it is governed by Pennsylvania law. Through the account, the customer holds securities of a Massachusetts corporation, which Able holds through a clearing corporation located in New York. The customer borrows from SP-1, and SP-1 files a financing statement in New Jersey. Later, the customer obtains a loan from SP-2. SP-2 takes a security interest and perfects by obtaining an agreement among the debtor, itself, and Able, which satisfies the requirement of Section 8-106(d)(2) to give the SP-2 control. Subsection (c) provides that perfection of SP-1's security interest by filing is governed by the location of the debtor, so the filing in New Jersey was appropriate. Subsection (a)(3), however, provides that Pennsylvania law-the law of the securities intermediary's jurisdiction-governs all other questions of perfection and priority. Thus, Pennsylvania law governs perfection of SP-2's security interest, and Pennsylvania law also governs the priority of the security interests of SP-1 and SP-2.

5. Change in Law Governing Perfection. When the issuer's jurisdiction, the securities intermediary's jurisdiction, or commodity intermediary's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well.

Similarly, the law governing perfection of a possessory security interest in a certificated security changes when the collateral is removed to another jurisdiction, see subsection (a)(1), and the law governing perfection by filing changes when the debtor changes its location. See subsection (c). Nevertheless, these changes will not result in an immediate loss of perfection. See Section 9-316.

§ 28:9-306. Law governing perfection and priority of security interests in letter-of-credit rights.

(a) Subject to subsection (c), the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a State.

(b) For purposes of this part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in § 28:5-116.

(c) This section does not apply to a security interest that is perfected only under § 28:9-308(d).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived in part from Section 8-110(e) and former Section 9-103(6).

2. Sui Generis Treatment. This section governs the applicable law for perfection and priority of security interests in letter-of-credit rights, other than a security interest perfected only under Section 9-308(d) (i.e., as a supporting obligation). The treatment differs substantially from that provided in Section 9-304 for deposit accounts. The basic rule is that the law of the issuer's or nominated person's (e.g., confirmer's) jurisdiction, derived from the terms of the letter of credit itself, controls perfection and priority, but only if the issuer's or nominated person's jurisdiction is a State, as defined in Section 9-102. If the issuer's or nominated person's jurisdiction is not a State, the baseline rule of Section 9-301 applies-perfection and priority are governed by the law of the debtor's location, determined under Section 9-307. Export transactions typically involve a foreign issuer and a domestic nominated person, such as a confirmer, located in a State. The principal goal of this section is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors, and a domestic nominated person.

3. Issuer's or Nominated Person's Jurisdiction. Subsection (b) defers to the rules established under Section 5-116 for determination of an issuer's or nominated person's jurisdiction.

Example: An Italian bank issues a letter of credit that is confirmed by a New York bank. The beneficiary is a Connecticut corporation. The letter of credit provides that the issuer's liability is governed by Italian law, and the confirmation provides that the confirmer's liability is governed by the law of New York. Under Sections 9-306(b) and 5-116(a), Italy is the issuer's jurisdiction and New York is the confirmer's (nominated person's) jurisdiction. Because the confirmer's jurisdiction is a State, the law of New York governs perfection and priority of a security interest in the beneficiary's letter-of-credit right against the confirmer. See Section 9-306(a). However, because the issuer's jurisdiction is not a State, the law of that jurisdiction does not govern. See Section 9-306(a). Rather, the choice-of-law rule in Section 9-301(1) applies to perfection and priority of a security interest in the beneficiary's letter-of-credit right against the issuer. Under that section, perfection and priority are governed by the law of the jurisdiction in which the debtor (beneficiary) is located. That jurisdiction is Connecticut. See Section 9-307.

4. Scope of this Section. This section specifies only the law governing perfection, the effect of perfection or nonperfection, and priority of security interests. Section 5-116 specifies the law governing the liability of, and Article 5 (or other applicable law) deals with the rights and duties of, an issuer or nominated person. Perfection, nonperfection, and priority have no effect on those rights and duties.

5. Change in Law Governing Perfection. When the issuer's jurisdiction, or nominated person's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, this change will not result in an immediate loss of perfection. See Section 9-316(f), (g).

CASE NOTES

ANALYSIS

Construction and application.
In general.

Construction and application.
Under District of Columbia law, interest-bearing bank account into which hotel deposited security deposit that it received from its tenant did not have to come into tenant's possession in order for hotel's perfected security interest in security deposit to continue in bank account, as being in nature of "proceeds" of security deposit. Timothy Dean's, Inc. v. White (In re Timothy Dean Rest. & Bar), 342 B.R. 1, 2006 Bankr. LEXIS 729 (2006).

Ten-day period applicable under District of Columbia law when secured creditor must take action in order for its perfected security interest to continue in proceeds of original collateral was never triggered, as to security deposit in which hotel possessed perfected security interest to secure its tenant's performance under restaurant lease, when funds that hotel received from tenant were deposited into interest-bearing account and converted from money into bank account, where bank account, the proceeds of security deposit, was at all times under hotel's control and never came into possession of tenant. Timothy Dean's, Inc. v. White (In re Timothy Dean Rest. & Bar), 342 B.R. 1, 2006 Bankr. LEXIS 729 (2006).

In general.
Under District of Columbia law, perfected security interest that hotel possessed in security deposit posted by restaurant to secure its performance under restaurant lease continued in interest bearing account into which hotel was required to place restaurant's security deposit, as being in nature of "proceeds" of security deposit. Timothy Dean's, Inc. v. White (In re Timothy Dean Rest. & Bar), 342 B.R. 1, 2006 Bankr. LEXIS 729 (2006).

§ 28:9-307. Location of debtor.

(a) In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) An debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one place of business is located at its place of business.

(3) A debtor that is an organization and has more than 1 place of business is located at its chief executive office.

(c) Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c).

(e) A registered organization that is organized under the law of a State is located in that State.

(f) Except as otherwise provided in subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a State are located:

(1) In the State that the law of the United States designates, if the law designates a State of location;

(2) In the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location, including by designating its main office, home office, or other comparable office; or

(3) In the District of Columbia, if neither paragraph (1) nor paragraph (2) of this subsection applies.

(g) A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) notwithstanding:

(1) The suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) The dissolution, winding up, or cancellation of the existence of the registered organization.

(h) The United States is located in the District of Columbia.

(i) A branch or agency of a bank that is not organized under the law of the United States or a State is located in the State in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one State.

(j) A foreign air carrier under the Federal Aviation Act of 1958, approved August 23, 1958 (72 Stat. 731; codified in scattered sections of the U.S. Code), as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) This section applies only for purposes of this part.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(d), 60 DCR 2688.)

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 added "including by designating its main office, home office, or other comparable office" in (f)(2).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-103(3)(d), substantially revised.

2. General Rules. As a general matter, the location of the debtor determines the jurisdiction whose law governs perfection of a security interest. See Sections 9-301(1), 9-305(c). It also governs priority of a security interest in certain types of intangible collateral, such as accounts, electronic chattel paper, and general intangibles. This section determines the location of the debtor for choice-of-law purposes, but not for other purposes. See subsection (k).

Subsection (b) states the general rules: An individual debtor is deemed to be located at the individual's principal residence with respect to both personal and business assets. Any other debtor is deemed to be located at its place of business if it has only one, or at its chief executive office if it has more than one place of business.

As used in this section, a "place of business" means a place where the debtor conducts its affairs. See subsection (a). Thus, every organization, even eleemosynary institutions and other organizations that do not conduct "for profit" business activities, has a "place of business." Under subsection (d), a person who ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction determined by subsection (b).

The term "chief executive office" is not defined in this Section or elsewhere in the Uniform Commercial Code. "Chief executive office" means the place from which the debtor man-

ages the main part of its business operations or other affairs. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. With respect to most multi-state debtors, it will be simple to determine which of the debtor's offices is the "chief executive office."

Even when a doubt arises, it would be rare that there could be more than two possibilities. A secured party in such a case may protect itself by perfecting under the law of each possible jurisdiction.

Similarly, the term "principal residence" is not defined. If the security interest in question is a purchase-money security interest in consumer goods which is perfected upon attachment, see Section 9-309(1), the choice of law may make no difference. In other cases, when a doubt arises, prudence may dictate perfecting under the law of each jurisdiction that might be the debtor's "principal residence."

The general rule is subject to several exceptions, each of which is discussed below.

3. Non-U.S. Debtors. Under the general rules of this section, a non-U.S. debtor normally would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

Accordingly, subsection (c) provides that the normal rules for determining the location of a debtor (i.e., the rules in subsection (b)) apply only if they yield a location that is "a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.“ The phrase "generally requires“ is meant to include legal regimes that generally require notice in a filing or recording system as a condition of perfecting nonpossessory security interests, but which permit perfection by another method (e.g., control, automatic perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this Article or an earlier version of this Article is such a jurisdiction. If the rules in subsection (b) yield a jurisdiction whose law does not generally require notice in a filing or registration system, the debtor is located in the District of Columbia.

Example 1: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in its accounts. Under subsection (b)(3), Debtor would be located in England.

However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection, the effect of perfection, and priority are governed by the law of the jurisdiction of the debtor's location-here, England or the District of Columbia (depending on the content of English law).

Example 2: Debtor is an English corporation with 7 offices in the United States and its chief executive office in London, England. Debtor creates a security interest in equipment located in London. Under subsection (b)(3) Debtor would be located in England. However, subsection (c) provides that subsection (b) applies only if English law generally conditions perfection on giving public notice in a filing, recording, or registration system. Otherwise, Debtor is located in the District of Columbia. Under Section 9-301(1), perfection is governed by the law of the jurisdiction of the debtor's location, whereas, under Section 9-301(3), the law of the jurisdiction in which the collateral is located-here, England-governs priority.

The foregoing discussion assumes that each transaction bears an appropriate relation to the forum State. In the absence of an appropriate relation, the forum State's entire UCC, including the choice-of-law provisions in Article 9 (Sections 9-301 through 9-307), will not apply. See Section 9-109, Comment 9.

4. Registered Organizations Organized Under Law of a State. Under subsection (e), a registered organization (e.g., a corporation or limited partnership) organized under the law of a "State" (defined in Section 9-102) is located in its State of organization. Subsection (g) makes clear that events affecting the status of a registered organization, such as the dissolution of a corporation or revocation of its charter, do not affect its location for purposes of subsection (e). However, certain of these events may result in, or be accompanied by, a transfer of collateral from the registered organization to another debtor. This section does not determine whether a transfer occurs, nor does it determine the legal consequences of any transfer.

Determining the registered organization-debtor's location by reference to the jurisdiction of organization could provide some important side benefits for the filing systems. A jurisdiction could structure its filing system so that it would be impossible to make a mistake in a registered organization-debtor's name on a financing statement. For example, a filer would be informed if a filed record designated an incorrect corporate name for the debtor. Linking filing to the jurisdiction of organization also could reduce pressure on the system imposed by transactions in which registered organizations cease to exist-as a consequence of merger or consolidation, for example. The jurisdiction of organization might prohibit such transac-

tions unless steps were taken to ensure that existing filings were refiled against a successor or terminated by the secured party.

5. Registered Organizations Organized Under Law of United States; Branches and Agencies of Banks Not Organized Under Law of United States. Subsection (f) specifies the location of a debtor that is a registered organization organized under the law of the United States. It defers to law of the United States, to the extent that that law determines, or authorizes the debtor to determine, the debtor's location. Thus, if the law of the United States designates a particular State as the debtor's location, that State is the debtor's location for purposes of this Article's choice-of-law rules. Similarly, if the law of the United States authorizes the registered organization to designate its State of location, the State that the registered organization designates is the State in which it is located for purposes of this Article's choice-of-law rules. In other cases, the debtor is located in the District of Columbia.

Subsection (f) also determines the location of branches and agencies of banks that are not organized under the law of the United States or a State. However, if all the branches and agencies of the bank are licensed only in one State, then they are located in that State. See subsection (i).

6. United States. To the extent that Article 9 governs (see Sections 1-105, 9-109(c)), the United States is located in the District of Columbia for purposes of this Article's choice-of-law rules. See subsection (h).

7. Foreign Air Carriers. Subsection (j) follows former Section 9-103(3)(d). To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in Section 9-311(b), but some nations are not parties to that Convention.

Subpart 2. Perfection.

§ 28:9-308. When security interest or agricultural lien is perfected; continuity of perfection.

(a) Except as otherwise provided in this section and § 28:9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in §§ 28:9-310 through 28:9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in § 28:9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.

(d) Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109, § 28:9-306, § 28:9-310, § 28:9-312, and § 28-4915.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-303, 9-115(2).

2. General Rule. This Article uses the term "attach" to describe the point at which property becomes subject to a security interest. The requisites for attachment are stated in Section 9-203. When it attaches, a security interest may be either perfected or unperfected. "Perfected" means that the security interest has attached and the secured party has taken all the steps required by this Article as specified in Sections 9-310 through 9-316. A perfected security interest may still be or become subordinate to other interests. See, e.g., Sections 9-320, 9-322. However, in general, after perfection the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor. See, e.g., Section 9-317.

Subsection (a) explains that the time of perfection is when the security interest has attached and any necessary steps for perfection, such as taking possession or filing, have been taken. The "except" clause refers to the perfection-upon-attachment rules appearing in Section 9-309. It also reflects that other subsections of this section, e.g., subsection (d), contain automatic-perfection rules. If the steps for perfection have been taken in advance, as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, then the security interest is perfected when it attaches.

3. Agricultural Liens. Subsection (b) is new. It describes the elements of perfection of an agricultural lien.

4. Continuous Perfection. The following example illustrates the operation of subsection (c):

Example 1: Debtor, an importer, creates a security interest in goods that it imports and the documents of title that cover the goods. The secured party, Bank, takes possession of a negotiable bill of lading covering certain imported goods and thereby perfects its security interest in the bill of lading and the goods. See Sections 9-313(a), 9-312(c)(1). Bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under Section 9-312(f), Bank continues to have a perfected security interest in the document and goods for 20 days. Bank files a financing statement covering the collateral before the expiration of the 20-day period. Its security interest now continues perfected for as long as the filing is good.

If the successive stages of Bank's security interest succeed each other without an intervening gap, the security interest is "perfected continuously," and the date of perfection is when the security interest first became perfected (i.e., when Bank received possession of the bill of lading). If, however, there is a gap between stages-for example, if Bank does not file until after the expiration of the 20-day period specified in Section 9-312(f) and leaves the collateral in the debtor's possession-then, the chain being broken, the perfection is no longer continuous. The date of perfection would now be the date of filing (after expiration of the 20-day period). Bank's security interest would be vulnerable to any interests arising during the gap period which under Section 9-317 take priority over an unperfected security interest.

5. Supporting Obligations. Subsection (d) is new. It provides for automatic perfection of a security interest in a supporting obligation for collateral if the security interest in the collateral is perfected. This is unlikely to effect any change in the law prior to adoption of this Article.

Example 2: Buyer is obligated to pay Debtor for goods sold. Buyer's president guarantees the obligation. Debtor creates a security interest in the right to payment (account) in favor of Lender. Under Section 9-203(f), the security interest attaches to Debtor's rights under the guarantee (supporting obligation). Under subsection (d), perfection of the security interest in the account constitutes perfection of the security interest in Debtor's rights under the guarantee.

6. Rights to Payment Secured by Lien. Subsection (e) is new. It deals with the situation in which a security interest is created in a right to payment that is secured by a security interest, mortgage, or other lien.

Example 3: Owner gives to Mortgagee a mortgage on Blackacre to secure a loan. Owner's obligation to pay is evidenced by a promissory note. In need of working capital, Mortgagee borrows from Financer and creates a security interest in the note in favor of Financer. Section 9-203(g) adopts the traditional view that the mortgage follows the note; i.e., the transferee of the note acquires the mortgage, as well. This subsection adopts a similar principle: perfection of a security interest in the right to payment constitutes perfection of a security interest in the mortgage securing it.

An important consequence of the rules in Section 9-203(g) and subsection (e) is that, by acquiring a perfected security interest in a mortgage (or other secured) note, the secured party acquires a security interest in the mortgage (or other lien) that is senior to the rights of a person who becomes a lien creditor of the mortgagee (Article 9 debtor). See Section 9-317(a)(2). This result helps prevent the separation of the mortgage (or other lien) from the note.

Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See Section 3-602. If the right to payment is a payment intangible, then Section 9-406 determines whom the account debtor must pay.

Similarly, this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.

7. Investment Property. Subsections (f) and (g) follow former Section 9-115(2).

CASE NOTES

Priority of security interests.

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Generally, party who first notifies public of his security interest in property, either through possession of collateral or filing of his financing treatment, prevails over all other parties with security interest in same collateral, regardless of which party first acquired security interest itself. D.C. Code 1973, §§ 28:9-204(1), 28:9-301(1), 28:9-302, 28:9-303, 28:9-305, 28:9-312(5). Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

§ 28:9-309. Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in § 28:9-311(b) with respect to consumer goods that are subject to a statute or treaty described in § 28:9-311(a);

(2) An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) A sale of a payment intangible;

(4) A sale of a promissory note;

(5) A security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;

(6) A security interest arising under § 28:2-401, 2-505, 2-711(3), or 2A-508(5), until the debtor obtains possession of the collateral;

(7) A security interest of a collecting bank arising under § 28:4-210;

(8) A security interest of an issuer or nominated person arising under § 28:5-118;

(9) A security interest arising in the delivery of a financial asset under § 28:9-206(c);

(10) A security interest in investment property created by a broker or securities intermediary;

(11) A security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder;

(13) A security interest created by an assignment of a beneficial interest in a decedent's estate; and

(14) A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(g), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-308, § 28:9-310, and § 28:9-323.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 added (14); and made related changes.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Derived from former Sections 9-302(1), 9-115(4)(c), (d), 9-116.

2. Automatic Perfection. This section contains the perfection-upon-attachment rules previously located in former Sections 9-302(1), 9-115(4)(c), (d), and 9-116. Rather than continue to state the rule by indirection, this section explicitly provides for perfection upon attachment.

3. Purchase-Money Security Interest in Consumer Goods. Former Section 9-302(1)(d) has been revised and appears here as paragraph (1). No filing or other step is required to perfect a purchase-money security interest in consumer goods, other than goods, such as automobiles, that are subject to a statute or treaty described in Section 9-311(a). However, filing is required to perfect a non-purchase-money security interest in consumer goods and is necessary to prevent a buyer of consumer goods from taking free of a security interest under Section 9-320(b). A fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-334.

4. Rights to Payment. Paragraph (2) expands upon former Section 9-302(1)(e) by affording automatic perfection to certain assignments of payment intangibles as well as accounts. The purpose of paragraph (2) is to save from ex post facto invalidation casual or isolated assignments-assignments which no one would think of filing. Any person who regularly takes assignments of any debtor's accounts or payment intangibles should file. In this connection Section 9-109(d)(4) through (7), which excludes certain transfers of accounts, chattel paper, payment intangibles, and promissory notes from this Article, should be consulted.

Paragraphs (3) and (4), which are new, afford automatic perfection to sales of payment intangibles and promissory notes, respectively. They reflect the practice under former Article 9. Under that Article, filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes, inasmuch as the former Article did not cover those sales. To the extent that the exception in paragraph (2) covers outright sales of payment intangibles, which automatically are perfected under paragraph (3), the exception is redundant.

5. Health-Care-Insurance Receivables. Paragraph (5) extends automatic perfection to assignments of health-care-insurance receivables if the assignment is made to the health-care provider that provided the health-care goods or services. The primary effect is that, when an individual assigns a right to payment under an insurance policy to the person who provided health-care goods or services, the provider has no need to file a financing statement against the individual. The normal filing requirements apply to other assignments of health-care-insurance receivables covered by this Article, e.g., assignments from the health-care provider to a financer.

6. Investment Property. Paragraph (9) replaces the last clause of former Section 9-116(2), concerning security interests that arise in the delivery of a financial asset.

Paragraphs (10) and (11) replace former Section 9-115(4)(c) and (d), concerning secured financing of securities and commodity firms and clearing corporations. The former sections indicated that, with respect to certain security interests created by a securities intermediary or commodity intermediary, "[t]he filing of a financing statement ... has no effect for purposes of perfection or priority with respect to that security interest." No change in meaning is intended by the deletion of the quoted phrase.

Secured financing arrangements for securities firms are currently implemented in various ways. In some circumstances, lenders may require that the transactions be structured as "hard pledges," where the securities are trans-

ferred on the books of a clearing corporation from the debtor's account to the lender's account or to a special pledge account for the lender where they cannot be disposed of without the specific consent of the lender. In other circumstances, lenders are content with so-called "agreement to pledge" or "agreement to deliver" arrangements, where the debtor retains the positions in its own account, but reflects on its books that the positions have been hypothecated and promises that the securities will be transferred to the secured party's account on demand.

The perfection and priority rules of this Article are designed to facilitate current secured financing arrangements for securities firms as well as to provide sufficient flexibility to accommodate new arrangements that develop in the future. Hard pledge arrangements are covered by the concept of control. See Sections 9-314, 9-106, 8-106. Non-control secured financing arrangements for securities firms are covered by the automatic perfection rule of paragraph (10). Before the 1994 revision of Articles 8 and 9, agreement to pledge arrangements could be implemented under a provision that a security interest in securities given for new value under a written security agreement was perfected without filing or possession for a period of 21 days. Although the security interests were temporary in legal theory, the financing arrangements could, in practice, be continued indefinitely by rolling over the loans at least every 21 days. Accordingly, a knowledgeable creditor of a securities firm realizes that the firm's securities may be subject to security interests that are not discoverable from any public records. The automatic-perfection rule of paragraph (10) makes it unnecessary to engage in the purely formal practice of rolling over these arrangements every 21 days.

In some circumstances, a clearing corporation may be the debtor in a secured financing arrangement. For example, a clearing corporation that settles delivery-versus-payment transactions among its participants on a net, same-day basis relies on timely payments from all participants with net obligations due to the system. If a participant that is a net debtor were to default on its payment obligation, the clearing corporation would not receive some of the funds needed to settle with participants that are net creditors to the system. To complete end-of-day settlement after a payment default by a participant, a clearing corporation that settles on a net, same-day basis may need to draw on credit lines and pledge securities of the defaulting participant or other securities pledged by participants in the clearing corporation to secure such drawings. The clearing corporation may be the top-tier securities intermediary for the securities pledged, so that it would not be practical for the lender to obtain control. Even where the clearing corporation holds some types of securities through other intermediaries, however, the clearing corporation is unlikely to be able to complete the arrangements necessary to convey "control" over the securities to be pledged in time to complete settlement in a timely manner. However, the term "securities intermediary" is defined in Section 8-102(a)(14) to include clearing corporations. Thus, the perfection rule of paragraph (10) applies to security interests in investment property granted by clearing corporations.

7. Beneficial Interests in Trusts. Under former Section 9-302(1)(c), filing was not required to perfect a security interest created by an assignment of a beneficial interest in a trust. Because beneficial interests in trusts are now used as collateral with greater frequency in commercial transactions, under this Article filing is required to perfect a security interest in a beneficial interest.

8. Assignments for Benefit of Creditors. No filing or other action is required to perfect an assignment for the benefit of creditors. These assignments are not financing transactions, and the debtor ordinarily will not be engaging in further credit transactions.

CASE NOTES

Perfection of security interest, generally.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.

(a) Except as otherwise provided in subsection (b) and § 28:9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under § 28:9-308(d), (e), (f), or (g);

(2) That is perfected under § 28:9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in § 28:9-311(a);

(4) In goods in possession of a bailee which is perfected under § 28:9-312(d)(1) or (2);

(5) In certificated securities, documents, goods, or instruments which is perfected without filing or possession under § 28:9-312(e), (f), or (g);

(6) In collateral in the secured party's possession under § 28:9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under § 28:9-313;

(8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under § 28:9-314;

(9) In proceeds which is perfected under § 28:9-315; or

(10) That is perfected under § 28:9-316.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(h), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-102, § 28:9-308, and § 28:9-311.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "electronic documents" in (b)(8).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-302(1), (2).

2. General Rule. Subsection (a) establishes a central Article 9 principle: Filing a financing statement is necessary for perfection of security interests and agricultural liens. However, filing is not necessary to perfect a security interest that is perfected by another permissible method, see subsection (b), nor does filing ordinarily perfect a security interest in a deposit account, letter-of-credit right, or money. See Section 9-312(b). Part 5 of the Article deals with the office in which to file, mechanics of filing, and operations of the filing office.

3. Exemptions from Filing. Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and (b)(9)) or upon the

occurrence of another event (subsections (b)(1), (b)(5), and (b)(9)), because they are perfected under the law of another jurisdiction (subsection (b)(10)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8)).

4. Assignments of Perfected Security Interests. Subsection (c) concerns assignment of a perfected security interest or agricultural lien. It provides that no filing is necessary in connection with an assignment by a secured party to an assignee in order to maintain perfection as against creditors of and transferees from the original debtor.

Example 1: Buyer buys goods from Seller, who retains a security interest in them. After Seller perfects the security interest by filing, Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on X's part, continues perfected against Buyer's transferees and creditors.

Example 2: Dealer creates a security interest in specific equipment in favor of Lender. After Lender perfects the security interest in the equipment by filing, Lender assigns the chattel paper (which includes the perfected security interest in Dealer's equipment) to X. The security interest in the equipment, in X's hands and without further steps on X's part, continues perfected against Dealer's transferees and creditors. However, regardless of whether Lender made the assignment to secure Lender's obligation to X or whether the assignment was an outright sale of the chattel paper, the assignment creates a security interest in the chattel paper in favor of X. Accordingly, X must take whatever steps may be required for perfection in order to be protected against Lender's transferees and creditors with respect to the chattel paper.

Subsection (c) applies not only to an assignment of a security interest perfected by filing but also to an assignment of a security interest perfected by a method other than by filing, such as by control or by possession. Although subsection (c) addresses explicitly only the absence of an additional filing requirement, the same result normally will follow in the case of an assignment of a security interest perfected by a method other than by filing. For example, as long as possession of collateral is maintained by an assignee or by the assignor or another person on behalf of the assignee, no further perfection steps need be taken on account of the assignment to continue perfection as against creditors and transferees of the original debtor. Of course, additional action may be required for perfection of the assignee's interest as against creditors and transferees of the assignor.

Similarly, subsection (c) applies to the assignment of a security interest perfected by compliance with a statute, regulation, or treaty under Section 9-311(b), such as a certificate-of-title statute. Unless the statute expressly provides to the contrary, the security interest will remain perfected against creditors of and transferees from the original debtor, even if the assignee takes no action to cause the certificate of title to reflect the assignment or to cause its name to appear on the certificate of title. See PEB Commentary No. 12, which discusses this issue under former Section 9-302(3). Compliance with the statute is "equivalent to filing" under Section 9-311(b).

CASE NOTES

ANALYSIS

First to file.

Generally, party who first notifies public of his security interest in property, either through possession of collateral or filing of his financing treatment, prevails over all other parties with security interest in same collateral, regardless of which party first acquired security interest itself. D.C. Code 1973, §§ 28:9-204(1), 28:9-301(1), 28:9-302, 28:9-303, 28:9-305, 28:9-312(5). Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

Necessity of filing.

Although agreement between debtor and creditor stated that creditor was granted security interest in named newsletter since formal steps mandated by Uniform Commercial Code to perfect that security interest were never taken, trustee was able to avoid creditor's security interest by reason of his status as judgment lien creditor and the plaintiff was not entitled to have an equitable lien imposed on proceeds of sale of newsletter. Bankr.Code, 11 U.S.C. §§ 101 et seq., 544(a), 546(b), 547; D.C. Code §§ 28:9-105(1)(h), 28:9-106, 28:9-203(1)(b), 28:9-302, 28:9-402, 28:9-403. In re Washington Communications Group, Inc., 10 B.R. 676, 1981 Bankr. LEXIS 3903 (1981).

It was unnecessary to file financial statement to perfect security interest in unearned insurance premiums, since right to refund of unearned insurance premiums was a right arising in or under policy of insurance within exclusionary language of Uniform Commercial Code, and since District of Columbia Code specifically exempted premium finance agreements from

filing requirements. D.C. Code §§ 28:9-104(g), 28:9-302, 35-1372. In re Auto-Train Corp., 9 B.R. 159, 1981 Bankr. LEXIS 4893 (1981).

Place of filing.

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). Heller v. Buchbinder, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

Sufficiency of filing.

Assignee of taxpayer's right to receive contractual payments did not qualify as holder of security interest with priority over Internal Revenue Service (IRS) lien, where financing statement filed by assignee misspelled taxpayer's name, making it so seriously misleading to be ineffective in perfecting its security interest. D.C. Code 1981, §§ 28:9-301(1)(b), 28:9-302, 28:9-302(1); U.C.C. §§ 9-302, 9-302 comment; 26 U.S.C. § 6323(h)(1, 6). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt § 28:9-310(a);

(2) The provisions of section 50-1201 et seq.; or

(3) A statute of another jurisdiction which provides for a security interest to be indicated on a certificate of title as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in subsection (d) and §§ 28:9-313 and 28:9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) and § 28:9-316(d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this article.

(d) During any period in which collateral subject to a statute specified in subsection (a)(2) is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(e), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-309, § 28:9-310, § 28:9-316, § 28:9-334, § 28:9-335, § 28:9-337, § 28:9-505, § 28:9-611, § 28:9-621, and § 50-1202.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 substituted "certificate-of-title statute" for "statute" in (a)(3).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-302(3), (4).

2. Federal Statutes, Regulations, and Treaties. Subsection (a)(1) exempts from the filing provisions of this Article transactions as to which a system of filing-state or federal-has been established under federal law. Subsection (b) makes clear that when such a system exists, perfection of a relevant security interest can be achieved only through compliance with that system (i.e., filing under this Article is not a permissible alternative).

An example of the type of federal statute referred to in subsection (a)(1) is 49 U.S.C. §§ 44107-11, for civil aircraft of the United States. The Assignment of Claims Act of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of subsection (a)(1). An assignee of a claim against the United States may benefit from compliance with the Assignment of Claims Act. But regardless of whether the assignee complies with that Act, the assignee must file under this Article in order to perfect its security interest against creditors and transferees of its assignor.

Subsection (a)(1) provides explicitly that the filing requirement of this Article defers only to federal statutes, regulations, or treaties whose requirements for a security interest's obtaining priority over the rights of a lien creditor preempt Section 9-310(a). The provision eschews reference to the term "perfection," inasmuch as Section 9-308 specifies the meaning of that term and a preemptive rule may use other terminology.

3. State Statutes. Subsections (a)(2) and (3) exempt from the filing requirements of this Article transactions covered by State certificate-of-title statutes covering motor vehicles and the like. The description of certificate-of-title statutes in subsections (a)(2) and (a)(3) tracks the language of the definition of "certificate of title" in Section 9-102. For a discussion of the operation of state certificate-of-title statutes in interstate contexts, see the Comments to Section 9-303.

Some states have enacted central filing statutes with respect to secured transactions in kinds of property that are of special importance in the local economy. Subsection (a)(2) defers to these statutes with respect to filing for that property.

4. Inventory Covered by Certificate of Title. Under subsection (d), perfection of a security interest in the inventory of a person in the business of selling goods of that kind is governed by the normal perfection rules, even if the inventory is subject to a certificate-of-title statute. Compliance with a certificate-of-title statute is both unnecessary and ineffective to perfect a security interest in inventory to which this subsection applies. Thus, a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in all the automobiles by filing a financing statement but not by compliance with a certificate-of-title statute.

Subsection (d), and thus the filing and other perfection provisions of this Article, does not apply to inventory that is subject to a certificate-of-title statute and is of a kind that the debtor is not in the business of selling. For example, if goods are subject to a certificate-of-title statute and the debtor is in the business of leasing but not of selling, goods of that kind, the other subsections of this section govern perfection of a security interest in the goods. The fact that the debtor eventually sells the goods does not, of itself, mean that the debtor "is in the business of selling goods of that kind."

The filing and other perfection provisions of this Article apply to goods subject to a certificate-of-title statute only "during any period in which collateral is inventory held for sale or lease or leased." If the debtor takes goods of this kind out of inventory and uses them, say, as equipment, a filed financing statement would not remain effective to perfect a security interest.

5. Compliance with Perfection Requirements of Other Statute. Subsection (b) makes clear that compliance with the perfection require-

ments (i.e., the requirements for obtaining priority over a lien creditor), but not other requirements, of a statute, regulation, or treaty described in subsection (a) is sufficient for perfection under this Article. Perfection of a security interest under such a statute, regulation, or treaty has all the consequences of perfection under this Article.

The interplay of this section with certain certificate-of-title statutes may create confusion and uncertainty. For example, statutes under which perfection does not occur until a certificate of title is issued will create a gap between the time that the goods are covered by the certificate under Section 9-303 and the time of perfection. If the gap is long enough, it may result in turning some unobjectionable transactions into avoidable preferences under Bankruptcy Code Section 547. (The preference risk arises if more than 10 days (or 20 days, in the case of a purchase-money security interest) passes between the time a security interest attaches (or the debtor receives possession of the collateral, in the case of a purchase-money security interest) and the time it is perfected.) Accordingly, the Legislative Note to this section instructs the legislature to amend the applicable certificate-of-title statute to provide that perfection occurs upon receipt by the appropriate State official of a properly tendered application for a certificate of title on which the security interest is to be indicated.

Under some certificate-of-title statutes, including the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, perfection generally occurs upon delivery of specified documents to a state official but may, under certain circumstances, relate back to the time of attachment. This relation-back feature can create great difficulties for the application of the rules in Sections 9-303 and 9-311(b). Accordingly, the Legislative Note also recommends to legislatures that they remove any relation-back provisions from certificate-of-title statutes affecting security interests.

6. Compliance with Perfection Requirements of Other Statute as Equivalent to Filing. Under Subsection (b), compliance with the perfection requirements (i.e., the requirements for obtaining priority over a lien creditor) of a statute, regulation, or treaty described in subsection (a) "is equivalent to the filing of a financing statement."

The quoted phrase appeared in former Section 9-302(3). Its meaning was unclear, and many questions arose concerning the extent to which and manner in which Article 9 rules referring to "filing" were applicable to perfection by compliance with a certificate-of-title statute. This Article takes a variety of approaches for applying Article 9's filing rules to compliance with other statutes and treaties. First, as discussed above in Comment 5, it leaves the determination of some rules, such as the rule establishing time of perfection (Section 9-516(a)), to the other statutes themselves. Second, this Article explicitly applies some Article 9 filing rules to perfection under other statutes or treaties. See, e.g., Section 9-505. Third, this Article makes other Article 9 rules applicable to security interests perfected by compliance with another statute through the "equivalent to ... filing" provision in the first sentence of Section 9-311(b). The third approach is reflected for the most part in occasional Comments explaining how particular rules apply when perfection is accomplished under Section 9-311(b). See, e.g., Section 9-310, Comment 4; Section 9-315, Comment 6; Section 9-317, Comment 8. The absence of a Comment indicating that a particular filing provision applies to perfection pursuant to Section 9-311(b) does not mean the provision is inapplicable.

7. Perfection by Possession of Goods Covered by Certificate-of-Title Statute. A secured party who holds a security interest perfected under the law of State A in goods that subsequently are covered by a State B certificate of title may face a predicament.

Ordinarily, the secured party will have four months under State B's Section 9-316(c) and (d) in which to (re)perfect as against a purchaser of the goods by having its security interest noted on a State B certificate. This procedure is likely to require the cooperation of the debtor and any competing secured party whose security interest has been noted on the certificate. Comment 4(e) to former Section 9-103 observed that "that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party." According to that Comment, "[t]he only solution for the out-of-state secured party under present certificate of title statutes seems to be to reperfect by possession, i.e., by repossessing the goods."

But the "solution" may not have worked: Former Section 9-302(4) provided that a security interest in property subject to a certificate-of-title statute "can be perfected only by compliance therewith."

Sections 9-316(d) and (e), 9-311(c), and 9-313(b) of this Article resolve the conflict by providing that a security interest that remains perfected solely by virtue of Section 9-316(e) can be (re)perfected by the secured party's taking possession of the collateral. These sections contemplate only that taking possession of goods covered by a certificate of title will work as a method of perfection. None of these sections creates a right to take possession. Section 9-609 and the agreement of the parties define the secured party's right to take possession.

CASE NOTES

In general.

While the District of Columbia Uniform Commercial Code (UCC) imposed general requirements for perfection of security interests, which altered common law rule of "first in time, first in right," those requirements, which by their terms were not applicable to security interest in motor vehicle, did not vary or displace common law requirements for perfection of security interest in vehicle. McCarthy v. BMW Bank of N. Am. (In re Dorton), 346 B.R. 271, 2006 U.S. Dist. LEXIS 54577 (2006), reversed by, remanded by 509 F.3d 528, 379 U.S. App. D.C. 1, 2007 U.S. App. LEXIS 27217, 64 U.C.C. Rep. Serv. 2d (CBC) 549 (2007).

§ 28:9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.

(a) A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) Except as otherwise provided in § 28:9-315(c) and (d) for proceeds:

(1) A security interest in a deposit account may be perfected only by control under § 28:9-314;

(2) And except as otherwise provided in § 28:9-308(d), a security interest in a letter-of-credit right may be perfected only by control under § 28:9-314; and

(3) A security interest in money may be perfected only by the secured party's taking possession under § 28:9-313.

(c) While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) A security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) Issuance of a document in the name of the secured party;

(2) The bailee's receipt of notification of the secured party's interest; or

(3) Filing as to the goods.

(e) A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

(1) Ultimate sale or exchange; or

(2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) Ultimate sale or exchange; or

(2) Presentation, collection, enforcement, renewal, or registration of transfer.

(h) After the 20-day period specified in subsection (e), (f), or (g) expires, perfection depends upon compliance with this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(i), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-310, § 28:9-323, and § 28:9-324.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "or control" following "possession" in (e).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-304, with additions and some changes.

2. Instruments. Under subsection (a), a security interest in instruments may be perfected by filing. This rule represents an important change from former Article 9, under which the secured party's taking possession of an instrument was the only method of achieving long-term perfection. The rule is likely to be particularly useful in transactions involving a large number of notes that a debtor uses as collateral but continues to collect from the makers. A security interest perfected by filing is subject to defeat by certain subsequent purchasers (including secured parties). Under Section 9-330(d), purchasers for value who take possession of an instrument without knowledge that the purchase violates the rights of the secured party generally would achieve priority over a security interest in the instrument perfected by filing. In addition, Section 9-331 provides that filing a financing statement does not constitute notice that would preclude a subsequent purchaser from becoming a holder in due course and taking free of all claims under Section 3-306.

3. Chattel Paper; Negotiable Documents. Subsection (a) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents. Tangible chattel paper is sometimes delivered to the assignee, and sometimes left in the hands of the assignor for collection. Subsection (a) allows the assignee to perfect its security interest by filing in the latter case. Alternatively, the assignee may perfect by taking possession. See Section 9-313(a). An assignee of electronic chattel paper may perfect by taking control. See Sections 9-314(a), 9-105. The security interest of an assignee who takes possession or control may qualify for priority over a competing security interest perfected by filing. See Section 9-330.

Negotiable documents may be, and usually are, delivered to the secured party. The secured party's taking possession will suffice as a perfection step. See Section 9-313(a). However, as is the case with chattel paper, a security interest in a negotiable document may be perfected by filing.

4. Investment Property. A security interest in investment property, including certificated securities, uncertificated securities, security entitlements, and securities accounts, may be perfected by filing. However, security interests created by brokers, securities intermediaries, or commodity intermediaries are automatically perfected; filing is of no effect. See Section 9-309(10), (11). A security interest in all kinds of investment property also may be perfected by control, see Sections 9-314, 9-106, and a security interest in a certificated security also may be perfected by the secured party's taking delivery under Section 8-301. See Section 9-313(a). A security interest perfected only by filing is subordinate to a conflicting security

interest perfected by control or delivery. See Section 9-328(1), (5). Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains control. Also, perfection by filing would not give the secured party protection against other types of adverse claims, since the Article 8 adverse claim cut-off rules require control. See Section 8-510.

5. Deposit Accounts. Under new subsection (b)(1), the only method of perfecting a security interest in a deposit account as original collateral is by control. Filing is ineffective, except as provided in Section 9-315 with respect to proceeds. As explained in Section 9-104, "control" can arise as a result of an agreement among the secured party, debtor, and bank, whereby the bank agrees to comply with instructions of the secured party with respect to disposition of the funds on deposit, even though the debtor retains the right to direct disposition of the funds. Thus, subsection (b)(1) takes an intermediate position between certain non-UCC law, which conditions the effectiveness of a security interest on the secured party's enjoyment of such dominion and control over the deposit account that the debtor is unable to dispose of the funds, and the approach this Article takes to securities accounts, under which a secured party who is unable to reach the collateral without resort to judicial process may perfect by filing. By conditioning perfection on "control," rather than requiring the secured party to enjoy absolute dominion to the exclusion of the debtor, subsection (b)(1) permits perfection in a wide variety of transactions, including those in which the secured party actually relies on the deposit account in extending credit and maintains some meaningful dominion over it, but does not wish to deprive the debtor of access to the funds altogether.

6. Letter-of-Credit Rights. Letter-of-credit rights commonly are "supporting obligations," as defined in Section 9-102. Perfection as to the related account, chattel paper, document, general intangible, instrument, or investment property will perfect as to the letter-of-credit rights. See Section 9-308(d). Subsection (b)(2) provides that, in other cases, a security interest in a letter-of-credit right may be perfected only by control. "Control," for these purposes, is explained in Section 9-107.

7. Goods Covered by Document of Title. Subsection (c) applies to goods in the possession of a bailee who has issued a negotiable document covering the goods. Subsection (d) applies to goods in the possession of a bailee who has issued a nonnegotiable document of title, including a document of title that is "non-negotiable" under Section 7-104. Section 9-313 governs perfection of a security interest in goods in the possession of a bailee who has not issued a document of title.

Subsection (c) clarifies the perfection and priority rules in former Section 9-304(2). Consistently with the provisions of Article 7, subsection (c) takes the position that, as long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document. Accordingly, a security interest in goods covered by a negotiable document may be perfected by perfecting a security interest in the document. The security interest also may be perfected by another method, e.g., by filing. The priority rule in subsection (c) governs only priority between (i) a security interest in goods which is perfected by perfecting in the document and (ii) a security interest in the goods which becomes perfected by another method while the goods are covered by the document.

Example 1: While wheat is in a grain elevator and covered by a negotiable warehouse receipt, Debtor creates a security interest in the wheat in favor of SP-1 and SP-2. SP-1 perfects by filing a financing statement covering "wheat." Thereafter, SP-2 perfects by filing a financing statement describing the warehouse receipt. Subsection (c)(1) provides that SP-2's security interest is perfected. Subsection (c)(2) provides that SP-2's security interest is senior to SP-1's.

Example 2: The facts are as in Example 1, but SP-1's security interest attached and was perfected before the goods were delivered to the grain elevator. Subsection (c)(2) does not apply, because SP-1's security interest did not become perfected during the time that the wheat was in the possession of a bailee. Rather, the first-to-file-or-perfect priority rule applies. See Section 9-322.

A secured party may become "a holder to whom a negotiable document of title has been duly negotiated" under Section 7-501. If so, the secured party acquires the rights specified by Article 7. Article 9 does not limit those rights, which may include the right to priority over an earlier-perfected security interest. See Section 9-331(a).

Subsection (d) takes a different approach to the problem of goods covered by a nonnegotiable document. Here, title to the goods is not looked on as being locked up in the document, and the secured party may perfect its security interest directly in the goods by filing as to them. The subsection provides two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of notification of the secured party's interest by the bailee. Perfection under subsection (d) occurs when the bailee receives notification of the secured party's interest in the goods, regardless of who

sends the notification. Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike former Section 9-304(3), from which it derives, subsection (d) does not apply to goods in the possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case and provides that perfection by possession as to goods not covered by a document requires the bailee's acknowledgment.

8. Temporary Perfection Without Having First Otherwise Perfected. Subsection (e) follows former Section 9-304(4) in giving perfected status to security interests in certificated securities, instruments, and negotiable documents for a short period (reduced from 21 to 20 days, which is the time period generally applicable in this Article), although there has been no filing and the collateral is in the debtor's possession. The 20-day temporary perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given "new value" (defined in Section 9-102) under an authenticated security agreement.

9. Maintaining Perfection After Surrendering Possession. There are a variety of legitimate reasons-many of them are described in subsections (f) and (g)-why certain types of collateral must be released temporarily to a debtor. No useful purpose would be served by cluttering the files with records of such exceedingly short term transactions.

Subsection (f) affords the possibility of 20-day perfection in negotiable documents and goods in the possession of a bailee but not covered by a negotiable document. Subsection (g) provides for 20-day perfection in certificated securities and instruments. These subsections derive from former Section 9-305(5). However, the period of temporary perfection has been reduced from 21 to 20 days, which is the time period generally applicable in this Article, and "enforcement" has been added in subsection (g) as one of the special and limited purposes for which a secured party can release an instrument or certificated security to the debtor and still remain perfected. The period of temporary perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor. There is no new value requirement, but the turnover must be for one or more of the purposes stated in subsection (f) or (g). The 20-day period may be extended by perfecting as to the collateral by another method before the period expires. However, if the security interest is not perfected by another method until after the 20-day period expires, there will be a gap during which the security interest is unperfected.

Temporary perfection extends only to the negotiable document or goods under subsection (f) and only to the certificated security or instrument under subsection (g). It does not extend to proceeds. If the collateral is sold, the security interest will continue in the proceeds for the period specified in Section 9-315.

Subsections (f) and (g) deal only with perfection. Other sections of this Article govern the priority of a security interest in goods after surrender of the document covering them. In the case of a purchase-money security interest in inventory, priority may be conditioned upon giving notification to a prior inventory financer. See Section 9-324.

CASE NOTES

ANALYSIS

Construction and application.

Writing which acknowledged bank's receipt of money and manifested bank's engagement to repay it qualified as "certificate of deposit" (CD) subject to Article 9, without regard to whether writing could be transferred or negotiated. U.C.C. § 9-105(1)(e). Drabkin v. Capital Bank, N.A., 156 B.R. 102, 1993 Bankr. LEXIS 963 (1993).

Nonperfected security interests.

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Possession by secured party.

Transaction by which bank in possession of debtor's fund-raising proceeds pursuant to security interest simultaneously credited and debited funds to debtor's account, for purposes of record keeping and compliance with federal election laws, was not lapse in possession and thus did not destroy bank's perfected security interest; funds only momentarily passed through debtor's account, never left bank and were never made available for debtor's use and thus could not have misled third parties to believe that debtor had control of funds. Federal Election Campaign Act of 1971, § 302(h)(1), 2 U.S.C. § 432(h)(1); D.C. Code 1981, §§ 28:1-101 to 28:10-104, 28:9-203(1)(a),

28:9-304(1). Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc., 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

§ 28:9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) Except as otherwise provided in subsection (b), a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under § 28:8-301.

(b) With respect to goods covered by a certificate of title issued by the District, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in § 28:9-316(d).

(c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under § 28:8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or § 28:8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(j), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-203, § 28:9-310, § 28:9-311, § 28:9-312, § 28:9-316, § 28:9-320, and § 28:9-328.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "tangible" preceding "negotiable documents" in the first sentence of (a).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-305, 9-115(6).

2. Perfection by Possession. As under the common law of pledge, no filing is required by this Article to perfect a security interest if the secured party takes possession of the collateral. See Section 9-310(b)(6).

This section permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, negotiable documents, money, or tangible chattel paper. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction are excluded. (But see Comment 6, below, regarding certificated securities.) A security interest in accounts and payment intangibles-property not ordinarily represented by any writing whose delivery operates to transfer the right to payment-may under this Article be perfected only by filing. This rule would not be affected by the fact that a security agreement or other record described the assignment of such collateral as a "pledge." Section 9-309(2) exempts from filing certain assignments of accounts or payment intangibles which are out of the ordinary course of financing. These exempted assignments are perfected when they attach. Similarly, under Section 9-309(3), sales of payment intangibles are automatically perfected.

3. "Possession." This section does not define "possession." It adopts the general concept as it developed under former Article 9. As under former Article 9, in determining whether a particular person has possession, the principles of agency apply. For example, if the collateral is in possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession, and subsection (c) does not apply. Sometimes a person holds collateral both as an agent of the secured party and as an agent of the debtor. The fact of dual agency is not of itself inconsistent with the secured party's having taken possession (and thereby having rendered subsection (c) inapplicable). The debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession. And, under appropriate circumstances, a court may determine that a person in possession is so closely connected to or controlled by the debtor that the debtor has retained effective possession, even though the person may have agreed to take possession on behalf of the secured party. If so, the person's taking possession would not constitute the secured party's taking possession and would not be sufficient for perfection. See also Section 9-205(b). In a typical escrow arrangement, where the escrowee has possession of collateral as agent for both the secured party and the debtor, the debtor's relationship to the escrowee is not such as to constitute retention of possession by the debtor.

4. Goods in Possession of Third Party: Perfection. Former Section 9-305 permitted perfection of a security interest by notification to a bailee in possession of collateral. This Article distinguishes between goods in the possession of a bailee who has issued a document of title covering the goods and goods in the possession of a third party who has not issued a document. Section 9-312(c) or (d) applies to the former, depending on whether the document is negotiable. Section 9-313(c) applies to the latter. It provides a method of perfection by possession when the collateral is possessed by a third person who is not the secured party's agent.

Notification of a third person does not suffice to perfect under Section 9-313(c). Rather, perfection does not occur unless the third person

authenticates an acknowledgment that it holds possession of the collateral for the secured party's benefit. Compare Section 9-312(d), under which receipt of notification of the security party's interest by a bailee holding goods covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not acknowledge receipt of the notification. A third person may acknowledge that it will hold for the secured party's benefit goods to be received in the future. Under these circumstances, perfection by possession occurs when the third person obtains possession of the goods.

Under subsection (c), acknowledgment of notification by a "lessee ... in ... ordinary course of ... business" (defined in Section 2A-103) does not suffice for possession. The section thus rejects the reasoning of In re Atlantic Systems, Inc., 135 B.R. 463 (Bankr. S.D.N.Y.1992) (holding that notification to debtor-lessor's lessee sufficed to perfect security interest in leased goods). See Steven O. Weise, Perfection by Possession: The Need for an Objective Test, 29 Idaho Law Rev. 705 (1992-93) (arguing that lessee's possession in ordinary course of debtor-lessor's business does not provide adequate public notice of possible security interest in leased goods). Inclusion of a per se rule concerning lessees is not meant to preclude a court, under appropriate circumstances, from determining that a third person is so closely connected to or controlled by the debtor that the debtor has retained effective possession. If so, the third person's acknowledgment would not be sufficient for perfection.

In some cases, it may be uncertain whether a person who has possession of collateral is an agent of the secured party or a non-agent bailee. Under those circumstances, prudence might suggest that the secured party obtain the person's acknowledgment to avoid litigation and ensure perfection by possession regardless of how the relationship between the secured party and the person is characterized.

5. No Relation Back. Former Section 9-305 provided that a security interest is perfected by possession from the time possession is taken "without a relation back." As the Comment to former Section 9-305 observed, the relation-back theory, under which the taking of possession was deemed to relate back to the date of the original security agreement, has had little vitality since the 1938 revision of the Federal Bankruptcy Act. The theory is inconsistent with former Article 9 and with this Article. See Section 9-313(d). Accordingly, this Article deletes the quoted phrase as unnecessary. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected. The only exceptions to this rule are the short, 20-day periods of perfection provided in Section 9-312(e), (f), and (g), during which a debtor may have possession of specified collateral in which there is a perfected security interest.

6. Certificated Securities. The second sentence of subsection (a) reflects the traditional rule for perfection of a security interest in certificated securities. Compare Section 9-115(6) (1994 Official Text); Sections 8-321, 8-313(1)(a) (1978 Official Text); Section 9-305 (1972 Official Text). It has been modified to refer to "delivery" under Section 8-301. Corresponding changes appear in Section 9-203(b).

Subsections (e), (f), and (g), which are new, apply to a person in possession of security certificates or holding security certificates for the secured party's benefit under Section 8-301. For delivery to occur when a person other than a secured party holds possession for the secured party, the person may not be a securities intermediary.

Under subsection (e), a possessory security interest in a certificated security remains perfected until the debtor obtains possession of the security certificate. This rule is analogous to that of Section 9-314(c), which deals with perfection of security interests in investment property by control. See Section 9-314, Comment 3.

7. Goods Covered by Certificate of Title. Subsection (b) is necessary to effect changes to the choice-of-law rules governing goods covered by a certificate of title. These changes are described in the Comments to Section 9-311. Subsection (b), like subsection (a), does not create a right to take possession. Rather, it indicates the circumstances under which the secured party's taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods: the goods become covered by a certificate of title issued by this State at a time when the security interest is perfected by any method under the law of another jurisdiction.

8. Goods in Possession of Third Party: No Duty to Acknowledge; Consequences of Acknowledgment. Subsections (f) and (g) are new and address matters as to which former Article 9 was silent. They derive in part from Section 8-106(g). Subsection (f) provides that a person in possession of collateral is not required to acknowledge that it holds for a secured party. Subsection (g)(1) provides that an acknowledgment is effective even if wrongful as to the debtor. Subsection (g)(2) makes clear that an acknowledgment does not give rise to any duties or responsibilities under this Article. Arrangements involving the possession of goods are hardly standardized. They include bailments for services to be performed on the goods (such as repair or processing), for use (leases), as security (pledges), for carriage, and for storage. This Article leaves to the agreement of the parties and to any other applicable law the imposition of duties and responsibili-

ties upon a person who acknowledges under subsection (c). For example, by acknowledging, a third party does not become obliged to act on the secured party's direction or to remain in possession of the collateral unless it agrees to do so or other law so provides.

9. Delivery to Third Party by Secured Party. New subsections (h) and (i) address the practice of mortgage warehouse lenders. These lenders typically send mortgage notes to prospective purchasers under cover of letters advising the prospective purchasers that the lenders hold security interests in the notes. These lenders relied on notification to maintain perfection under former 9-305. Requiring them to obtain authenticated acknowledgments from each prospective purchaser under subsection (c) could be unduly burdensome and disruptive of established practices. Under subsection (h), when a secured party in possession itself delivers the collateral to a third party, instructions to the third party would be sufficient to maintain perfection by possession; an acknowledgment would not be necessary. Under subsection (i), the secured party does not relinquish possession by making a delivery under subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes clear that a person to whom collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article provides otherwise.

CASE NOTES

Analysis

"Instrument".
Possession by secured party.

"Instrument".

Whether writing is of kind "customarily transferred by delivery in ordinary course of business," so as to qualify as "instrument" a security interest in which can be perfected by possession, depends on current usage of marketplace and on actual business practices, without regard to whether writing has been labeled "non-negotiable" or "non-transferable" by parties. U.C.C. § 9-105(1)(i). Drabkin v. Capital Bank, N.A., 156 B.R. 102, 1993 Bankr. LEXIS 963 (1993).

Writing does not qualify as "instrument," a security interest in which can be perfected by possession, merely because it is of type customarily presented for payment. U.C.C. § 9-105(1)(i). Drabkin v. Capital Bank, N.A., 156 B.R. 102, 1993 Bankr. LEXIS 963 (1993).

Mere fact that hypothecation agreement executed by parties may have rendered an otherwise nontransferable writing transferable in some limited fashion was not determinative of whether writing was of kind "customarily transferred by delivery in ordinary course of business," so as to qualify as "instrument" under Article 9, a security interest in which could be perfected by possession. U.C.C. § 9-105(1)(i). Drabkin v. Capital Bank, N.A., 156 B.R. 102, 1993 Bankr. LEXIS 963 (1993).

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

Possession by secured party.

Transaction by which bank in possession of debtor's fund-raising proceeds pursuant to security interest simultaneously credited and debited funds to debtor's account, for purposes of record keeping and compliance with federal election laws, was not lapse in possession and thus did not destroy bank's perfected security interest; funds only momentarily passed through debtor's account, never left bank and were never made available for debtor's use and thus could not have misled third parties to believe that debtor had control of funds. Federal Election Campaign Act of 1971, § 302(h)(1), 2 U.S.C. § 432(h)(1); D.C. Code 1981, §§ 28:1-101 to 28:10-104, 28:9-203(1)(a), 28:9-304(1). Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc., 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

Bank had continuously perfected security interest in proceeds from sale of debtor's prints, in which bank originally had perfected security interest; bank took possession of proceeds within statutory ten-day period. D.C. Code 1981, §§ 28:9-305, 28:9-306(3)(c). Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc., 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

To have perfected security interest in rents, under District of Columbia law, mortgagee must first obtain possession of premises either by consent or by appointment of receiver. In re 1726 Washington, D.C. Partners, 120 B.R. 1, 1990 Bankr. LEXIS 2201 (1990).

§ 28:9-314. Perfection by control.

(a) A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral under § 28:7-106, § 28:9-104, § 28:9-105, § 28:9-106, or § 28:9-107.

(b) A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights, or electronic documents is perfected by control under § 28:7-106, § 28:9-104, § 28:9-105, or § 28:9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) A security interest in investment property is perfected by control under § 28:9-106 from the time the secured party obtains control and remains perfected by control until:

(1) The secured party does not have control; and

(2) One of the following occurs:

(A) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(k), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-310, § 28:9-312, § 28:9-327, § 28:9-328, and § 28:9-329.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 rewrote (a) and (b).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Substantially new; derived in part from former Section 9-115(4).

2. Control. This section provides for perfection by control with respect to investment property, deposit accounts, letter-of-credit rights, and electronic chattel paper. For explanations of how a secured party takes control of these types of collateral, see Sections 9-104 through 9-107. Subsection (b) explains when a security interest is perfected by control and how long a security interest remains perfected by control. Like Section 9-313(d) and for the same reasons, subsection (b) makes no reference to the doctrine of "relation back." See Section 9-313, Comment 5.

3. Investment Property. Subsection (c) provides a special rule for investment property. Once a secured party has control, its security interest remains perfected by control until the secured party ceases to have control and the debtor receives possession of collateral that is a certificated security, becomes the registered owner of collateral that is an uncertificated security, or becomes the entitlement holder of collateral that is a security entitlement. The result is particularly important in the "repledge" context. See Section 9-207, Comment 5.

In a transaction in which a secured party who has control grants a security interest in investment property or sells outright the investment property, by virtue of the debtor's consent or applicable legal rules, a purchaser from the secured party typically will cut off the debtor's rights in the investment property or be immune from the debtor's claims. See Section 9-207, Comments 5 and 6.

If the investment property is a security, the debtor normally would retain no interest in the security following the purchase from the secured party, and a claim of the debtor against

the secured party for redemption (Section 9-623) or otherwise with respect to the security would be a purely personal claim. If the investment property transferred by the secured party is a financial asset in which the debtor had a security entitlement credited to a securities account maintained with the secured party as a securities intermediary, the debtor's claim against the secured party could arise as a part of its securities account notwithstanding its personal nature. (This claim would be analogous to a "credit balance" in the securities account, which is a component of the securities account even though it is a personal claim against the intermediary.) In the case in which the debtor may retain an interest in investment property notwithstanding a repledge or sale by the secured party, subsection (c) makes clear that the security interest will remain perfected by control.

§ 28:9-315. Secured party's rights on disposition of collateral and in proceeds.

(a) Except as otherwise provided in this article and in § 28:2-403(2):

(1) A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) A security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

(1) If the proceeds are goods, to the extent provided by § 28:9-336; and

(2) If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.

(c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless:

(1) The following conditions are satisfied:

(A) A filed financing statement covers the original collateral;

(B) The proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) The proceeds are not acquired with cash proceeds;

(2) The proceeds are identifiable cash proceeds; or

(3) The security interest in the proceeds is perfected other than under subsection (c) when the security interest attaches to the proceeds or within 20 days thereafter.

(e) If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subsection (d)(1) becomes unperfected at the later of:

(1) When the effectiveness of the filed financing statement lapses under § 28:9-515 or is terminated under § 28:9-513; or

(2) The 21st day after the security interest attaches to the proceeds.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109, § 28:9-203, § 28:9-310, § 28:9-312, § 28:9-509, and § 28:9-607.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-306.

2. Continuation of Security Interest or Agricultural Lien Following Disposition of Collateral. Subsection (a)(1), which derives from former Section 9-306(2), contains the general rule that a security interest survives disposition of the collateral. In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim both any proceeds and the original collateral but, of course, may have only one satisfaction.

In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceeds. For example, the general rule does not apply, and a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement or otherwise. Subsection (a)(1) adopts the view of PEB Commentary No. 3 and makes explicit that the authorized disposition to which it refers is an authorized disposition "free of" the security interest or agricultural lien. The secured party's right to proceeds under this section or under the express terms of an agreement does not in itself constitute an authorization of disposition. The change in language from former Section 9-306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned upon the secured party's receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former Article 9.

This Article contains several provisions under which a transferee takes free of a security interest or agricultural lien. For example, Section 9-317 states when transferees take free of unperfected security interests; Sections 9-320 and 9-321 on goods, 9-321 on general intangibles, 9-330 on chattel paper and instruments, and 9-331 on negotiable instruments, negotiable documents, and securities state when purchasers of such collateral take free of a security interest, even though perfected and even though the disposition was not authorized. Section 9-332 enables most transferees (including non-purchasers) of funds from a deposit account and most transferees of money to take free of a perfected security interest in the deposit account or money.

Likewise, the general rule that a security interest survives disposition does not apply if the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in ordinary course of business. Section 2-403(2) gives the merchant the power to transfer all the secured party's rights to the buyer, even if the sale is wrongful as against the secured party. Thus, under subsection (a)(1), an entrusting secured party runs the same risk as any other entruster.

3. Secured Party's Right to Identifiable Proceeds. Under subsection (a)(2), which derives from former Section 9-306(2), a security interest attaches to any identifiable "proceeds," as defined in Section 9-102. See also Section 9-203(f). Subsection (b) is new. It indicates when proceeds commingled with other property are identifiable proceeds and permits the use of whatever methods of tracing other law permits with respect to the type of property involved. Among the "equitable principles" whose use other law may permit is the "lowest intermediate balance rule." See Restatement (2d), Trusts s 202.

4. Automatic Perfection in Proceeds: General Rule. Under subsection (c), a security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected. This Article extends the period of automatic perfection in proceeds from 10 days to 20 days. Generally, a security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds. See subsection (d). The loss of perfected status under subsection (d) is prospective only. Compare, e.g., Section 9-515(c) (deeming security interest unperfected retroactively).

5. Automatic Perfection in Proceeds: Proceeds Acquired with Cash Proceeds. Subsection (d)(1) derives from former Section 9-306(3)(a). It carries forward the basic rule that a security interest in proceeds remains perfected beyond the period of automatic perfection if a filed financing statement covers the original collateral (e.g., inventory) and the proceeds are collateral in which a security interest may be perfected by filing in the office where the financing statement has been filed (e.g., equipment). A different rule applies if the proceeds are acquired with cash proceeds, as is the case if the original collateral (inventory) is sold for cash (cash proceeds) that is used to purchase equipment (proceeds). Under these circumstances, the security interest in the equipment

proceeds remains perfected only if the description in the filed financing indicates the type of property constituting the proceeds (e.g., "equipment").

This section reaches the same result but takes a different approach. It recognizes that the treatment of proceeds acquired with cash proceeds under former Section 9-306(3)(a) essentially was superfluous. In the example, had the filing covered "equipment" as well as "inventory," the security interest in the proceeds would have been perfected under the usual rules governing after-acquired equipment (see former Sections 9-302, 9-303); paragraph (3)(a) added only an exception to the general rule. Subsection (d)(1)(C) of this section takes a more direct approach. It makes the general rule of continued perfection inapplicable to proceeds acquired with cash proceeds, leaving perfection of a security interest in those proceeds to the generally applicable perfection rules under subsection (d)(3).

Example 1: Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "inventory." Debtor sells the inventory and deposits the buyer's check into a deposit account. Debtor draws a check on the deposit account and uses it to pay for equipment. Under the "lowest intermediate balance rule," which is a permitted method of tracing in the relevant jurisdiction, see Comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend perfection beyond the 20-day automatic period.

Example 2: Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "all debtor's property." As in Example 1, Debtor sells the inventory, deposits the buyer's check into a deposit account, draws a check on the deposit account, and uses the check to pay for equipment. Under the "lowest intermediate balance rule," which is a permitted method of tracing in the relevant jurisdiction, see Comment 3, the funds used to pay for the equipment were identifiable proceeds of the inventory. Because the proceeds (equipment) were acquired with cash proceeds (deposit account), subsection (d)(1) does not extend perfection beyond the 20-day automatic period. However, because the financing statement is sufficient to perfect a security interest in debtor's equipment, under subsection (d)(3) the security interest in the equipment proceeds remains perfected beyond the 20-day period.

6. Automatic Perfection in Proceeds: Lapse or Termination of Financing Statement During 20-Day Period; Perfection Under Other Statute or Treaty. Subsection (e) provides that a security interest in proceeds perfected under subsection (d)(1) ceases to be perfected when the financing statement covering the original collateral lapses or is terminated. If the lapse or termination occurs before the 21st day after the security interest attaches, however, the security interest in the proceeds remains perfected until the 21st day. Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in Section 9-311(a) "is equivalent to the filing of a financing statement." It follows that collateral subject to a security interest perfected by such compliance under Section 9-311(b) is covered by a "filed financing statement" within the meaning of Section 9-315(d) and (e).

7. Automatic Perfection in Proceeds: Continuation of Perfection in Cash Proceeds. Former Section 9-306(3)(b) provided that if a filed financing statement covered original collateral, a security interest in identifiable cash proceeds of the collateral remained perfected beyond the ten-day period of automatic perfection. Former Section 9-306(3)(c) contained a similar rule with respect to identifiable cash proceeds of investment property. Subsection (d)(2) extends the benefits of former Sections 9-306(3)(b) and (3)(c) to identifiable cash proceeds of all types of original collateral in which a security interest is perfected by any method. Under subsection (d)(2), if the security interest in the original collateral was perfected, a security interest in identifiable cash proceeds will remain perfected indefinitely, regardless of whether the security interest in the original collateral remains perfected. In many cases, however, a purchaser or other transferee of the cash proceeds will take free of the perfected security interest. See, e.g., Sections 9-330(d) (purchaser of check), 9-331 (holder in due course of check), 9-332 (transferee of money or funds from a deposit account).

8. Insolvency Proceedings; Returned and Repossessed Goods. This Article deletes former Section 9-306(4), which dealt with proceeds in insolvency proceedings. Except as otherwise provided by the Bankruptcy Code, the debtor's entering into bankruptcy does not affect a secured party's right to proceeds.

This Article also deletes former Section 9-306(5), which dealt with returned and repossessed goods. Section 9-330, Comments 9 to 11 explain and clarify the application of priority rules to returned and repossessed goods as proceeds of chattel paper.

9. Proceeds of Collateral Subject to Agricultural Lien. This Article does not determine whether a lien extends to proceeds of farm products encumbered by an agricultural lien. If, however, the proceeds are themselves farm products on which an "agricultural lien" (defined in Section 9-102) arises under other law, then the agricultural-lien provisions of this Article apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds.

CASE NOTES

ANALYSIS

"Inventory".
Construction and application.
Possession of proceeds.
Punitive damages.
Setoff.

"Inventory".

As between the same parties and at the same point in time, a product cannot be classified as both "inventory" and "consumer goods." Code Md.1957, art. 95B,§§ 9-109, 9-109(1, 4), 9-307, 9-307(1, 2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Automobile held by used car dealer for purpose of sale to buying public in ordinary course of business was "inventory" and remained so despite subsequent sale of automobile, and, thus, under provision of Uniform Commercial Code buyer of automobile in ordinary course of business bought free of security interest of dealer's chattel mortgagee. Code Md.1957, art. 95B, §§ 9-109(1, 4), 9-306, 9-307(1, 2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Construction and application.

Issues in suit by buyer of automobile against chattel mortgagee, which held mortgage created by seller and which repossessed automobile, were governed by provisions of Uniform Commercial Code, so that determination of issues in accordance with theory of estoppel constituted error; however, where judgment of trial judge was correct, such error did not require reversal. Code Md.1957, art. 95B, § 1-101 et seq. Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Possession of proceeds.

Bank had continuously perfected security interest in proceeds from sale of debtor's prints, in which bank originally had perfected security interest; bank took possession of proceeds within statutory ten-day period. D.C. Code 1981, §§ 28:9-305, 28:9-306(3)(c). Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc., 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

Punitive damages.

Where chattel mortgagee, which held mortgage created by dealer, repossessed automobile without notice to buyer, although it knew that buyer held title to automobile, and obtained new title for automobile on basis of deliberate and materially false representations to Maryland Department of Motor Vehicles, award of punitive damages to buyer in his suit against chattel mortgagee was proper. Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Setoff.

Although under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by judgment creditor of borrower against collateral, bank could exercise common-law right of setoff against borrower's demand accounts on deposit with bank. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

§ 28:9-316. Effect of change in governing law.

(a) A security interest perfected pursuant to the law of the jurisdiction designated in § 28:9-301(1) or 28:9-305(c) remains perfected until the earliest of:

(1) The time perfection would have ceased under the law of that jurisdiction;

(2) The expiration of 4 months after a change of the debtor's location to another jurisdiction; or

(3) The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction; or

(b) If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest

time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) Thereafter the collateral is brought into another jurisdiction; and

(3) Upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Except as otherwise provided in subsection (e), a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from the District remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) A security interest described in subsection (d) becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under § 28:9-311(b) or 28:9-313 are not satisfied before the earlier of:

(1) The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from the District; or

(2) The expiration of 4 months after the goods had become so covered.

(f) A security interest in deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) The time the security interest would have become unperfected under the law of that jurisdiction; or

(2) The expiration of 4 months after a change of the applicable jurisdiction to another jurisdiction.

(g) If a security interest described in subsection (f) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(h) The following rules apply to collateral to which a security interest attaches within 4 months after the debtor changes its location to another jurisdiction:

(1) A financing statement filed before the change pursuant to the law of the jurisdiction designated in § 28:9-301(1) or § 28:9-305(c) is effective to perfect a security interest in the collateral if the financing statement would

have been effective to perfect a security interest in the collateral had the debtor not changed its location.

(2) If a security interest perfected by a financing statement that is effective under paragraph (1) of this subsection becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in § 28:9-301(1) or § 28:9-305(c) or the expiration of the 4-month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(i) If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in § 28:9-301(1) or § 28:9-305(c) and the new debtor is located in another jurisdiction, the following rules apply:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within 4 months after, the new debtor becomes bound under § 28:9-203(d), if the financing statement would have been effective to perfect a security interest in the collateral had the collateral been acquired by the original debtor.

(2) A security interest perfected by the financing statement and which becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in § 28:9-301(1) or § 28:9-305(c) or the expiration of the 4-month period remains perfected thereafter. A security interest that is perfected by the financing statement but which does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(f), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-310, § 28:9-311, § 28:9-313, § 28:9-320, and § 28:9-326.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 substituted "Effect of" for "Continued perfection of security interest following" in the section heading; and added (h) and (i).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-103(1)(d), (2)(b), (3)(e), as modified.

2. Continued Perfection. This section deals with continued perfection of security interests that have been perfected under the law of another jurisdiction. The fact that the law of a particular jurisdiction ceases to govern perfection under Sections 9-301 through 9-307 does not necessarily mean that a security interest perfected under that law automatically becomes unperfected. To the contrary: This section generally provides that a security interest perfected under the law of one jurisdiction remains perfected for a fixed period of time (four months or one year, depending on the circumstances), even though the jurisdiction whose law governs perfection changes. However, cessation of perfection under the law of

the original jurisdiction cuts short the fixed period. The four-month and one-year periods are long enough for a secured party to discover in most cases that the law of a different jurisdiction governs perfection and to reperfect (typically by filing) under the law of that jurisdiction. If a secured party properly reperfects a security interest before it becomes unperfected under subsection (a), then the security interest remains perfected continuously thereafter. See subsection (b).

Example 1: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2005, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected for four months after the move. See subsection (a)(2).

Example 2: Debtor is a general partnership whose chief executive office is in Pennsylvania. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania on May 15, 2002. On April 1, 2007, without Lender's knowledge, Debtor moves its chief executive office to New Jersey. Lender's security interest remains perfected only through May 14, 2007, when the effectiveness of the filed financing statement lapses. See subsection (a)(1). Although, under these facts, Lender would have only a short period of time to discover that Debtor had relocated and to reperfect under New Jersey law, Lender could have protected itself by filing a continuation statement in Pennsylvania before Debtor relocated. By doing so, Lender would have prevented lapse and allowed itself the full four months to discover Debtor's new location and refile there or, if Debtor is in default, to perfect by taking possession of the equipment.

Example 3: Under the facts of Example 2, Lender files a financing statement in New Jersey before the effectiveness of the Pennsylvania financing statement lapses. Under subsection (b), Lender's security interest is continuously perfected beyond May 14, 2007, for a period determined by New Jersey's Article 9.

Subsection (a)(3) allows a one-year period in which to reperfect. The longer period is necessary, because, even with the exercise of due diligence, the secured party may be unable to discover that the collateral has been transferred to a person located in another jurisdiction.

Example 4: Debtor is a Pennsylvania corporation. Lender perfects a security interest in Debtor's equipment by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. They form a Delaware corporation (Newcorp) into which they merge Debtor. The merger effectuates a transfer of the collateral from Debtor to Newcorp, which thereby becomes a debtor and is located in another jurisdiction. Under subsection (a)(3), the security interest remains perfected for one year after the merger. If a financing statement is filed in Delaware against Newcorp within the year following the merger, then the security interest remains perfected thereafter for a period determined by Delaware's Article 9.

Note that although Newcorp is a "new debtor" as defined in Section 9-102, the application of subsection (a)(3) is not limited to transferees who are new debtors. Note also that, under Section 9-507, the financing statement naming Debtor remains effective even though Newcorp has become the debtor.

This section addresses security interests that are perfected (i.e., that have attached and as to which any required perfection step has been taken) before the debtor changes its location. As the following example explains, this section does not apply to security interests that have not attached before the location changes.

Example 5: Debtor is a Pennsylvania corporation. Debtor grants to Lender a security interest in Debtor's existing and after-acquired inventory. Lender perfects by filing in Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware.

They form a Delaware corporation (Newcorp) into which they merge Debtor. By virtue of the merger, Newcorp becomes bound by Debtor's security agreement. See Section 9-203. After the merger, Newcorp acquires inventory to which Lender's security interest attaches. Because Newcorp is located in Delaware, Delaware law governs perfection of a security interest in Newcorp's inventory. See Sections 9-301, 9-307. Having failed to perfect under Delaware law, Lender holds an unperfected security interest in the inventory acquired by Newcorp after the merger. The same result follows regardless of the name of the Delaware corporation (i.e., even if the Delaware corporation and Debtor have the same name). A different result would occur if Debtor and Newcorp were incorporated in the same state. See Section 9-508, Comment 4.

3. Retroactive Unperfection. Subsection (b) sets forth the consequences of the failure to reperfect before perfection ceases under subsection (a): the security interest becomes unperfected prospectively and, as against purchasers for value, including buyers and secured parties, but not as against donees or lien creditors, retroactively. The rule applies to agricultural liens, as well. See also Section 9-515 (taking the same approach with respect to lapse). Although this approach creates the potential for circular priorities, the alternative - retroactive unperfection against lien creditors - would create substantial and unjustifiable preference risks.

Example 6: Under the facts of Example 4, six months after the merger, Buyer bought from Newcorp some equipment formerly owned by Debtor. At the time of the purchase, Buyer took subject to Lender's perfected security interest, of which Buyer was unaware. See Section 9-315(a)(1). However, subsection (b) provides that if Lender fails to reperfect in Delaware within a year after the merger, its security interest becomes unperfected and is deemed never to have been perfected against Buyer. Having given value and received delivery of the equipment without knowledge of the security interest and before it was perfected, Buyer would take free of the security interest. See Section 9-317(b).

Example 7: Under the facts of Example 4, one month before the merger, Debtor created a security interest in certain equipment in favor of Financer, who perfected by filing in Pennsylvania. At that time, Financer's security interest is subordinate to Lender's. See Section 9-322(a)(1). Financer reperfects by filing in Delaware within a year after the merger, but Lender fails to do so. Under subsection (b), Lender's security interest is deemed never to have been perfected against Financer, a purchaser for value. Consequently, under Section 9-322(a)(2), Financer's security interest is now senior.

Of course, the expiration of the time period specified in subsection (a) does not of itself prevent the secured party from later reperfecting under the law of the new jurisdiction. If the secured party does so, however, there will be a gap in perfection, and the secured party may lose priority as a result. Thus, in Example 7, if Lender perfects by filing in Delaware more than one year under the merger, it will have a new date of filing and perfection for purposes of Section 9-322(a)(1). Financer's security interest, whose perfection dates back to the filing in Pennsylvania under subsection (b), will remain senior.

4. Possessory Security Interests. Subsection (c) deals with continued perfection of possessory security interests. It applies not only to security interests perfected solely by the secured party's having taken possession of the collateral. It also applies to security interests perfected by a method that includes as an element of perfection the secured party's having taken possession, such as perfection by taking delivery of a certificated security in registered form, see Section 9-313(a), and perfection by obtaining control over a certificated security. See Section 9-314(a).

5. Goods Covered by Certificate of Title. Subsections (d) and (e) address continued perfection of a security interest in goods covered by a certificate of title. The following examples explain the operation of those subsections.

Example 8: Debtor's automobile is covered by a certificate of title issued by Illinois. Lender perfects a security interest in the automobile by complying with Illinois' certificate-of-title statute. Thereafter, Debtor applies for a certificate of title in Indiana. Six months thereafter, Creditor acquires a judicial lien on the automobile. Under Section 9-303(b), Illinois law ceases to govern perfection; rather, once Debtor delivers the application and applicable fee to the appropriate Indiana authority, Indiana law governs. Nevertheless, under Indiana's Section 9-316(d), Lender's security interest remains perfected until it would become unperfected under Illinois law had no certificate of title been issued by Indiana. (For example, Illinois' certificate-of-title statute may provide that the surrender of an Illinois certificate of title in connection with the issuance of a certificate of title by another jurisdiction causes a security interest noted thereon to become unperfected.) If Lender's security interest remains perfected, it is senior to Creditor's judicial lien.

Example 9: Under the facts in Example 8, five months after Debtor applies for an Indiana certificate of title, Debtor sells the automobile to Buyer. Under subsection (e)(2), because Lender did not reperfect within the four months after the goods became covered by the Indiana certificate of title, Lender's security interest is deemed never to have been perfected against Buyer. Under Section 9-317(b), Buyer is likely to take free of the security interest. Lender could have protected itself by perfecting its security interest either under Indiana's certificate-of-title statute, see Section 9-311, or, if it had a right to do so under an agreement or Section 9-609, by taking possession of the automobile. See Section 9-313(b).

The results in Examples 8 and 9 do not depend on the fact that the original perfection was achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by which a security interest is perfected under the law of another jurisdiction when the goods became covered by a certificate of title from this State.

Section 9-337 affords protection to a limited class of persons buying or acquiring a security interest in the goods while a security interest is perfected under the law of another jurisdiction but after this State has issued a clean certificate of title.

6. Deposit Accounts, Letter-of-Credit Rights, and Investment Property. Subsections (f) and (g) address changes in the jurisdiction of a bank, issuer of an uncertificated security, issuer of or nominated person under a letter of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

7. Agricultural Liens. This section does not apply to agricultural liens.

Example 10: Supplier holds an agricultural lien on corn. The lien arises under an Iowa statute. Supplier perfects by filing a financing statement in Iowa, where the corn is located. See Section 9-302. Debtor stores the corn in Missouri. Assume the Iowa agricultural lien survives or an agricultural lien arises under Missouri law (matters that this Article does not govern). Once the corn is located in Missouri, Missouri becomes the jurisdiction whose law governs perfection. See Section 9-302. Thus, the agricultural lien will not be perfected unless Supplier files a financing statement in Missouri.

Subpart 3. Priority.

§ 28:9-317. Interests that take priority over or take free of unperfected security interest or agricultural lien.

(a) A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under § 28:9-322; and

(2) Except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:

(A) The security interest or agricultural lien is perfected; or

(B) One of the conditions specified in § 28:9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) A licensee of a general intangible or a buyer, other than a secured party, of collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Except as otherwise provided in §§ 28:9-320 and 28:9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(l), 60 DCR 2634; May 1, 2013, D.C. Law 19-302, § 2(g), 60 DCR 2688.)

Section references. — This section is referenced in § 28:2A-307.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "tangible documents" for "documents" in (b); and inserted "electronic documents" in (d).

The 2013 amendment by D.C. Law 19-302 substituted "certificated security" for "security

certificate" in (b); and substituted "collateral other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security" for "accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a certificated security" in (d).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-301, 2A-307(2).

2. Scope of This Section. As did former Section 9-301, this section lists the classes of persons who take priority over, or take free of, an unperfected security interest. Section 9-308 explains when a security interest or agricultural lien is "perfected." A security interest that has attached (see Section 9-203) but as to which a required perfection step has not been taken is "unperfected." Certain provisions have been moved from former Section 9-301. The definition of "lien creditor" now appears in Section 9-102, and the rules governing priority in future advances are found in Section 9-323.

3. Competing Security Interests. Section 9-322 states general rules for determining priority among conflicting security interests and refers to other sections that state special rules of priority in a variety of situations. The security interests given priority under Section 9-322 and the other sections to which it refers take priority in general even over a perfected security interest. A fortiori they take priority over an unperfected security interest.

4. Filed but Unattached Security Interest vs. Lien Creditor. Under former Section 9-301(1)(b), a lien creditor's rights had priority over an unperfected security interest. Perfection required attachment (former Section 9-303) and attachment required the giving of value (former Section 9-203). It followed that, if a secured party had filed a financing statement but the debtor had not entered into a security agreement and value had not yet been given, an intervening lien creditor whose lien arose after filing but before attachment of the security interest acquired rights that are senior to those of the secured party who later gives value.

This result comported with the nemo dat concept: When the security interest attached, the collateral was already subject to the judicial lien.

On the other hand, this approach treated the first secured advance differently from all other advances, even in circumstances in which a security agreement covering the collateral had been entered into before the judicial lien attached. The special rule for future advances in former Section 9-301(4) (substantially reproduced in Section 9-323(b)) afforded priority to a discretionary advance made by a secured party within 45 days after the lien creditor's rights arose as long as the secured party was "perfected" when the lien creditor's lien arose-i.e., as long as the advance was not the first one and an earlier advance had been made.

Subsection (a)(2) revises former Section 9-301(1)(b) and, in appropriate cases, treats the first advance the same as subsequent advances. More specifically, a judicial lien that arises after the security-agreement condition of Section 9-203(b)(3) is satisfied and a financing statement is filed, but before the security interest attaches and becomes perfected is subordinate to all advances secured by the security interest, even the first advance, except as otherwise provided in Section 9-323(b). However, if the security interest becomes unperfected (e.g., because the effectiveness of the filed financing statement lapses) before the judicial lien arises, the security interest is subordinate. If a financing statement is filed but a security interest does not attach, then no priority contest arises. The lien creditor has the only enforceable claim to the property.

5. Security Interest of Consignor or Receivables Buyer vs. Lien Creditor. Section 1-201(37) defines "security interest" to include the interest of most true consignors of goods and the interest of most buyers of certain receivables (accounts, chattel paper, payment intangibles, and promissory notes). A consignee of goods or a seller of accounts or chattel paper each is deemed to have rights in the collateral which a lien creditor may reach, as long as the competing security interest of the consignor or buyer is unperfected. This is so even though, as between the consignor and the debtor-consignee, the latter has only limited rights, and, as between the buyer and debtor-seller, the latter does not have any rights in the collateral. See Sections 9-318 (seller), 9-319 (consignee). Security interests arising from sales of payment intangibles and promissory notes are automatically perfected. See Section 9-309. Accordingly, a subsequent judicial lien always would be subordinate to the rights of a buyer of those types of receivables.

6. Purchasers Other Than Secured Parties. Subsections (b), (c), and (d) afford priority over

an unperfected security interest to certain purchasers (other than secured parties) of collateral. They derive from former Sections 9-301(1)(c), 2A-307(2), and 9-301(d). Former Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are "subordinate" to the rights of certain purchasers. But, as former Comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the phrase "takes free."

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (tangible chattel paper, documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

Normally, there will be no question when a buyer of chattel paper, documents, instruments, or security certificates "receives delivery" of the property. See Section 1-201 (defining "delivery"). However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee "receives delivery" within the meaning of subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods.

The rule of subsection (b) obviously is not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore, with respect to such intangibles (accounts, electronic chattel paper, general intangibles, and investment property other than certificated securities), subsection (d) gives priority to any buyer who gives value without knowledge, and before perfection, of the security interest. A licensee of a general intangible takes free of an unperfected security interest in the general intangible under the same circumstances. Note that a licensee of a general intangible in ordinary course of business takes rights under a nonexclusive license free of security interests created by the licensor, even if perfected. See Section 9-321.

Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts, chattel paper, payment intangibles, or promissory notes is a "secured party" (defined in Section 9-102), and subsections (b) and (d) do not determine priority of the security interest created by the sale. Rather, the priority rules generally applicable to competing security interests apply. See Section 9-322.

7. Agricultural Liens. Subsections (a), (b), and (c) subordinate unperfected agricultural liens in the same manner in which they subordinate unperfected security interests.

8. Purchase-Money Security Interests. Subsection (e) derives from former Section 9-301(2). It provides that, if a purchase-money security interest is perfected by filing no later than 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of buyers, lessees, or lien creditors which arise between the time the security interest attaches and the time of filing. Subsection (e) differs from former Section 9-301(2) in two significant respects. First, subsection (e) protects a purchase-money security interest against all buyers and lessees, not just against transferees in bulk. Second, subsection (e) conditions this protection on filing within 20, as opposed to ten, days after delivery.

Section 9-311(b) provides that compliance with the perfection requirements of a statute or treaty described in Section 9-311(a) "is equivalent to the filing of a financing statement." It follows that a person who perfects a security interest in goods covered by a certificate of title by complying with the perfection requirements of an applicable certificate-of-title statute "files a financing statement" within the meaning of subsection(e).

CASE NOTES

ANALYSIS

"Security".

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instru-

ment"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

First to file.

Generally, party who first notifies public of his security interest in property, either through possession of collateral or filing of his financing treatment, prevails over all other parties with security interest in same collateral, regardless of which party first acquired security interest itself. D.C. Code 1973, §§ 28:9-204(1), 28:9-301(1), 28:9-302, 28:9-303, 28:9-305, 28:9-312(5). Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

Lien creditors.

— After perfection, lien creditors.

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). Heller v. Buchbinder, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

— Prior to perfection.

Because, under District of Columbia law, rights of unperfected secured party were subordinate to rights of one who becomes lien creditor before perfection of security interest, Chapter 7 trustee, as holder of the rights of a hypothetical judgment lien creditor, held rights in debtor's automobile superior to creditor-automobile dealership's rights, and so was entitled to turnover of the vehicle, which had been seized by creditor postpetition. Bankr.Code, 11 U.S.C. §§ 542(a), 544(a)(1); D.C. Code 1981, § 28:9-301(1)(b). McCarthy v. Imported Cars of Md., Inc. (In re Johnson), 230 B.R. 466, 1999 Bankr. LEXIS 141 (1999).

Under District of Columbia law, rights of unperfected secured party are subordinate to rights of one who becomes lien creditor before perfection of the security interest. D.C. Code 1981, § 28:9-301(1)(b). McCarthy v. Imported Cars of Md., Inc. (In re Johnson), 230 B.R. 466, 1999 Bankr. LEXIS 141 (1999).

Under Uniform Commercial Code provisions governing assignment of accounts, taxpayer that assigned its right to receive payments under contract with District of Columbia retained property interests in accounts upon which Internal Revenue Service (IRS) lien could attach, prior to perfection of assignee's security interest. U.C.C. § 9-318(3); D.C. Code 1981, §§ 28:9-301(1)(b), 28:9-318(3). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Assignee of taxpayer's right to receive contractual payments did not qualify as holder of security interest with priority over Internal Revenue Service (IRS) lien, where financing statement filed by assignee misspelled taxpayer's name, making it so seriously misleading to be ineffective in perfecting its security interest. D.C. Code 1981, §§ 28:9-301(1)(b), 28:9-302, 28:9-302(1); U.C.C. §§ 9-302, 9-302 comment; 26 U.S.C. § 6323(h)(1, 6). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-318. No interest retained in right to payment that is sold; rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or

chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Sellers of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes. Section 1-201(37) defines "security interest" to include the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes. See also Section 9-109(a) and Comment 5. Subsection (a) makes explicit what was implicit, but perfectly obvious, under former Article 9: The fact that a sale of an account or chattel paper gives rise to a "security interest" does not imply that the seller retains an interest in the property that has been sold. To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold. Subsection (a) also applies to sales of payment intangibles and promissory notes, transactions that were not covered by former Article 9. Neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation.

3. Buyers of Accounts and Chattel Paper. Another aspect of sales of accounts and chattel paper also was implicit, and equally obvious, under former Article 9: If the buyer's security interest is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold. The seller is deemed to have these rights even though, as between the parties, it has sold all its rights to the buyer. Subsection (b) makes this explicit. As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold.

Example: Debtor sells accounts or chattel paper to Buyer-1 and retains no interest in them. Buyer-1 does not file a financing statement. Debtor then sells the same receivables to Buyer-2. Buyer-2 files a proper financing statement. Having sold the receivables to Buyer-1, Debtor would not have any rights in the collateral so as to permit Buyer-2's security (ownership) interest to attach. Nevertheless, under this section, for purposes of determining the rights of purchasers for value from Debtor, Debtor is deemed to have the rights that Debtor sold. Accordingly, Buyer-2's security interest attaches, is perfected by the filing, and, under Section 9-322, is senior to Buyer-1's interest.

4. Effect of Perfection. If the security interest of a buyer of accounts or chattel paper is perfected the usual result would take effect: transferees from and creditors of the seller could not acquire an interest in the sold accounts or chattel paper. The same result would occur if payment intangibles or promissory notes were sold, inasmuch as the buyer's security interest is automatically perfected under Section 9-309.

§ 28:9-319. Rights and title of consignee with respect to creditors and purchasers.

(a) Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected security interest held by the consignor would have priority over the rights of the creditor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Consignments. This section takes an approach to consignments similar to that taken by Section 9-318 with respect to buyers of accounts and chattel paper. Revised Section 1-201(37) defines "security interest" to include the interest of a consignor of goods under many true consignments. Section 9-319(a) provides that, for purposes of determining the rights of certain third parties, the consignee is deemed to acquire all rights and title that the consignor had, if the consignor's security interest is unperfected. The consignee acquires these rights even though, as between the parties, it purchases a limited interest in the goods (as would be the case in a true consignment, under which the consignee acquires only the interest of a bailee). As a consequence of this section, creditors of the consignee can acquire judicial liens and security interests in the goods.

Insofar as creditors of the consignee are concerned, this Article to a considerable extent reformulates the former law, which appeared in former Sections 2-326 and 9-114, without changing the results. However, neither Article 2 nor former Article 9 specifically addresses the rights of non-ordinary course buyers from the consignee. Former Section 9-114 contained priority rules applicable to security interests in consigned goods. Under this Article, the priority rules for purchase-money security interests in inventory apply to consignments. See Section 9-103(d). Accordingly, a special section containing priority rules for consignments no longer is needed. Section 9-317 determines whether the rights of a judicial lien creditor are senior to the interest of the consignor, Sections 9-322 and 9-324 govern competing security interests in consigned goods, and Sections 9-317, 9-315, and 9-320 determine whether a buyer takes free of the consignor's interest.

The following example explains the operation of this section:

Example 1: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-1 does not file a financing statement. Debtor then grants a security interest in the goods to SP-2. SP-2 files a proper financing statement. Assuming Debtor is a mere bailee, as in a "true" consignment, Debtor would not have any rights in the collateral (beyond those of a bailee) so as to permit SP-2's security interest to attach to any greater rights. Nevertheless, under this section, for purposes of determining the rights of Debtor's creditors, Debtor is deemed to acquire SP-1's rights. Accordingly, SP-2's security interest attaches, is perfected by the filing, and, under Section 9-322, is senior to SP-1's interest.

3. Effect of Perfection. Subsection (b) contains a special rule with respect to consignments that are perfected. If application of this Article would result in the consignor having priority over a competing creditor, then other law determines the rights and title of the consignee.

Example 2: SP-1 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-1 files a proper financing statement. Debtor then grants a security interest in the goods to SP-2. Under Section 9-322, SP-1's security interest is senior to SP-2's. Subsection (b) indicates that, for purposes of determining SP-2's rights, other law determines the rights and title of the consignee. If, for example, a consignee obtains only the special property of a bailee, then SP-2's security interest would attach only to that special property.

Example 3: SP-1 obtains a security interest in all Debtor's existing and after-acquired inventory. SP-1 perfects its security interest with a proper filing. Then SP-2 delivers goods to Debtor in a transaction constituting a "consignment" as defined in Section 9-102. SP-2 files a proper financing statement but does not send notification to SP-1 under Section 9-324(b). Accordingly, SP-2's security interest is junior to SP-1's under Section 9-322(a). Under Section 9-319(a), Debtor is deemed to have the consignor's rights and title, so that SP-1's security interest attaches to SP-2's ownership interest in the goods. Thereafter, Debtor grants a security interest in the goods to SP-3, and SP-3 perfects by filing. Because SP-2's perfected security interest is senior to SP-3's under Section 9-322(a), Section 9-319(b) applies: Other law determines Debtor's rights and title to the goods insofar as SP-3 is concerned, and SP-3's security interest attaches to those rights.

§ 28:9-320. Buyer of goods.

(a) Except as otherwise provided in subsection (e), a buyer in ordinary

course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Except as otherwise provided in subsection (e), a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

(1) Without knowledge of the security interest;
(2) For value;
(3) Primarily for the buyer's personal, family, or household purposes; and
(4) Before the filing of a financing statement covering the goods.

(c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b), the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by § 28:9-316(a) and (b).

(d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Subsections (a) and (b) do not affect a security interest in goods in the possession of the secured party under § 28:9-313.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:7-209, § 28:7-503, and § 28:9-317.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-307.

2. Scope of This Section. This section states when buyers of goods take free of a security interest even though perfected. Of course, a buyer who takes free of a perfected security interest takes free of an unperfected one. Section 9-317 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest. Article 2 states general rules on purchase of goods from a seller with defective or voidable title (Section 2-403).

3. Buyers in Ordinary Course. Subsection (a) derives from former Section 9-307(1). The definition of "buyer in ordinary course of business" in Section 1-201 restricts its application to buyers "from a person, other than a pawnbroker, in the business of selling goods of that kind." Thus subsection (a) applies primarily to inventory collateral. The subsection further excludes from its operation buyers of "farm products"(defined in Section 9-102) from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys goods "in good faith, without knowledge that the sale violates the rights of another person and in the ordinary course." Subsection (a) provides that such a buyer takes free of a security interest, even though perfected, and even though the buyer knows the security interest exists. Reading the definition together with the rule of law results in the buyer's taking free if the buyer merely knows that a security interest covers the goods but taking subject if the buyer knows, in addition, that the sale violates a term in an agreement with the secured party.

As did former Section 9-307(1), subsection (a) applies only to security interests created by the seller of the goods to the buyer in ordinary course. However, under certain circumstances a buyer in ordinary course who buys goods that were encumbered with a security interest created by a person other than the seller may take free of the security interest, as Example 2 explains. See also Comment 6, below.

Example 1: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment.

Buyer buys the equipment from Dealer. Even if Buyer qualifies as a buyer in the ordinary course of business, Buyer does not take free of Lender's security interest under subsection (a), because Dealer did not create the security interest; Manufacturer did.

Example 2: Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to a perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Lender learns of the sale but does nothing to assert its security interest. Buyer buys the equipment from Dealer.

Inasmuch as Lender's acquiescence constitutes an "entrusting" of the goods to Dealer within the meaning of Section 2-403(3) Buyer takes free of Lender's security interest under Section 2-403(2) if Buyer qualifies as a buyer in ordinary course of business.

4. Buyers of Farm Products. This section does not enable a buyer of farm products to take free of a security interest created by the seller, even if the buyer is a buyer in ordinary course of business. However, a buyer of farm products may take free of a security interest under Section 1324 of the Food Security Act of 1985, 7 U.S.C. § 1631.

5. Buyers of Consumer Goods. Subsection (b), which derives from former Section 9-307(2), deals with buyers of collateral that the debtor-seller holds as "consumer goods" (defined in Section 9-102). Under Section 9-309(1), a purchase-money interest in consumer goods, except goods that are subject to a statute or treaty described in Section 9-311(a) (such as automobiles that are subject to a certificate-of-title statute), is perfected automatically upon attachment. There is no need to file to perfect. Under subsection (b) a buyer of consumer goods takes free of a security interest, even though perfected, if the buyer buys (1) without knowledge of the security interest, (2) for value, (3) primarily for the buyer's own personal, family, or household purposes, and (4) before a financing statement is filed.

As to purchase money-security interests which are perfected without filing under Section 9-309(1): A secured party may file a financing statement, although filing is not required for perfection. If the secured party does file, all buyers take subject to the security interest. If the secured party does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to security interests for which a perfection step is required: This category includes all non-purchase-money security interests, and all security interests, whether or not purchase-money, in goods subject to a statute or treaty described in Section 9-311(a), such as automobiles covered by a certificate-of-title statute. As long as the required perfection step has not been taken and the security interest remains unperfected, not only the buyers described in subsection (b) but also the purchasers described in Section 9-317 will take free of the security interest. After a financing statement has been filed or the perfection requirements of the applicable certificate-of-title statute have been complied with (compliance is the equivalent of filing a financing statement; see Section 9-311(b)), all subsequent buyers, under the rule of subsection (b), are subject to the security interest.

The rights of a buyer under subsection (b) turn on whether a financing statement has been filed against consumer goods. Occasionally, a debtor changes his or her location after a filing is made. Subsection (c), which derives from former Section 9-103(1)(d)(iii), deals with the continued effectiveness of the filing under those circumstances. It adopts the rules of Sections 9-316(a) and (b). These rules are explained in the Comments to that section.

6. Authorized Dispositions. The limitations that subsections (a) and (b) impose on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party authorized the sale in an express agreement or otherwise, the buyer takes free under Section 9-315(a) without regard to the limitations of this section. (That section also states the right of a secured party to the proceeds of a sale, authorized or unauthorized.) Moreover, the buyer also takes free if the secured party waived or otherwise is precluded from asserting its security interest against the buyer. See Section 1-103.

7. Oil, Gas, and Other Minerals. Under subsection (d), a buyer in ordinary course of business of minerals at the wellhead or minehead or after extraction takes free of a security interest created by the seller. Specifically, it provides that qualified buyers take free not only of Article 9 security interests but also of interests "arising out of an encumbrance." As defined in Section 9-102, the term "encumbrance" means "a right, other than an ownership interest, in real property." Thus, to the extent that a mortgage encumbers minerals not only before but also after extraction, subsection (d) enables a buyer in ordinary course of the minerals to take free of the mortgage. This subsection does not, however, enable these buyers to take free of interests arising out of ownership interests in the real property. This issue is significant only in a minority of states. Several of them have adopted special statutes and nonuniform amendments to Article 9 to provide special protections to mineral owners, whose interests often are highly fractionalized in the case of oil and gas. See Terry I. Cross, Oil and Gas Product Liens—Statutory Security Interests for Producers and Royalty Owners Un-

der the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming, 50 Consumer Fin. L. Q. Rep. 418 (1996). Inasmuch as a complete resolution of the issue would require the addition of complex provisions to this Article, and there are good reasons to believe that a uniform solution would not be feasible, this Article leaves its resolution to other legislation.

8. Possessory Security Interests. Subsection (e) is new. It rejects the holding of Tanbro Fabrics Corp. v. Deering Milliken, Inc., 350 N.E.2d 590 (N.Y.1976) and, together with Section 9-317(b), prevents a buyer of goods collateral from taking free of a security interest if the collateral is in the possession of the secured party. "The secured party" referred in subsection (e) is the holder of the security interest referred to in subsection (a) or (b). Section 9-313 determines whether a secured party is in possession for purposes of this section. Under some circumstances, Section 9-313 provides that a secured party is in possession of collateral even if the collateral is in the physical possession of a third party.

CASE NOTES

Construction and application.

Automobile held by used car dealer for purpose of sale to buying public in ordinary course of business was "inventory" and remained so despite subsequent sale of automobile, and, thus, under provision of Uniform Commercial Code buyer of automobile in ordinary course of business bought free of security interest of dealer's chattel mortgagee. Code Md.1957, art. 95B, §§ 9-109(1, 4), 9-306, 9-307(1, 2). Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

§ 28:9-321. Licensee of general intangible and lessee of goods in ordinary course of business.

(a) In this section, "licensee in ordinary course of business" means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices.

(b) A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:2A-307, § 28:7-209, § 28:7-503, and § 28:9-317.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Derived from Sections 2A-103(1)(o), 2A-307(3).

2. Licensee in Ordinary Course. Like the analogous rules in Section 9-320(a) with respect to buyers in ordinary course and subsection (c) with respect to lessees in ordinary course, the new rule in subsection (b) reflects the expectations of the parties and the marketplace: a licensee under a nonexclusive license takes subject to a security interest unless the secured party authorizes the license free of the security interest or other, controlling law such

as that of this section (protecting ordinary-course licensees) dictates a contrary result. See Sections 9-201, 9-315. The definition of "licensee in ordinary course of business" in subsection (a) is modeled upon that of "buyer in ordinary course of business."

3. Lessee in Ordinary Course. Subsection (c) contains the rule formerly found in Section 2A-307(3). The rule works in the same way as that of Section 9-320(a).

§ 28:9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) For the purposes subsection (a)(1):

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under § 28:9-327, 28:9-328, 28:9-329, 28:9-330, or 28:9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

(A) The security interest in proceeds is perfected;

(B) The proceeds are cash proceeds or of the same type as the collateral; and

(C) In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Subsections (a) through (e) are subject to:

(1) Subsection (g) and the other provisions of this part;

(2) § 28:4-210 with respect to a security interest of a collecting bank;

(3) § 28:5-118 with respect to a security interest of an issuer or nominated person; and

(4) § 28:9-110 with respect to a security interest arising under Article 2 or 2A.

(g) A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109, § 28:9-317, § 28:9-323, § 28:9-324, § 28:9-325, § 28:9-328, § 28:9-330, and § 28:9-709.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-312(5), (6).

2. Scope of This Section. In a variety of situations, two or more people may claim a security interest in the same collateral. This section states general rules of priority among conflicting security interests. As subsection (f) provides, the general rules in subsections (a) through (e) are subject to the rule in subsection (g) governing perfected agricultural liens and to the other rules in this Part of this Article. Rules that override this section include those applicable to purchase-money security interests (Section 9-324) and those qualifying for special priority in particular types of collateral. See, e.g., Section 9-327 (deposit accounts); Section 9-328 (investment property); Section 9-329 (letter-of-credit rights); Section 9-330 (chattel paper and instruments); Section 9-334 (fixtures). In addition, the general rules of sections (a) through (e) are subject to priority rules governing security interests arising under Articles 2, 2A, 4, and 5.

3. General Rules. Subsection (a) contains three general rules. Subsection (a)(1) governs the priority of competing perfected security interests. Subsection (a)(2) governs the priority of competing security interests if one is perfected and the other is not. Subsection (a)(3) governs the priority of competing unperfected security interests. The rules may be regarded as adaptations of the idea, deeply rooted at common law, of a race of diligence among creditors. The first two rules are based on precedence in the time as of which the competing secured parties either filed their financing statements or obtained perfected security interests. Under subsection (a)(1), the first secured party who files or perfects has priority. Under subsection (a)(2), which is new, a perfected security interest has priority over an unperfected one. Under subsection (a)(3), if both security interests are unperfected, the first to attach has priority. Note that Section 9-709(b) may affect the application of subsection (a) to a filing that occurred before the effective date of this Article and which would be ineffective to perfect a security interest under former Article 9 but effective under this Article.

4. Competing Perfected Security Interests. When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing," of course, refers to the filing of an effective financing statement. "Perfection" refers to the acquisition of a perfected security interest, i.e., one that has attached and as to which any required perfection step has been taken. See Sections 9-308 and 9-309.

Example 1: On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. A has priority even though B's loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

The problem stated in Example 1 is peculiar to a notice-filing system under which filing may occur before the security interest attaches (see Section 9-502). The justification for determining priority by order of filing lies in the necessity of protecting the filing system-that is, of allowing the first secured party who has filed to make subsequent advances without each time

having to check for subsequent filings as a condition of protection. Note, however, that this first-to-file protection is not absolute. For example, Section 9-324 affords priority to certain purchase-money security interests, even if a competing secured party was the first to file or perfect.

Example 2: A and B make non-purchase-money advances secured by the same collateral. The collateral is in Debtor's possession, and neither security interest is perfected when the second advance is made. Whichever secured party first perfects its security interest (by taking possession of the collateral or by filing) takes priority. It makes no difference whether that secured party knows of the other security interest at the time it perfects its own.

The rule of subsection (a)(1), affording priority to the first to file or perfect, applies to security interests that are perfected by any method, including temporarily (Section 9-312) or upon attachment (Section 9-309), even though there may be no notice to creditors or subsequent purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection as long as there is no intervening period without filing or perfection. See Section 9-308(c).

Example 3: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-312(e). On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 10, A files. A has priority, even after the 20-day period expires, regardless of whether A knows of B's security interest when A files. A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period. However, the perfection of A's security interest extends only "to the extent it arises for new value given." To the extent A's security interest secures advances made by A beyond the 20-day period, its security interest would be subordinate to B's, inasmuch as B was the first to file.

In general, the rule in subsection (a)(1) does not distinguish among various advances made by a secured party. The priority of every advance dates from the earlier of filing or perfection. However, in rare instances, the priority of an advance dates from the time the advance is made. See Example 3 and Section 9-323.

5. Priority in After-Acquired Property. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection but may also be based on priority in filing before perfection.

Example 4: On February 1, A makes advances to Debtor under a security agreement covering "all Debtor's machinery, both existing and after-acquired." A promptly files a financing statement. On April 1, B takes a security interest in all Debtor's machinery, existing and after-acquired, to secure an outstanding loan. The following day, B files a financing statement. On May 1, Debtor acquires a new machine. When Debtor acquires rights in the new machine, both A and B acquire security interests in the machine simultaneously. Both security interests are perfected simultaneously. However, A has priority because A filed before B.

When after-acquired collateral is encumbered by more than one security interest, one of the security interests often is a purchase-money security interest that is entitled to special priority under Section 9-324.

6. Priority in Proceeds: General Rule. Subsection (b)(1) follows former Section 9-312(6). It provides that the baseline rules of subsection (a) apply generally to priority conflicts in proceeds except where otherwise provided (e.g., as in subsections (c) through (e)). Under Section 9-203, attachment cannot occur (and therefore, under Section 9-308, perfection cannot occur) as to particular collateral until the collateral itself comes into existence and the debtor has rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not perfected until the proceeds come into existence and the debtor acquires rights in them.

Example 5: On April 1, Debtor authenticates a security agreement granting to A a security interest in all Debtor's existing and after-acquired inventory. The same day, A files a financing statement covering inventory. On May 1, Debtor authenticates a security agreement granting B a security interest in all Debtor's existing and future accounts. On June 1, Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires the account, B's security interest attaches to it and is perfected by B's financing statement. At the very same time, A's security interest attaches to the account as proceeds of the inventory and is automatically perfected. See Section 9-315. Under subsection (b) of this section, for purposes of determining A's priority in the account, the time of filing as to the original collateral (April 1, as to inventory) is also the time of filing as to proceeds (account). Accordingly, A's security interest in the account has priority over B's. Of course, had B filed its financing statement before A filed (e.g., on March 1), then B would have priority in the accounts.

Section 9-324 governs the extent to which a special purchase-money priority in goods or software carries over into the proceeds of the original collateral.

7. Priority in Proceeds: Special Rules. Subsections (c), (d), and (e), which are new, provide

additional priority rules for proceeds of collateral in situations where the temporal (first-in-time) rules of subsection (a)(1) are not appropriate. These new provisions distinguish what these Comments refer to as "non-filing collateral" from what they call "filing collateral." As used in these Comments, non-filing collateral is collateral of a type for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search. More specifically, non-filing collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights. Other collateral-accounts, commercial tort claims, general intangibles, goods, nonnegotiable documents, and payment intangibles-is filing collateral.

8. Proceeds of Non-Filing Collateral: Non-Temporal Priority. Subsection (c)(2) provides a baseline priority rule for proceeds of non-filing collateral which applies if the secured party has taken the steps required for non-temporal priority over a conflicting security interest in non-filing collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property). This rule determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under subsection (c)(2), the priority in the original collateral continues in proceeds if the security interest in proceeds is perfected and the proceeds are cash proceeds or non-filing proceeds "of the same type" as the original collateral. As used in subsection (c)(2), "type" means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is "of the same type" as a security entitlement (i.e., investment property), and a promissory note is "of the same type" as a draft (i.e., an instrument).

Example 6: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives cash proceeds of the security (e.g., dividends deposited into Debtor's deposit account). If the first-to-file-or-perfect rule of subsection (a)(1) were applied, SP-1's security interest in the cash proceeds would be senior, although SP-2's security interest continues perfected under Section 9-315 beyond the 20-day period of automatic perfection. This was the result under former Article 9. Under subsection (c), however, SP-2's security interest is senior.

Note that a different result would obtain in Example 6 (i.e., SP-1's security interest would be senior) if SP-1 were to obtain control of the deposit-account proceeds. This is so because subsection (c) is subject to subsection (f), which in turn provides that the priority rules under subsections (a) through (e) are subject to "the other provisions of this part." One of those "other provisions" is Section 9-327, which affords priority to a security interest perfected by control. See Section 9-327(1).

Example 7: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend on the original collateral. Although the new security is of the same type as the original collateral (i.e., investment property), once the 20-day period of automatic perfection expires (see Section 9-315(d)), SP-2's security interest is unperfected.

(SP-2 has not filed or taken delivery or control, and no temporary-perfection rule applies.) Consequently, once the 20-day period expires, subsection (c) does not confer priority, and, under subsection (a)(2), SP-1's security interest in the security is senior. This was the result under former Article 9.

Example 8: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a new certificated security issued as a stock dividend of the collateral. Because the new security is of the same type as the original collateral (i.e., investment property) and (unlike Example 7) SP-2's security interest is perfected by filing, SP-2's security interest is senior under subsection (c). If the new security were redeemed by the issuer upon surrender and yet another security were received by Debtor, SP-2's security interest would continue to enjoy priority under subsection (c). The new security would be proceeds of proceeds.

Example 9: SP-1 perfects its security interest in investment property by filing. SP-2 subsequently perfects its security interest in investment property by taking control of a certificated security and also by filing against investment property. Debtor receives proceeds of the security consisting of a dividend check that it deposits to a deposit account. Because the check and the deposit account are cash proceeds, SP-1's and SP-2's security interests in the cash proceeds are perfected under Section 9-315 beyond the 20-day period of automatic perfection. However, SP-2's security interest is senior under subsection (c).

Example 10: SP-1 perfects its security interest in investment property by filing. SP-2 perfects subsequently by taking control of a certificated security and also by filing against investment property. Debtor receives an instrument as proceeds of the security. (Assume that the instrument is not cash proceeds.) Because the instrument is not of the same type as the

original collateral (i.e., investment property), SP-2's security interest, although perfected by filing, does not achieve priority under subsection (c). Under the first-to-file-or-perfect rule of subsection (a)(1), SP-1's security interest in the proceeds is senior.

The proceeds of proceeds are themselves proceeds. See Section 9-102 (defining "proceeds" and "collateral"). Sometimes competing security interests arise in proceeds that are several generations removed from the original collateral. As the following example explains, the applicability of subsection (c) may turn on the nature of the intervening proceeds.

Example 11: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into another deposit account, as to which SP-1 has not obtained control. Subsection (c) does not govern priority in this other deposit account. This deposit account is cash proceeds and is also the same type of collateral as SP-1's original collateral, as required by subsections (c)(2)(A) and (B). However, SP-1's security interest does not satisfy subsection (c)(2)(C) because the inventory proceeds, which intervened between the original deposit account and the deposit account constituting the proceeds at issue, are not cash proceeds, proceeds of the same type as the collateral (original deposit account), or an account relating to the collateral. Stated otherwise, once proceeds other than cash proceeds, proceeds of the same type as the original collateral, or an account relating to the original collateral intervene in the chain of proceeds, priority under subsection (c) is thereafter unavailable. The special priority rule in subsection (d) also is inapplicable to this case. See Comment 9, Example 13, below. Instead, the general first-to-file-or-perfect rule of subsections (a) and (b) apply. Under that rule, SP-1 has priority unless its security interest in the inventory proceeds became unperfected under Section 9-315(d). Had SP-2 filed against inventory before SP-1 obtained control of the original deposit account, the SP-2 would have had priority even if SP-1's security interest in the inventory proceeds remained perfected.

9. Proceeds of Non-Filing Collateral: Special Temporal Priority. Under subsections (d) and (e), if a security interest in non-filing collateral is perfected by a method other than filing (e.g., control or possession), it does not retain its priority over a conflicting security interest in proceeds that are filing collateral. Moreover, it is not entitled to priority in proceeds under the first-to file-or-perfect rule of subsections (a)(1) and (b). Instead, under subsection (d), priority is determined by a new first-to-file rule.

Example 12: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against equipment, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's equipment. SP-1 then files against Debtor's equipment. Debtor uses funds from the deposit account to purchase equipment, which SP-1 can trace as proceeds of its security interest in Debtor's deposit account. If the first-to-file-or-perfect rule were applied, SP-1's security interest would be senior under subsections (a)(1) and (b), because it was the first to perfect in the original collateral and there was no period during which its security interest was unperfected. Under subsection (d), however, SP-2's security interest would be senior because it filed first. This corresponds with the likely expectations of the parties.

Note that under subsection (e), the first-to-file rule of subsection (d) applies only if the proceeds in question are other than non-filing collateral (i.e., if the proceeds are filing collateral). If the proceeds are non-filing collateral, either the first-to-file-or-perfect rule under subsections (a) and (b) or the non-temporal priority rule in subsection (c) would apply, depending on the facts.

Example 13: SP-1 perfects its security interest in Debtor's deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor's existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor's deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into another deposit account, as to which SP-1 has not obtained control. As discussed above in Comment 8, Example 11, subsection (c) does not govern priority in this deposit account. Subsection (d) also does not govern, because the proceeds at issue (the deposit account) are cash proceeds. See subsection (e). Rather, the general rules of subsections (a) and (b) govern.

10. Priority in Supporting Obligations. Under subsections (b)(2) and (c)(1), a security interest having priority in collateral also has priority in a supporting obligation for that collateral. However, the rules in these subsections are subject to the special rule in Section 9-329 governing the priority of security interests in a letter-of-credit right. See subsection (f). Under Section 9-329, a secured party's failure to obtain control (Section 9-107) of a letter-

of-credit right that serves as supporting collateral leaves its security interest exposed to a priming interest of a party who does take control.

11. Unperfected Security Interests. Under subsection (a)(3), if conflicting security interests are unperfected, the first to attach has priority. This rule may be of merely theoretical interest, inasmuch as it is hard to imagine a situation where the case would come into litigation without either secured party's having perfected its security interest. If neither security interest had been perfected at the time of the filing of a petition in bankruptcy, ordinarily neither would be good against the trustee in bankruptcy under the Bankruptcy Code.

12. Agricultural Liens. Statutes other than this Article may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. Under subsection (g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, subsection (a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest.

Inasmuch as no agricultural lien on proceeds arises under this Article, subsections (b) through (e) do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under subsection (g) and the statute creating the agricultural lien gives the secured party a lien on proceeds of the collateral subject to the lien, a court should apply the principle of subsection (g) and award priority in the proceeds to the holder of the perfected agricultural lien.

CASE NOTES

Analysis

First to file.
Unperfected security interests.

First to file.

Generally, party who first notifies public of his security interest in property, either through possession of collateral or filing of his financing treatment, prevails over all other parties with security interest in same collateral, regardless of which party first acquired security interest itself. D.C. Code 1973, §§ 28:9-204(1), 28:9-301(1), 28:9-302, 28:9-303, 28:9-305, 28:9-312(5). Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

Unperfected security interests.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. First Sav. Bank v. Barclays Bank, S.A., 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

§ 28:9-323. Future advances.

(a) Except as otherwise provided in subsection (c), for purposes of determining the priority of a perfected security interest under § 28:9-322(a)(1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) Is made while the security interest is perfected only:

(A) Under § 28:9-309 when it attaches; or

(B) Temporarily under § 28:9-312(e), (f), or (g); and

(2) Is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under § 28:9-309 or 28:9-312(e), (f), or (g).

(b) Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made:

(b) Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor while the security interest is perfected only to the extent that it secures advances made more than 45 days after the person becomes a lien creditor unless the advance is made:

(1) Without knowledge of the lien; or

(2) Pursuant to a commitment entered into without knowledge of the lien.

(c) Subsections (a) and (b) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Except as otherwise provided in subsection (e), a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the buyer's purchase; or

(2) Forty-five days after the purchase.

(e) Subsection (d) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period.

(f) Except as otherwise provided in subsection (g), a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) The time the secured party acquires knowledge of the lease; or

(2) Forty-five days after the lease contract becomes enforceable.

(g) Subsection (f) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:2A-307 and § 28:9-328.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-312(7), 9-301(4), 9-307(3), 2A-307(4).

2. Scope of This Section. A security agreement may provide that collateral secures future advances. See Section 9-204(c). This section collects all of the special rules dealing with the priority of advances made by a secured party after a third party acquires an interest in the collateral. Subsection (a) applies when the third party is a competing secured party. It replaces and clarifies former Section 9-312(7). Subsection (b) deals with lien creditors and replaces former Section 9-301(4). Subsections (d) and (e) deal with buyers and replace former Section 9-307(3). Subsections (f) and (g) deal with lessees and replace former Section 2A-307(4).

3. Competing Security Interests. Under a proper reading of the first-to-file-or-perfect rule of Section 9-322(a)(1) (and former Section 9-312(5)), it is abundantly clear that the time when an advance is made plays no role in determining priorities among conflicting security interests except when a financing statement was not filed and the advance is the giving of value as the last step for attachment and perfection. Thus, a secured party takes subject to all advances secured by a competing security interest having priority under Section 9-322(a)(1). This result generally obtains regardless of how the competing security interest is perfected and regardless of whether the advances are made "pursuant to commitment" (Section 9-102). Subsection (a) of this section

states the only other instance when the time of an advance figures in the priority scheme in Section 9-322: when the security interest is perfected only automatically under Section 9-309 or temporarily under Section 9-312(e), (f), or (g), and the advance is not made pursuant to a commitment entered into while the security interest was perfected by another method. Thus, an advance has priority from the date it is made only in the rare case in which it is made without commitment and while the security interest is perfected only temporarily under Section 9-312.

The new formulation in subsection (a) clarifies the result when the initial advance is paid and a new ("future") advance is made subsequently. Under former Section 9-312(7), the priority of the new advance turned on whether it was "made while a security interest is perfected." This section resolves any ambiguity by omitting the quoted phrase.

Example 1: On February 1, A makes an advance secured by machinery in the debtor's possession and files a financing statement. On March 1, B makes an advance secured by the same machinery and files a financing statement. On April 1, A makes a further advance, under the original security agreement, against the same machinery. A was the first to file and so, under the first-to-file-or-perfect rule of Section 9-322(a)(1), A's security interest has priority over B's, both as to the February 1 and as to the April 1 advance. It makes no difference whether A knows of B's intervening advance when A makes the second advance. Note that, as long as A was the first to file or perfect, A would have priority with respect to both advances if either A or B had perfected by taking possession of the collateral. Likewise, A would have priority if A's April 1 advance was not made under the original agreement with the debtor, but was under a new agreement.

Example 2: On October 1, A acquires a temporarily perfected (20-day) security interest, unfiled, in a negotiable document in the debtor's possession under Section 9-312(e) or (f). The security interest secures an advance made on that day as well as future advances. On October 5, B files and thereby perfects a security interest that previously had attached to the same document. On October 8, A makes an additional advance. On October 10, A files. Under Section 9-322(a)(1), because A was the first to perfect and maintained continuous perfection or filing since the start of the 20-day period, A has priority, even after the 20-day period expires. See Section 9-322, Comment 4, Example 3. However, under this section, for purposes of Section 9-322(a)(1), to the extent A's security interest secures the October 8 advance, the security interest was perfected on October 8. Inasmuch as B perfected on October 5, B has priority over the October 8 advance.

The rule in subsection (a) is more liberal toward the priority of future advances than the corresponding rules applicable to intervening lien creditors (subsection (b)), buyers (subsections (d) and (e)), and lessees (subsections (f) and (g)).

4. Competing Lien Creditors. Subsection (b) replaces former Section 9-301(4) and addresses the rights of a "lien creditor," as defined in Section 9-102. Under Section 9-317(a)(2), a security interest is senior to the rights of a person who becomes a lien creditor, unless the person becomes a lien creditor before the security interest is perfected and before a financing statement covering the collateral is filed and Section 9-203(b)(3) is satisfied. Subsection (b) of this section provides that a security interest is subordinate to those rights to the extent that the specified circumstances occur. Subsection (b) does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under Section 9-317(a)(2); it only subordinates.

As under former Section 9-301(4), a secured party's knowledge does not cut short the 45-day period during which future advances can achieve priority over an intervening lien creditor's interest. Rather, because of the impact of the rule in subsection (b) on the question whether the security interest for future advances is "protected" under Section 6323(c)(2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966, the priority of the security interest for future advances over a lien creditor is made absolute for 45 days regardless of knowledge of the secured party concerning the lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien.

5. Sales of Receivables; Consignments. Subsections (a) and (b) do not apply to outright sales of accounts, chattel paper, payment intangibles, or promissory notes, nor do they apply to consignments.

6. Competing Buyers and Lessees. Under subsections (d) and (e), a buyer will not take subject to a security interest to the extent it secures advances made after the secured party has knowledge that the buyer has purchased the collateral or more than 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45-day period and without knowledge of the purchase. Subsections (f) and (g) provide an analogous rule for lessees. Of course, a buyer in ordinary course who takes free of the security interest under Section 9-320 and a lessee in ordinary course who takes free under Section 9-321 are not subject to any future advances. Subsections (d) and (e) replace former Section 9-307(3), and subsections (f) and

(g) replace former Section 2A-307(4). No change in meaning is intended.

§ 28:9-324. Priority of purchase-money security interests.

(a) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in § 28:9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

(b) Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in § 28:9-330, and, except as otherwise provided in § 28:9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within 5 years before the debtor receives possession of the inventory; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Subsections (b)(2) through (4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under § 28:9-312(f), before the beginning of the 20-day period thereunder.

(d) Subject to subsection (e) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in § 28:9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the livestock;

(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within 6 months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Subsections (d)(2) through (4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under § 28:9-312(f), before the beginning of the 20-day period thereunder.

(f) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in § 28:9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f) of this section:

(1) A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) In all other cases, § 28:9-322(a) applies to the qualifying security interests.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-325.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-312(3), (4).

2. Priority of Purchase-Money Security Interests. This section contains the priority rules applicable to purchase-money security interests, as defined in Section 9-103. It affords a special, non-temporal priority to those purchase-money security interests that satisfy the statutory conditions. In most cases, priority will be over a security interest asserted under an after-acquired property clause. See Section 9-204 on the extent to which security interests in after-acquired property are validated.

A purchase-money security interest can be created only in goods and software. See Section 9-103. Section 9-324(a), which follows former Section 9-312(4), contains the general rule for purchase-money security interests in goods. It is subject to subsections (b) and (c), which derive from former Section 9-312(3) and apply to purchase-money security interests in inventory, and subsections (d) and (e), which apply to purchase-money security interests in livestock that are farm products. Subsection (f) applies to purchase-money security interests in software. Subsection (g) deals with the relatively unusual case in which a debtor creates two purchase-money security interests in the same collateral and both security interests qualify for special priority under one of the other subsections.

Former Section 9-312(2) contained a rule affording special priority to those who provided secured credit that enabled a debtor to produce crops. This rule proved unworkable and has been eliminated from this Article. Instead, model Section 9-324A contains a revised production-money priority rule. That section is a model, not uniform, provision. The sponsors of the UCC have taken no position as to whether

it should be enacted, instead leaving the matter for state legislatures to consider if they are so inclined.

3. Purchase-Money Priority in Goods Other Than Inventory and Livestock. Subsection (a) states a general rule applicable to all types of goods except inventory and farm-products livestock: the purchase-money interest takes priority if it is perfected when the debtor receives possession of the collateral or within 20 days thereafter. (As to the 20-day "grace period," compare Section 9-317(e). Former Sections 9-312(4) and 9-301(2) contained a 10-day grace period.) The perfection requirement means that the purchase-money secured party either has filed a financing statement before that time or has a temporarily perfected security interest in goods covered by documents under Section 9-312(e) and (f) which is continued in a perfected status by filing before the expiration of the 20-day period specified in that section. A purchase-money security interest qualifies for priority under subsection (a), even if the purchase-money secured party knows that a conflicting security interest has been created and/or that the holder of the conflicting interest has filed a financing statement covering the collateral.

Normally, there will be no question when "the debtor receives possession of the collateral" for purposes of subsection (a). However, sometimes a debtor buys goods and takes possession of them in stages, and then assembly and testing are completed (by the seller or debtor-buyer) at the debtor's location. Under those circumstances, the buyer "takes possession" within the meaning of subsection (a) when, after an inspection of the portion of the goods in the debtor's possession, it would be apparent to a potential lender to the debtor that the debtor has acquired an interest in the goods taken as a whole.

A similar issue concerning the time when "the debtor receives possession" arises when a person acquires possession of goods under a transaction that is not governed by this Article and then later agrees to buy the goods on secured credit. For example, a person may take possession of goods as lessee under a lease contract and then exercise an option to purchase the goods from the lessor on secured credit. Under Section 2A-307(1), creditors of the lessee generally take subject to the lease contract; filing a financing statement against the lessee is unnecessary to protect the lessor's leasehold or residual interest. Once the lease is converted to a security interest, filing a financing statement is necessary to protect the seller's (former lessor's) security interest. Accordingly, the 20-day period in subsection (a) does not commence until the goods become "collateral" (defined in Section 9-102), i.e., until they are subject to a security interest.

4. Purchase-Money Security Interests in Inventory. Subsections (b) and (c) afford a means by which a purchase-money security interest in inventory can achieve priority over an earlier-filed security interest in the same collateral. To achieve priority, the purchase-money security interest must be perfected when the debtor receives possession of the inventory. For a discussion of when "the debtor receives possession," see Comment 3, above. The 20-day grace period of subsection (a) does not apply.

The arrangement between an inventory secured party and its debtor typically requires the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though it has already given a purchase-money security interest in the inventory to another secured party. For this reason, subsections (b)(2) through (4) and (c) impose a second condition for the purchase-money security interest's achieving priority: the purchase-money secured party must give notification to the holder of a conflicting security interest who filed against the same item or type of inventory before the purchase-money secured party filed or its security interest became perfected temporarily under Section 9-312(e) or (f). The notification requirement protects the non-purchase-money inventory secured party in such a situation: if the inventory secured party has received notification, it presumably will not make an advance; if it has not received notification (or if the other security interest does not qualify as purchase-money), any advance the inventory secured party may make ordinarily will have priority under Section 9-322. Inasmuch as an arrangement for periodic advances against incoming goods is unusual outside the inventory field, subsection (a) does not contain a notification requirement.

5. Notification to Conflicting Inventory Secured Party: Timing. Under subsection (b)(3), the perfected purchase-money security interest achieves priority over a conflicting security interest only if the holder of the conflicting security interest receives a notification within five years before the debtor receives possession of the purchase-money collateral. If the debtor never receives possession, the five-year period never begins, and the purchase-money security interest has priority, even if notification is not given. However, where the purchase-money inventory financing began by the purchase-money secured party's possession of a negotiable document of title, to retain priority the secured party must give the notification required by subsection (b) at or before the usual time, i.e., when the debtor gets possession of the inventory, even though the security interest remains perfected for 20 days under Section 9-312(e) or (f).

Some people have mistakenly read former Section 9-312(3)(b) to require, as a condition of purchase-money priority in inventory, that the purchase-money secured party give the notification before it files a financing statement. Read correctly, the "before" clauses compare (i) the time when the holder of the conflicting security interest filed a financing statement with (ii) the time when the purchase-money security interest becomes perfected by filing or automatically perfected temporarily. Only if (i) occurs before (ii) must notification be given to the holder of the conflicting security interest. Subsection (c) has been rewritten to clarify this point.

6. Notification to Conflicting Inventory Secured Party: Address. Inasmuch as the address provided as that of the secured party on a filed financing statement is an "address that is reasonable under the circumstances," the holder of a purchase-money security interest may satisfy the requirement to "send" notification to the holder of a conflicting security interest in inventory by sending a notification to that address, even if the address is or becomes incorrect. See Section 9-102 (definition of "send"). Similarly, because the address is "held out by [the holder of the conflicting security interest] as the place for receipt of such communications [i.e., communications relating to security interests]," the holder is deemed to have "received" a notification delivered to that address. See Section 1-201(26).

7. Consignments. Subsections (b) and (c) also determine the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee. Inasmuch as a consignment subject to this Article is defined to be a purchase-money security interest, see Section 9-103(d), no inference concerning the nature of the transaction should be drawn from the fact that a consignor uses the term "security interest" in its notice under subsection (b)(4). Similarly, a notice stating that the consignor has delivered or expects to deliver goods, properly described, "on consignment" meets the requirements of subsection (b)(4), even if it does not contain the term "security interest," and even if the transaction subsequently is determined to be a security interest. Cf. Section 9-505 (use of "consignor" and "consignee" in financing statement).

8. Priority in Proceeds: General. When the purchase-money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Subsections (a), (d), and (f) give an affirmative answer, but only as to proceeds in which the security interest is perfected (see Section 9-315). Although this qualification did not appear in former Section 9-312(4), it was implicit in that provision.

In the case of inventory collateral under subsection (b), where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the special priority of the purchase-money secured interest carries over into only certain types of proceeds. As under former Section 9-312(3), the purchase-money priority in inventory under subsection (b) carries over into identifiable cash proceeds (defined in Section 9-102) received on or before the delivery of the inventory to a buyer.

As a general matter, also like former Section 9-312(3), the purchase-money priority in inventory does not carry over into proceeds consisting of accounts or chattel paper. Many parties financing inventory are quite content to protect their first-priority security interest in the inventory itself. They realize that when the inventory is sold, someone else will be financing the resulting receivables (accounts or chattel paper), and the priority for inventory will not run forward to the receivables constituting the proceeds. Indeed, the cash supplied by the receivables financer often will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase-money basis makes contractual arrangements that the proceeds of receivables financing by another be devoted to paying off the inventory security interest.

However, the purchase-money priority in inventory does carry over to proceeds consisting of chattel paper and its proceeds (and also to instruments) to the extent provided in Section 9-330. Under Section 9-330(e), the holder of a purchase-money security interest in inventory is deemed to give new value for proceeds consisting of chattel paper. Taken together, Sections 9-324(b) and 9-330(e) enable a purchase-money inventory secured party to obtain priority in chattel paper constituting proceeds of the inventory, even if the secured party does not actually give new value for the chattel paper, provided the purchase-money secured party satisfies the other conditions for achieving priority.

When the proceeds of original collateral (goods or software) consist of a deposit account, Section 9-327 governs priority to the extent it conflicts with the priority rules of this section.

9. Priority in Accounts Constituting Proceeds of Inventory. The application of the priority rules in subsection (b) is shown by the following examples:

Example 1: Debtor creates a security interest in its existing and after-acquired inventory in favor of SP-1, who files a financing statement covering inventory. SP-2 subsequently takes a purchase-money security interest in certain inventory and, under subsection (b), achieves priority in this inventory over SP-1. This inventory is then sold, producing accounts. Accounts are not cash proceeds, and so the special pur-

chase-money priority in the inventory does not control the priority in the accounts. Rather, the first-to-file-or-perfect rule of Section 9-322(a)(1) applies. The time of SP-1's filing as to the inventory is also the time of filing as to the accounts under Section 9-322 (b). Assuming that each security interest in the accounts proceeds remains perfected under Section 9-315, SP-1 has priority as to the accounts.

Example 2: In Example 1, if SP-2 had filed directly against accounts, the date of that filing as to accounts would be compared with the date of SP-1's filing as to the inventory. The first filed would prevail under Section 9-322(a)(1).

Example 3: If SP-3 had filed against accounts in Example 1 before either SP-1 or SP-2 filed against inventory, SP-3's filing against accounts would have priority over the filings of SP-1 and SP-2. This result obtains even though the filings against inventory are effective to continue the perfected status of SP-1's and SP-2's security interest in the accounts beyond the 20-day period of automatic perfection. See Section 9-315. SP-1's and SP-2's position as to the inventory does not give them a claim to accounts (as proceeds of the inventory) which is senior to someone who has filed earlier against accounts. If, on the other hand, either SP-1's or SP-2's filing against the inventory preceded SP-3's filing against accounts, SP-1 or SP-2 would outrank SP-3 as to the accounts.

10. Purchase-Money Security Interests in Livestock. New subsections (d) and (e) provide a purchase-money priority rule for farm-products livestock. They are patterned on the purchase-money priority rule for inventory found in subsections (b) and (c) and include a requirement that the purchase-money secured party notify earlier-filed parties. Two differences between subsections (b) and (d) are noteworthy. First, unlike the purchase-money inventory lender, the purchase-money livestock lender enjoys priority in all proceeds of the collateral. Thus, under subsection (d), the purchase-money secured party takes priority in accounts over an earlier-filed accounts financer. Second, subsection (d) affords priority in certain products of the collateral as well as proceeds.

11. Purchase-Money Security Interests in Aquatic Farm Products. Aquatic goods produced in aquacultural operations (e.g., catfish raised on a catfish farm) are farm products. See Section 9-102 (definition of "farm products"). The definition does not indicate whether aquatic goods are "crops," as to which the model production money security interest priority in Section 9-324A applies, or "livestock," as to which the purchase-money priority in subsection (d) of this section applies. This Article leaves courts free to determine the classification of particular aquatic goods on a case-by-case basis, applying whichever priority rule makes more sense in the overall context of the debtor's business.

12. Purchase-Money Security Interests in Software. Subsection (f) governs the priority of purchase-money security interests in software. Under Section 9-103(c), a purchase-money security interest arises in software only if the debtor acquires its interest in the software for the principal purpose of using the software in goods subject to a purchase-money security interest. Under subsection (f), a purchase-money security interest in software has the same priority as the purchase-money security interest in the goods in which the software was acquired for use. This priority is determined under subsections (b) and (c) (for inventory) or (a) (for other goods).

13. Multiple Purchase-Money Security Interests. New subsection (g) governs priority among multiple purchase-money security interests in the same collateral. It grants priority to purchase-money security interests securing the price of collateral (i.e., created in favor of the seller) over purchase-money security interests that secure enabling loans. Section 7.2(c) of the Restatement (3d) of the Law of Property (Mortgages) (1997) adopts this rule with respect to real property mortgages. As Comment d to that section explains:

the equities favor the vendor. Not only does the vendor part with specific real estate rather than money, but the vendor would never relinquish it at all except on the understanding that the vendor will be able to use it to satisfy the obligation to pay the price. This is the case even though the vendor may know that the mortgagor is going to finance the transaction in part by borrowing from a third party and giving a mortgage to secure that obligation. In the final analysis, the law is more sympathetic to the vendor's hazard of losing real estate previously owned than to the third party lender's risk of being unable to collect from an interest in real estate that never previously belonged to it.

The first-to-file-or-perfect rule of Section 9-322 applies to multiple purchase-money security interests securing enabling loans.

§ 28:9-325. Priority of security interests in transferred collateral.

(a) Except as otherwise provided in subsection (b), a security interest

created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) The debtor acquired the collateral subject to the security interest created by the other person;

(2) The security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) There is no period thereafter when the security interest is unperfected.

(b) Subsection (a) subordinates a security interest only if the security interest:

(1) Otherwise would have priority solely under § 28:9-322(a) or 28:9-324; or

(2) Arose solely under § 28:2-711(3) or 2A-508(5).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. "Double Debtor Problem." This section addresses the "double debtor" problem, which arises when a debtor acquires property that is subject to a security interest created by another debtor.

3. Taking Subject to Perfected Security Interest. Consider the following scenario:

Example 1: A owns an item of equipment subject to a perfected security interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See Sections 9-201, 9-315(a)(1). Under this section, if B creates a security interest in the equipment in favor of SP-B, SP-B's security interest is subordinate to SP-A's security interest, even if SP-B filed against B before SP-A filed against A, and even if SP-B took a purchase-money security interest. Normally, SP-B could have investigated the source of the equipment and discovered SP-A's filing before making an advance against the equipment, whereas SP-A had no reason to search the filings against someone other than its debtor, A.

4. Taking Subject to Unperfected Security Interest. This section applies only if the security interest in the transferred collateral was perfected when the transferee acquired the collateral. See subsection (a)(2). If this condition is not met, then the normal priority rules apply.

Example 2: A owns an item of equipment subject to an unperfected security interest in favor of SP-A. A sells the equipment to B, who gives value and takes delivery of the equipment without knowledge of the security interest. B takes free of the security interest. See Section 9-317(b). If B then creates a security interest in favor of SP-B, no priority issue arises; SP-B has the only security interest in the equipment.

Example 3: The facts are as in Example 2, except that B knows of SP-A's security interest and therefore takes the equipment subject to it. If B creates a security interest in the equipment in favor of SP-B, this section does not determine the relative priority of the security interests. Rather, the normal priority rules govern. If SP-B perfects its security interest, then, under Section 9-322(a)(2), SP-A's unperfected security interest will be junior to SP-B's perfected security interest. The award of priority to SP-B is premised on the belief that SP-A's failure to file could have misled SP-B.

5. Taking Subject to Perfected Security Interest that Becomes Unperfected. This section applies only if the security interest in the transferred collateral did not become unperfected at any time after the transferee acquired the collateral. See subsection (a)(3). If this condition is not met, then the normal priority rules apply.

Example 4: As in Example 1, A owns an item of equipment subject to a perfected security interest in favor of SP-A. A sells the equipment to B, not in the ordinary course of business. B acquires its interest subject to SP-A's security interest. See Sections 9-201, 9-315(a)(1). B creates a security interest in favor of SP-B, and SP-B perfects its security interest. This section provides that SP-A's security interest is senior to SP-B's. However, if SP-A's financing statement lapses while SP-B's security interest is perfected, then the normal priority rules would

apply, and SP-B's security interest would become senior to SP-A's security interest. See Sections 9-322(a)(2), 9-515(c).

6. Unusual Situations. The appropriateness of the rule of subsection (a) is most apparent when it works to subordinate security interests having priority under the basic priority rules of Section 9-322(a) or the purchase-money priority rules of Section 9-324.

The rule also works properly when applied to the security interest of a buyer under Section 2-711(3) or a lessee under Section 2A-508(5). However, subsection (a) may provide an inappropriate resolution of the "double debtor" problem in some of the wide variety of other contexts in which the problem may arise. Although subsection (b) limits the application of subsection (a) to those cases in which subordination is known to be appropriate, courts should apply the rule in other settings, if necessary to promote the underlying purposes and policies of the Uniform Commercial Code. See Section 1-102(1).

§ 28:9-326. Priority of security interests created by new debtor.

(a) Subject to subsection (b) of this section, a security interest that is created by a new debtor in collateral in which the new debtor has or acquires rights and is perfected solely by a filed financing statement that would be ineffective to perfect the security interest but for the application of § 28:9-316(i)(1) or 28:9-508 is subordinate to a security interest in the same collateral which is perfected other than by such a filed financing statement.

(b) The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filing financing statements described in subsection (a) of this section. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(h), 60 DCR 2688.)

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote (a); and substituted "described in subsection (a) of this section" for "that are effective solely under § 28:9-508" in (b).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Subordination of Security Interests Created by New Debtor. This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor.

Subsection (a) subordinates the original debtor's secured party's security interest perfected against the new debtor solely under Section 9-508. The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. As used in this section, "a filed financing statement that is effective solely under Section 9-508" refers to a financing statement filed against the original debtor that continues to be effective under Section 9-508. It does not encompass a new initial financing statement providing the name of the new debtor, even if the initial financing statement is filed to maintain the effectiveness of a financing statement under the circumstances described in Section 9-508(b). Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to the new debtor. See Section 9-508(c). Concerning priority contests involving transferred collateral, see Sections 9-325 and 9-507.

Example 1: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-possession security interest in an item of Z

Corp's inventory. Z Corp becomes bound as debtor by X Corp's security agreement (e.g., Z Corp buys X Corp's assets and assumes its security agreement). See Section 9-203(d). Under Section 9-508, SP-X's financing statement is effective to perfect a security interest in the item of inventory in which Z Corp has rights. However, subsection (a) provides that SP-X's security interest is subordinate to SP-Z's, regardless of whether SP-X's financing statement was filed before SP-Z perfected its security interest.

Example 2: SP-X holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory, and SP-Z holds a perfected-by-filing security interest in Z Corp's existing and after-acquired inventory. Z Corp becomes bound as debtor by X Corp's security agreement. Subsequently, Z Corp acquires a new item of inventory. Under Section 9-508, SP-X's financing statement is effective to perfect a security interest in the new item of inventory in which Z Corp has rights. However, because SP-Z's security interest was perfected by another method, subsection (a) provides that SP-X's security interest is subordinate to SP-Z's, regardless of which financing statement was filed first. This would be the case even if SP-Z filed after Z Corp became bound by X Corp's security agreement.

3. Other Priority Rules. Subsection (b) addresses the priority among security interests created by the original debtor (X Corp).

By invoking the other priority rules of this subpart, as applicable, subsection (b) preserves the relative priority of security interests created by the original debtor.

Example 3: Under the facts of Example 2, SP-Y also holds a perfected-by-filing security interest in X Corp's existing and after-acquired inventory. SP-Y filed after SP-X. Inasmuch as both SP-X's and SP-Y's security interests in inventory acquired by Z Corp after it became bound are perfected solely under Section 9-508, the normal priority rules determine their relative priorities.

Under the "first-to-file-or-perfect" rule of Section 9-322(a)(1), SP-X has priority over SP-Y.

Example 4: Under the facts of Example 3, after Z Corp became bound by X Corp's security agreement, SP-Y promptly filed a new initial financing statement against Z Corp. At that time, SP-X's security interest was perfected only by virtue of its original filing against X Corp which was "effective solely under Section 9-508." Because SP-Y's security interest no longer is perfected by a financing statement that is "effective solely under Section 9-508," this section does not apply to the priority contest. Rather, the normal priority rules apply. Under Section 9-322, because SP-Y's financing statement was filed against Z Corp, the new debtor, before SP-X's, SP-Y's security interest is senior to that of SP-X. Similarly, the normal priority rules would govern priority between SP-Y and SP-Z.

The second sentence of subsection (b) effectively limits the applicability of the first sentence to situations in which a new debtor has become bound by more than one security agreement entered into by the same original debtor. When the new debtor has become bound by security agreements entered into by different original debtors, the second sentence provides that priority is based on priority in time of the new debtor's becoming bound.

Example 5: Under the facts of Example 2, SP-W holds a perfected-by-filing security interest in W Corp's existing and after-acquired inventory. After Z Corp became bound by X Corp's security agreement in favor of SP-X, Z Corp became bound by W Corp's security agreement. Under subsection (b), SP-W's security interest in inventory acquired by Z Corp is subordinate to that of SP-X, because Z Corp became bound under SP-X's security agreement before it became bound under SP-W's security agreement. This is the result regardless of which financing statement (SP-X's or SP-W's) was filed first.

The second sentence of subsection (b) reflects the generally accepted view that priority based on the first-to-file rule is inappropriate for resolving priority disputes when the filings were made against different debtors. Like subsection (a) and the first sentence of subsection (b), however, the second sentence of subsection (b) relates only to priority conflicts among security interests perfected by filed financing statements that are "effective solely under Section 9-508."

Example 6: Under the facts of Example 5, after Z Corp became bound by W Corp's security agreement, SP-W promptly filed a new initial financing statement against Z Corp. At that time, SP-X's security interest was perfected only pursuant to its original filing against X Corp which was "effective solely under Section 9-508." Because SP-W's security interest is not perfected by a financing statement that is "effective solely under Section 9-508," this section does not apply to the priority contest. Rather, the normal priority rules apply. Under Section 9-322, because SP-W's financing statement was the first to be filed against Z Corp, the new debtor, SP-W's security interest is senior to that of SP-X. Similarly, the normal priority rules would govern priority between SP-W and SP-Z.

§ 28:9-327. Priority of security interests in deposit account.

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under § 28:9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control under § 28:9-314 rank according to priority in time of obtaining control.

(3) Except as otherwise provided in paragraph (4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under § 28:9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-322, § 28:9-324, and § 28:9-330.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived from former Section 9-115(5).

2. Scope of This Section. This section contains the rules governing the priority of conflicting security interests in deposit accounts. It overrides conflicting priority rules. See Sections 9-322(f)(1), 9-324(a), (b), (d), (f). This section does not apply to accounts evidenced by an instrument (e.g., certain certificates of deposit), which by definition are not "deposit accounts."

3. Control. Under paragraph (1), security interests perfected by control (Sections 9-314, 9-104) take priority over those perfected otherwise, e.g., as identifiable cash proceeds under Section 9-315. Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor's default (i.e., control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.

Paragraph (2) governs the case (expected to be very rare) in which a bank enters into a Section 9-104(a)(2) control agreement with more than one secured party. It provides that the security interests rank according to time of obtaining control. If the bank is solvent and the control agreements are well drafted, the bank will be liable to each secured party, and the priority rule will have no practical effect.

4. Priority of Bank. Under paragraph (3), the security interest of the bank with which the deposit account is maintained normally takes priority over all other conflicting security interests in the deposit account, regardless of whether the deposit account constitutes the competing secured party's original collateral or its proceeds. A rule of this kind enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account.

A secured party who takes a security interest in the deposit account as original collateral can protect itself against the results of this rule in one of two ways. It can take control of the deposit account by becoming the bank's customer. Under paragraph (4), this arrangement operates to subordinate the bank's security interest. Alternatively, the secured party can obtain a subordination agreement from the bank. See Section 9-339.

A secured party who claims the deposit account as proceeds of other collateral can reduce the risk of becoming junior by obtaining the debtor's agreement to deposit proceeds into a

specific cash-collateral account and obtaining the agreement of that bank to subordinate all its claims to those of the secured party. But if the debtor violates its agreement and deposits funds into a deposit account other than the cash-collateral account, the secured party risks being subordinated.

5. Priority in Proceeds of, and Funds Transferred from, Deposit Account. The priority afforded by this section does not extend to proceeds of a deposit account. Rather, Section 9-322(c) through (e) and the provisions referred to in Section 9-322(f) govern priorities in proceeds of a deposit account. Section 9-315(d) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see Section 9-332.

§ 28:9-328. Priority of security interests in investment property.

The following rules govern priority among conflicting security interests in the same investment property.

(1) A security interest held by a secured party having control of investment property under § 28:9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security interests held by secured parties, each of which has control under § 28:9-106, rank according to priority in time of:

(A) If the collateral is a security, obtaining control;

(B) If the collateral is a security entitlement carried in a securities account and:

(i) If the secured party obtained control under § 28:8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) If the secured party obtained control under § 28:8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) If the secured party obtained control through another person under § 28:8-106(d)(3), the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in § 28:9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under § 28:9-313(a) and not by control under § 28:9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under § 28:9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by §§ 28:9-322 and 28:9-323.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-322.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-115(5).

2. Scope of This Section. This section contains the rules governing the priority of conflicting security interests in investment property. Paragraph (1) states the most important general rule-that a secured party who obtains control has priority over a secured party who does not obtain control. Paragraphs (2) through (4) deal with conflicting security interests each of which is perfected by control. Paragraph (5) addresses the priority of a security interest in a certificated security which is perfected by delivery but not control. Paragraph (6) deals with the relatively unusual circumstance in which a broker, securities intermediary, or commodity intermediary has created conflicting security interests none of which is perfected by control. Paragraph (7) provides that the general priority rules of Sections 9-322 and 9-323 apply to cases not covered by the specific rules in this section. The principal application of this residual rule is that the usual first in time of filing rule applies to conflicting security interests that are perfected only by filing. Because the control priority rule of paragraph (1) provides for the ordinary cases in which persons purchase securities on margin credit from their brokers, there is no need for special rules for purchase-money security interests. See also Section 9-103 (limiting purchase-money collateral to goods and software).

3. General Rule: Priority of Security Interest Perfected by Control. Under paragraph (1), a secured party who obtains control has priority over a secured party who does not obtain control. The control priority rule does not turn on either temporal sequence or awareness of conflicting security interests. Rather, it is a structural rule, based on the principle that a lender should be able to rely on the collateral without question if the lender has taken the necessary steps to assure itself that it is in a position where it can foreclose on the collateral without further action by the debtor. The control priority rule is necessary because the perfection rules provide considerable flexibility in structuring secured financing arrangements. For example, at the "retail" level, a secured lender to an investor who wants the full measure of protection can obtain control, but the creditor may be willing to accept the greater measure of risk that follows from perfection by filing. Similarly, at the "wholesale" level, a lender to securities firms can leave the collateral with the debtor and obtain a perfected security interest under the automatic perfection rule of Section 9-309(10), but a lender who wants to be entirely sure of its position will want to obtain control. The control priority rule of paragraph (1) is an essential part of this system of flexibility. It is feasible to provide more than one method of perfecting security interests only if the rules ensure that those who take the necessary steps to obtain the full measure of protection do not run the risk of subordination to those who have not taken such steps. A secured party who is unwilling to run the risk that the debtor has granted or will grant a conflicting control security interest should not make a loan without obtaining control of the collateral.

As applied to the retail level, the control priority rule means that a secured party who obtains control has priority over a conflicting security interest perfected by filing without regard to inquiry into whether the control secured party was aware of the filed security interest. Prior to the 1994 revisions to Articles 8 and 9, Article 9 did not permit perfection of security interests in securities by filing. Accordingly, parties who deal in securities never developed a practice of searching the UCC files before conducting securities transactions. Although filing is now a permissible method of perfection, in order to avoid disruption of existing practices in this business it is necessary to give perfection by filing a different and more limited effect for securities than for some other forms of collateral. The priority rules are not based on the assumption that parties who perfect by the usual method of obtaining control will search the files. Quite the contrary, the control priority rule is intended to ensure that, with respect to investment property, secured parties who do obtain control are entirely un-

affected by filings. To state the point another way, perfection by filing is intended to affect only general creditors or other secured creditors who rely on filing. The rule that a security interest perfected by filing can be primed by a control security interest, without regard to awareness, is a consequence of the system of perfection and priority rules for investment property. These rules are designed to take account of the circumstances of the securities markets, where filing is not given the same effect as for some other forms of property. No implication is made about the effect of filing with respect to security interests in other forms of property, nor about other Article 9 rules, e.g., Section 9-330, which govern the circumstances in which security interests in other forms of property perfected by filing can be primed by subsequent perfected security interests.

The following examples illustrate the application of the priority rule in paragraph (1):

Example 1: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock for which Debtor has a certificate. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor delivers the certificate, properly indorsed, to Beta. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see Section 8-106(b)(1), and hence has priority over Alpha.

Example 2: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor instructs Able to have the 1000 shares transferred through the clearing corporation to Custodian Bank, to be credited to Beta's account with Custodian Bank. Alpha and Beta both have perfected security interests in the XYZ Co. stock. Beta has control, see Section 8-106(d)(1), and hence has priority over Alpha.

Example 3: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, which is held through a securities account with Able & Co. Alpha perfects by filing. Later, Debtor borrows from Beta and grants Beta a security interest in the 1000 shares of XYZ Co. stock. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected security interests in the XYZ Co. stock (more precisely, in the Debtor's security entitlement to the financial asset consisting of the XYZ Co. stock). Beta has control, see Section 8-106(d)(2), and hence has priority over Alpha.

Example 4: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns 1000 shares of XYZ Co. stock, held through a securities account with Able & Co. Alpha perfects by filing. Debtor's agreement with Able & Co. provides that Able has a security interest in all securities carried in the account as security for any obligations of Debtor to Able. Debtor incurs obligations to Able and later defaults on the obligations to Alpha and Able. Able has control by virtue of the rule of Section 8-106(e) that if a customer grants a security interest to its own intermediary, the intermediary has control. Since Alpha does not have control, Able has priority over Alpha under the general control priority rule of paragraph (1).

4. Conflicting Security Interests Perfected by Control: Priority of Securities Intermediary or Commodity Intermediary. Paragraphs (2) through (4) govern the priority of conflicting security interests each of which is perfected by control. The following example explains the application of the rules in paragraphs (3) and (4):

Example 5: Debtor holds securities through a securities account with Able & Co. Debtor's agreement with Able & Co. provides that Able has a security interest in all securities carried in the account as security for any obligations of Debtor to Able. Debtor borrows from Beta and grants Beta a security interest in 1000 shares of XYZ Co. stock carried in the account. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Debtor incurs obligations to Able and later defaults on the obligations to Beta and Able. Both Beta and Able have control, so the general control priority rule of paragraph (1) does not apply. Compare Example 4. Paragraph (3) provides that a security interest held by a securities intermediary in positions of its own customer has priority over a conflicting security interest of an external lender, so Able has priority over Beta. (Paragraph (4) contains a parallel rule for commodity intermediaries.) The agreement among Able, Beta, and Debtor could, of course, determine the relative priority of the security interests of Able and Beta, see Section 9-339, but the fact that the intermediary has agreed to act on the instructions of a secured party such as Beta does not itself imply

any agreement by the intermediary to subordinate.

5. Conflicting Security Interests Perfected by Control: Temporal Priority. Former Section 9-115 introduced into Article 9 the concept of conflicting security interests that rank equally. Paragraph (2) of this section governs priority in those circumstances in which more than one secured party (other than a broker, securities intermediary, or commodity intermediary) has control. It replaces the equal-priority rule for conflicting security interests in investment property with a temporal rule. For securities, both certificated and uncertificated, under paragraph (2)(A) priority is based on the time that control is obtained. For security entitlements carried in securities accounts, the treatment is more complex. Paragraph (2)(B) bases priority on the timing of the steps taken to achieve control. The following example illustrates the application of paragraph (2).

Example 6: Debtor borrows from Alpha and grants Alpha a security interest in a variety of collateral, including all of Debtor's investment property. At that time Debtor owns a security entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds through a securities account with Able & Co. Debtor, Able, and Alpha enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Alpha will also have the right to direct dispositions and receive the proceeds. Later, Debtor borrows from Beta and grants Beta a security interest in all its investment property, existing and after-acquired. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to receive dividends and distributions, and will continue to have the right to direct dispositions, but Beta will also have the right to direct dispositions and receive the proceeds. Alpha and Beta both have perfected-by-control security interests in the security entitlement to the XYZ Co. stock by virtue of their agreements with Able. See Sections 9-314(a), 9-106(a), 8-106(d)(2). Under paragraph (2)(B)(ii), the priority of each security interest dates from the time of the secured party's agreement with Able. Because Alpha's agreement was first in time, Alpha has priority. This priority applies equally to security entitlements to financial assets credited to the account after the agreement was entered into.

The priority rule is analogous to "first-to-file" priority under Section 9-322 with respect to after-acquired collateral. Paragraphs (2)(B)(i) and (2)(B)(iii) provide similar rules for security entitlements as to which control is obtained by other methods, and paragraph (2)(C) provides a similar rule for commodity contracts carried in a commodity account. Section 8-510 also has been revised to provide a temporal priority conforming to paragraph (2)(B).

6. Certificated Securities. A long-standing practice has developed whereby secured parties whose collateral consists of a security evidenced by a security certificate take possession of the security certificate. If the security certificate is in bearer form, the secured party's acquisition of possession constitutes "delivery" under Section 8-301(a)(1), and the delivery constitutes "control" under Section 8-106(a). Comment 5 discusses the priority of security interests perfected by control of investment property.

If the security certificate is in registered form, the secured party will not achieve control over the security unless the security certificate contains an appropriate indorsement or is (re-)registered in the secured party's name. See Section 8-106(b). However, the secured party's acquisition of possession constitutes "delivery" of the security certificate under Section 8-301 and serves to perfect the security interest under Section 9-313(a), even if the security certificate has not been appropriately indorsed and has not been (re)registered in the secured party's name. A security interest perfected by this method has priority over a security interest perfected other than by control (e.g., by filing). See paragraph (5).

The priority rule stated in paragraph (5) may seem anomalous, in that it can afford less favorable treatment to purchasers who buy collateral outright that to those who take a security interest in it. For example, a buyer of a security certificate would cut off a security interest perfected by filing only if the buyer achieves the status of a protected purchaser under Section 8-303. The buyer would not be a protected purchaser, for example, if it does not obtain "control" under Section 8-106 (e.g., if it fails to obtain a proper indorsement of the certificate) or if it had notice of an adverse claim under Section 8-105. The apparent anomaly disappears, however, when one understands the priority rule not as one intended to protect careless or guilty parties, but as one that eliminates the need to conduct a search of the public records only insofar as necessary to serve the needs of the securities markets.

7. Secured Financing of Securities Firms. Priority questions concerning security interests granted by brokers and securities intermediaries are governed by the general control-beats-non-control priority rule of paragraph (1), as supplemented by the special rules set out in paragraphs (2) (temporal priority-first to control), (3) (special priority for securities intermediary), and (6) (equal priority for non-control). The following examples illustrate the priority rules as applied to this setting. (In all cases it is assumed that the debtor retains sufficient other securities to satisfy all customers' claims. This

section deals with the relative rights of secured lenders to a securities firm. Disputes between a secured lender and the firm's own customers are governed by Section 8-511.)

Example 7: Able & Co., a securities dealer, enters into financing arrangements with two lenders, Alpha Bank and Beta Bank. In each case the agreements provide that the lender will have a security interest in the securities identified on lists provided to the lender on a daily basis, that the debtor will deliver the securities to the lender on demand, and that the debtor will not list as collateral any securities which the debtor has pledged to any other lender. Upon Able's insolvency it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Alpha and Beta both have perfected security interests under the automatic-perfection rule of Section 9-309(10). Neither Alpha nor Beta has control. Paragraph (6) provides that the security interests of Alpha and Beta rank equally, because each of them has a non-control security interest granted by a securities firm. They share pro-rata.

Example 8: Able enters into financing arrangements, with Alpha Bank and Beta Bank as in Example 7. At some point, however, Beta decides that it is unwilling to continue to provide financing on a non-control basis. Able directs the clearing corporation where it holds its principal inventory of securities to move specified securities into Beta's account. Upon Able's insolvency it is discovered that a list of collateral provided to Alpha includes securities that had been moved to Beta's account. Both Alpha and Beta have perfected security interests; Alpha under the automatic-perfection rule of Section 9-309(10), and Beta under that rule and also the perfection-by-control rule in Section 9-314(a). Beta has control but Alpha does not. Beta has priority over Alpha under paragraph (1).

Example 9: Able & Co. carries its principal inventory of securities through Clearing Corporation, which offers a "shared control" facility whereby a participant securities firm can enter into an arrangement with a lender under which the securities firm will retain the power to trade and otherwise direct dispositions of securities carried in its account, but Clearing Corporation agrees that, at any time the lender so directs, Clearing Corporation will transfer any securities from the firm's account to the lender's account or otherwise dispose of them as directed by the lender. Able enters into financing arrangements with two lenders, Alpha and Beta, each of which obtains such a control agreement from Clearing Corporation. The agreement with each lender provides that Able will designate specific securities as collateral on lists provided to the lender on a daily or other periodic basis, and that it will not pledge the same securities to different lenders. Upon Able's insolvency, it is discovered that Able has listed the same securities on the collateral lists provided to both Alpha and Beta. Both Alpha and Beta have control over the disputed securities. Paragraph (2) awards priority to whichever secured party first entered into the agreement with Clearing Corporation.

8. Relation to Other Law. Section 1-103 provides that "unless displaced by particular provisions of this Act, the principles of law and equity ... shall supplement its provisions." There may be circumstances in which a secured party's action in acquiring a security interest that has priority under this section constitutes conduct that is wrongful under other law. Though the possibility of such resort to other law may provide an appropriate "escape valve" for cases of egregious conduct, care must be taken to ensure that this does not impair the certainty and predictability of the priority rules. Whether a court may appropriately look to other law to impose liability upon or estop a secured party from asserting its Article 9 priority depends on an assessment of the secured party's conduct under the standards established by such other law as well as a determination of whether the particular application of such other law is displaced by the UCC.

Some circumstances in which other law is clearly displaced by the UCC rules are readily identifiable. Common law "first in time, first in right" principles, or correlative tort liability rules such as common law conversion principles under which a purchaser may incur liability to a person with a prior property interest without regard to awareness of that claim, are necessarily displaced by the priority rules set out in this section since these rules determine the relative ranking of security interests in investment property. So too, Article 8 provides protections against adverse claims to certain purchasers of interests in investment property.

In circumstances where a secured party not only has priority under Section 9-328, but also qualifies for protection against adverse claims under Section 8-303, 8-502, or 8-510, resort to other law would be precluded.

In determining whether it is appropriate in a particular case to look to other law, account must also be taken of the policies that underlie the commercial law rules on securities markets and security interests in securities. A principal objective of the 1994 revision of Article 8 and the provisions of Article 9 governing investment property was to ensure that secured financing transactions can be implemented on a simple, timely, and certain basis. One of the circumstances that led to the revision was the concern that uncertainty in the application of the rules on secured transactions involving securities and other financial assets could contribute to systemic risk by impairing the ability

of financial institutions to provide liquidity to the markets in times of stress. The control priority rule is designed to provide a clear and certain rule to ensure that lenders who have taken the necessary steps to establish control do not face a risk of subordination to other lenders who have not done so.

The control priority rule does not turn on an inquiry into the state of a secured party's awareness of potential conflicting claims because a rule under which a person's rights depended on that sort of after-the-fact inquiry could introduce an unacceptable measure of uncertainty. If an inquiry into awareness could provide a complete and satisfactory resolution of the problem in all cases, the priority rules of this section would have incorporated that test. The fact that they do not necessarily means that resort to other law based solely on that factor is precluded, though the question whether a control secured party induced or encouraged its financing arrangement with actual knowledge that the debtor would be violating the rights of another secured party may, in some circumstances, appropriately be treated as a factor in determining whether the control party's action is the kind of egregious conduct for which resort to other law is appropriate.

§ 28:9-329. Priority of security interests in letter-of-credit right.

The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) A security interest held by a secured party having control of the letter-of-credit right under § 28:9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under § 28:9-314 rank according to priority in time of obtaining control.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-322.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; loosely modeled after former Section 9-115(5).

2. General Rule. Paragraph (1) awards priority to a secured party who perfects a security interest directly in letter-of-credit rights (i.e., one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under Section 5-114(c)) over another conflicting security interest (i.e., one that is perfected automatically in the letter-of-credit rights as supporting obligations under Section 9-308(d)). This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds. If an issuer or nominated person recognizes multiple security interests in a letter-of-credit right, resulting in multiple parties having control (Section 9-107), under paragraph (2) the security interests rank according to the time of obtaining control.

3. Drawing Rights; Transferee Beneficiaries. Drawing under a letter of credit is personal to the beneficiary and requires the beneficiary to perform the conditions for drawing under the letter of credit. Accordingly, a beneficiary's grant of a security interest in a letter of credit includes the beneficiary's "letter-of-credit right" as defined in Section 9-102 and the right to "proceeds of [the] letter of credit" as defined in Section 5-114(a), but does not include the right to demand payment under the letter of credit.

Section 5-114(e) provides that the "[r]ights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds." To the extent the rights of a transferee beneficiary or nominated person are independent and superior, this Article does not apply. See Section 9-109(c).

Under Article 5, there is in effect a novation upon the transfer with the issuer becoming bound on a new, independent obligation to the transferee. The rights of nominated persons and transferee beneficiaries under a letter of credit include the right to demand payment from the issuer. Under Section 5-114(e), their rights to payment are independent of their

obligations to the beneficiary (or original beneficiary) and superior to the rights of assignees of letter-of-credit proceeds (Section 5-114(c)) and others claiming a security interest in the beneficiary's (or original beneficiary's) letter-of-credit rights.

A transfer of drawing rights under a transferable letter of credit establishes independent Article 5 rights in the transferee and does not create or perfect an Article 9 security interest in the transferred drawing rights. The definition of "letter-of-credit right" in Section 9-102 excludes a beneficiary's drawing rights. The exercise of drawing rights by a transferee beneficiary may breach a contractual obligation of the transferee to the original beneficiary concerning when and how much the transferee may draw or how it may use the funds received under the letter of credit. If, for example, drawing rights are transferred to support a sale or loan from the transferee to the original beneficiary, then the transferee would be obligated to the original beneficiary under the sale or loan agreement to account for any drawing and for the use of any funds received. The transferee's obligation would be governed by the applicable law of contracts or restitution.

4. Secured Party-Transferee Beneficiaries. As described in Comment 3, drawing rights under letters of credit are transferred in many commercial contexts in which the transferee is not a secured party claiming a security interest in an underlying receivable supported by the letter of credit. Consequently, a transfer of a letter of credit is not a method of "perfection" of a security interest. The transferee's independent right to draw under the letter of credit and to receive and retain the value thereunder (in effect, priority) is not based on Article 9 but on letter-of-credit law and the terms of the letter of credit. Assume, however, that a secured party does hold a security interest in a receivable that is owned by a beneficiary-debtor and supported by a transferable letter of credit. Assume further that the beneficiary-debtor causes the letter of credit to be transferred to the secured party, the secured party draws under the letter of credit, and, upon the issuer's payment to the secured party-transferee, the underlying account debtor's obligation to the original beneficiary-debtor is satisfied. In this situation, the payment to the secured party-transferee is proceeds of the receivable collected by the secured party-transferee. Consequently, the secured party-transferee would have certain duties to the debtor and third parties under Article 9. For example, it would be obliged to collect under the letter of credit in a commercially reasonable manner and to remit any surplus pursuant to Sections 9-607 and 9-608.

This scenario is problematic under letter-of-credit law and practice, inasmuch as a transferee beneficiary collects in its own right arising from its own performance. Accordingly, under Section 5-114, the independent and superior rights of a transferee control over any inconsistent duties under Article 9. A transferee beneficiary may take a transfer of drawing rights to avoid reliance on the original beneficiary's credit and collateral, and it may consider any Article 9 rights superseded by its Article 5 rights. Moreover, it will not always be clear (i) whether a transferee beneficiary has a security interest in the underlying collateral, (ii) whether any security interest is senior to the rights of others, or (iii) whether the transferee beneficiary is aware that it holds a security interest. There will be clear cases in which the role of a transferee beneficiary as such is merely incidental to a conventional secured financing. There also will be cases in which the existence of a security interest may have little to do with the position of a transferee beneficiary as such. In dealing with these cases and less clear cases involving the possible application of Article 9 to a nominated person or a transferee beneficiary, the right to demand payment under a letter of credit should be distinguished from letter-of-credit rights. The courts also should give appropriate consideration to the policies and provisions of Article 5 and letter-of-credit practice as well as Article 9.

§ 28:9-330. Priority of purchaser of chattel paper or instrument.

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) In good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under § 28:9-105; and

(2) The chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) A purchaser of chattel paper has priority over a security interest in the

chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under § 28:9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Except as otherwise provided in § 28:9-327, a purchaser having priority in chattel paper under subsection (a) or (b) also has priority in proceeds of the chattel paper to the extent that:

(1) § 28:9-322 provides for priority in the proceeds; or

(2) The proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Except as otherwise provided in § 28:9-331(a), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) For purposes of subsections (a) and (b), the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) For purposes of subsections (b) and (d), if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-322 and § 28:9-324.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-308.

2. Non-Temporal Priority. This Article permits a security interest in chattel paper or instruments to be perfected either by filing or by the secured party's taking possession. This section enables secured parties and other purchasers of chattel paper (both electronic and tangible) and instruments to obtain priority over earlier-perfected security interests.

3. Chattel Paper. Subsections (a) and (b) follow former Section 9-308 in distinguishing between earlier-perfected security interests in chattel paper that is claimed merely as proceeds of inventory subject to a security interest and chattel paper that is claimed other than merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase "merely as proceeds." For an elaboration, see PEB Commentary No. 8.

This section makes explicit the "good faith" requirement and retains the requirements of "the ordinary course of the purchaser's business" and the giving of "new value" as conditions for priority. Concerning the last, this Article deletes former Section 9-108 and adds to Section 9-102 a completely different definition of the term "new value." Under subsection (e), the holder of a purchase-money security interest in inventory is deemed to give "new value" for chattel paper constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even if it does not make an additional advance against the chattel paper.

If a possessory security interest in tangible chattel paper or a perfected-by-control security interest in electronic chattel paper does not qualify for priority under this section, it may be subordinate to a perfected-by-filing security interest under Section 9-322(a)(1).

4. Possession. The priority afforded by this section turns in part on whether a purchaser "takes possession" of tangible chattel paper. Similarly, the governing law provisions in Section 9-301 address both "possessory" and "nonpossessory" security interests. Two common practices have raised particular concerns. First, in some cases the parties create more than one copy or counterpart of chattel paper evidencing a single secured obligation or lease. This practice raises questions as to which counterpart is the "original" and whether it is necessary for a purchaser to take possession of all counterparts in order to "take possession" of the chattel paper. Second, parties sometimes enter into a single "master" agreement. The master agreement contemplates that the parties will enter into separate "schedules" from time to time, each evidencing chattel paper. Must a purchaser of an obligation or lease evidenced by a single schedule also take possession of the master agreement as well as the schedule in order to "take possession" of the chattel paper?

The problem raised by the first practice is easily solved. The parties may in the terms of their agreement and by designation on the chattel paper identify only one counterpart as the original chattel paper for purposes of taking possession of the chattel paper. Concerns about the second practice also are easily solved by careful drafting. Each schedule should provide that it incorporates the terms of the master agreement, not the other way around. This will make it clear that each schedule is a "stand alone" document.

5. Chattel Paper Claimed Merely as Proceeds. Subsection (a) revises the rule in former Section 9-308(b) to eliminate reference to what the purchaser knows. Instead, a purchaser who meets the possession or control, ordinary course, and new value requirements takes priority over a competing security interest unless the chattel paper itself indicates that it has been assigned to an identified assignee other than the purchaser. Thus subsection (a) recognizes the common practice of placing a "legend" on chattel paper to indicate that it has been assigned. This approach, under which the chattel paper purchaser who gives new value in ordinary course can rely on possession of unlegended, tangible chattel paper without any concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financers.

6. Chattel Paper Claimed Other Than Merely as Proceeds. Subsection (b) eliminates the requirement that the purchaser take without knowledge that the "specific paper" is subject to the security interest and substitutes for it the requirement that the purchaser take "without knowledge that the purchase violates the rights of the secured party." This standard derives from the definition of "buyer in ordinary course of business" in Section 1-201(9). The source of the purchaser's knowledge is irrelevant. Note, however, that "knowledge" means "actual knowledge." Section 1-201(25).

In contrast to a junior secured party in accounts, who may be required in some special circumstances to undertake a search under the "good faith" requirement, see Comment 5 to Section 9-331, a purchaser of chattel paper under this section is not required as a matter of good faith to make a search in order to determine the existence of prior security interests. There may be circumstances where the purchaser undertakes a search nevertheless, either on its own volition or because other considerations make it advisable to do so, e.g., where the purchaser also is purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing statement covering the chattel paper or who knows that the chattel paper is encumbered with a security interest, does not have knowledge that its purchase violates the secured party's rights. However, if a purchaser sees a statement in a financing statement to the effect that a purchase of chattel paper from the debtor would violate the rights of the filed secured party, the purchaser would have such knowledge. Likewise, under new subsection (f), if the chattel paper itself indicates that it had been assigned to an identified secured party other than the purchaser, the purchaser would have wrongful knowledge for purposes of subsection (b), thereby preventing the purchaser from qualifying for priority under that subsection, even if the purchaser did not have actual knowledge. In the case of tangible chattel paper, the indication normally would consist of a written legend on the chattel paper. In the case of electronic chattel paper, this Article leaves to developing market and technological practices the manner in which the chattel paper would indicate an assignment.

7. Instruments. Subsection (d) contains a special priority rule for instruments. Under this subsection, a purchaser of an instrument has priority over a security interest perfected by a method other than possession (e.g., by filing, temporarily under Section 9-312(e) or (g), as proceeds under Section 9-315(d), or automatically upon attachment under Section 9-309(4) if the security interest arises out of a sale of the instrument) if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party. Generally, to the extent subsection (d) conflicts with Section 3-306, subsection (d) governs. See Section 3-102(b). For example, notice of a conflicting security interest precludes a purchaser from becoming a holder in due course under Section 3-302 and thereby taking free of all claims to the instrument under Section 3-306. However,

a purchaser who takes even with knowledge of the security interest qualifies for priority under subsection (d) if it takes without knowledge that the purchase violates the rights of the holder of the security interest. Likewise, a purchaser qualifies for priority under subsection (d) if it takes for "value" as defined in Section 1-201, even if it does not take for "value" as defined in Section 3-303.

Subsection (d) is subject to Section 9-331(a), which provides that Article 9 does not limit the rights of a holder in due course under Article 3. Thus, in the rare case in which the purchaser of an instrument qualifies for priority under subsection (d), but another person has the rights of a holder in due course of the instrument, the other person takes free of the purchaser's claim. See Section 3-306.

The rule in subsection (d) is similar to the rules in subsections (a) and (b), which govern priority in chattel paper. The observations in Comment 6 concerning the requirement of good faith and the phrase "without knowledge that the purchase violates the rights of the secured party" apply equally to purchasers of instruments. However, unlike a purchaser of chattel paper, to qualify for priority under this section a purchaser of an instrument need only give "value" as defined in Section 1-201; it need not give "new value." Also, the purchaser need not purchase the instrument in the ordinary course of its business.

Subsection (d) applies to checks as well as notes. For example, to collect and retain checks that are proceeds (collections) of accounts free of a senior secured party's claim to the same checks, a junior secured party must satisfy the good-faith requirement (honesty in fact and the observance of reasonable commercial standards of fair dealing) of this subsection. This is the same good-faith requirement applicable to holders in due course. See Section 9-331, Comment 5.

8. Priority in Proceeds of Chattel Paper. Subsection (c) sets forth the two circumstances under which the priority afforded to a purchaser of chattel paper under subsection (a) or (b) extends also to proceeds of the chattel paper. The first is if the purchaser would have priority under the normal priority rules applicable to proceeds. The second, which the following Comments discuss in greater detail, is if the proceeds consist of the specific goods covered by the chattel paper. Former Article 9 generally was silent as to the priority of a security interest in proceeds when a purchaser qualifies for priority under Section 9-308 (but see former Section 9-306(5)(b), concerning returned and repossessed goods).

9. Priority in Returned and Repossessed Goods. Returned and repossessed goods may constitute proceeds of chattel paper. The following Comments explain the treatment of returned and repossessed goods as proceeds of chattel paper. The analysis is consistent with that of PEB Commentary No. 5, which these Comments replace, and is based upon the following example:

Example: SP-1 has a security interest in all the inventory of a dealer in goods (Dealer); SP-1's security interest is perfected by filing. Dealer sells some of its inventory to a buyer in the ordinary course of business (BIOCOB) pursuant to a conditional sales contract (chattel paper) that does not indicate that it has been assigned to SP-1. SP-2 purchases the chattel paper from Dealer and takes possession of the paper in good faith, in the ordinary course of business, and without knowledge that the purchase violates the rights of SP-1. Subsequently, BIOCOB returns the goods to Dealer because they are defective. Alternatively, Dealer acquires possession of the goods following BIOCOB's default.

10. Assignment of Non-Lease Chattel Paper.

a. Loan by SP-2 to Dealer Secured by Chattel Paper (or Functional Equivalent Pursuant to Recourse Arrangement).

(1) Returned Goods. If BIOCOB returns the goods to Dealer for repairs, Dealer is merely a bailee and acquires thereby no meaningful rights in the goods to which SP-1's security interest could attach. (Although SP-1's security interest could attach to Dealer's interest as a bailee, that interest is not likely to be of any particular value to SP-1.) Dealer is the owner of the chattel paper (i.e., the owner of a right to payment secured by a security interest in the goods); SP-2 has a security interest in the chattel paper, as does SP-1 (as proceeds of the goods under Section 9-315). Under Section 9-330, SP-2's security interest in the chattel paper is senior to that of SP-1. SP-2 enjoys this priority regardless of whether, or when, SP-2 filed a financing statement covering the chattel paper. Because chattel paper and goods represent different types of collateral, Dealer does not have any meaningful interest in goods to which either SP-1's or SP-2's security interest could attach in order to secure Dealer's obligations to either creditor. See Section 9-102 (defining "chattel paper" and "goods").

Now assume that BIOCOB returns the goods to Dealer under circumstances whereby Dealer once again becomes the owner of the goods. This would be the case, for example, if the goods were defective and BIOCOB was entitled to reject or revoke acceptance of the goods. See Sections 2-602 (rejection), 2-608 (revocation of acceptance). Unless BIOCOB has waived its defenses as against assignees of the chattel paper, SP-1's and SP-2's rights against BIOCOB would be subject to BIOCOB's claims and defenses. See Sections 9-403, 9-404. SP-1's security interest would attach again because the returned goods would be proceeds of the

chattel paper. Dealer's acquisition of the goods easily can be characterized as "proceeds" consisting of an "in kind" collection on or distribution on account of the chattel paper. See Section 9-102 (definition of "proceeds"). Assuming that SP-1's security interest is perfected by filing against the goods and that the filing is made in the same office where a filing would be made against the chattel paper, SP-1's security interest in the goods would remain perfected beyond the 20-day period of automatic perfection. See Section 9-315(d).

Because Dealer's newly reacquired interest in the goods is proceeds of the chattel paper, SP-2's security interest also would attach in the goods as proceeds. If SP-2 had perfected its security interest in the chattel paper by filing (again, assuming that filing against the chattel paper was made in the same office where a filing would be made against the goods), SP-2's security interest in the reacquired goods would be perfected beyond 20 days. See Section 9-315(d). However, if SP-2 had relied only on its possession of the chattel paper for perfection and had not filed against the chattel paper or the goods, SP-2's security interest would be unperfected after the 20-day period. See Section 9-315(d). Nevertheless, SP-2's unperfected security interest in the goods would be senior to SP-1's security interest under Section 9-330(c). The result in this priority contest is not affected by SP-2's acquiescence or non-acquiescence in the return of the goods to Dealer.

(2) Repossessed Goods. As explained above, Dealer owns the chattel paper covering the goods, subject to security interests in favor of SP-1 and SP-2. In Article 9 parlance, Dealer has an interest in chattel paper, not goods. If Dealer, SP-1, or SP-2 repossesses the goods upon BIOCOB's default, whether the repossession is rightful or wrongful as among Dealer, SP-1, or SP-2, Dealer's interest will not change. The location of goods and the party who possesses them does not affect the fact that Dealer's interest is in chattel paper, not goods. The goods continue to be owned by BIOCOB. SP-1's security interest in the goods does not attach until such time as Dealer reacquires an interest (other than a bare possessory interest) in the goods. For example, Dealer might buy the goods at a foreclosure sale from SP-2 (whose security interest in the chattel paper is senior to that of SP-1); that disposition would cut off BIOCOB's rights in the goods. Section 9-617.

In many cases the matter would end upon sale of the goods to Dealer at a foreclosure sale and there would be no priority contest between SP-1 and SP-2; Dealer would be unlikely to buy the goods under circumstances whereby SP-2 would retain its security interest. There can be exceptions, however. For example, Dealer may be obliged to purchase the goods from SP-2 and SP-2 may be obliged to convey the goods to Dealer, but Dealer may fail to pay SP-2. Or, one could imagine that SP-2, like SP-1, has a general security interest in the inventory of Dealer. In the latter case, SP-2 should not receive the benefit of any special priority rule, since its interest in no way derives from priority under Section 9-330. In the former case, SP-2's security interest in the goods reacquired by Dealer is senior to SP-1's security interest under Section 9-330.

b. Dealer's Outright Sale of Chattel Paper to SP-2. Article 9 also applies to a transaction whereby SP-2 buys the chattel paper in an outright sale transaction without recourse against Dealer. Sections 1-201(37), 9-109(a). Although Dealer does not, in such a transaction, retain any residual ownership interest in the chattel paper, the chattel paper constitutes proceeds of the goods to which SP-1's security interest will attach and continue following the sale of the goods. Section 9-315(a). Even though Dealer has not retained any interest in the chattel paper, as discussed above BIOCOB subsequently may return the goods to Dealer under circumstances whereby Dealer reacquires an interest in the goods. The priority contest between SP-1 and SP-2 will be resolved as discussed above; Section 9-330 makes no distinction among purchasers of chattel paper on the basis of whether the purchaser is an outright buyer of chattel paper or one whose security interest secures an obligation of Dealer.

11. Assignment of Lease Chattel Paper. As defined in Section 9-102, "chattel paper" includes not only writings that evidence security interests in specific goods but also those that evidence true leases of goods.

The analysis with respect to lease chattel paper is similar to that set forth above with respect to non-lease chattel paper. It is complicated, however, by the fact that, unlike the case of chattel paper arising out of a sale, Dealer retains a residual interest in the goods. See Section 2A-103(1)(q) (defining "lessor's residual interest"); In re Leasing Consultants, Inc., 486 F.2d 367 (2d Cir.1973) (lessor's residual interest under true lease is an interest in goods and is a separate type of collateral from lessor's interest in the lease). If Dealer leases goods to a "lessee in ordinary course of business" (LIOCOB), then LIOCOB takes its interest under the lease (i.e., its "leasehold interest") free of the security interest of SP-1. See Sections 2A-307(3), 2A-103(1)(m) (defining "leasehold interest"), (1)(o) (defining "lessee in ordinary course of business"). SP-1 would, however, retain its security interest in the residual interest. In addition, SP-1 would acquire an interest in the lease chattel paper as proceeds. If Dealer then assigns the lease chattel paper to SP-2, Section 9-330 gives SP-2 priority over SP-1 with respect to the chattel paper, but not with respect to the residual interest in the goods. Consequently,

assignees of lease chattel paper typically take a security interest in and file against the lessor's residual interest in goods, expecting their priority in the goods to be governed by the first-to-file-or-perfect rule of Section 9-322.

If the goods are returned to Dealer, other than upon expiration of the lease term, then the security interests of both SP-1 and SP-2 normally would attach to the goods as proceeds of the chattel paper. (If the goods are returned to Dealer at the expiration of the lease term and the lessee has made all payments due under the lease, however, then Dealer no longer has any rights under the chattel paper. Dealer's interest in the goods consists solely of its residual interest, as to which SP-2 has no claim.) This would be the case, for example, when the lessee rescinds the lease or when the lessor recovers possession in the exercise of its remedies under Article 2A. See, e.g., Section 2A-525. If SP-2 enjoyed priority in the chattel paper under Section 9-330, then SP-2 likewise would enjoy priority in the returned goods as proceeds. This does not mean that SP-2 necessarily is entitled to the entire value of the returned goods. The value of the goods represents the sum of the present value of (i) the value of their use for the term of the lease and (ii) the value of the residual interest. SP-2 has priority in the former, but SP-1 ordinarily would have priority in the latter. Thus, an allocation of a portion of the value of the goods to each component may be necessary. Where, as here, one secured party has a security interest in the lessor's residual interest and another has a priority security interest in the chattel paper, it may be advisable for the conflicting secured parties to establish a method for making such an allocation and otherwise to determine their relative rights in returned goods by agreement.

§ 28:9-331. Priority of rights of purchasers of instruments, documents, and securities under other articles; priority of interests in financial assets and security entitlements under Article 8.

(a) This article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8.

(b) This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8.

(c) Filing under this article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-322 and § 28:9-330.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-309.

2. "Priority." In some provisions, this Article distinguishes between claimants that take collateral free of a security interest (in the sense that the security interest no longer encumbers the collateral) and those that take an interest in the collateral that is senior to a surviving security interest. See, e.g., Section 9-317. Whether a holder or purchaser referred to in this section takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes a security interest in it. The term "priority" is meant to encompass both scenarios, as it does in Section 9-330.

3. Rights Acquired by Purchasers. The rights to which this section refers are set forth in Sections 3-305 and 3-306 (holder in due course), 7-502 (holder to whom a negotiable document of title has been duly negotiated), and 8-303 (protected purchaser). The holders and purchasers referred to in this section do not always take priority over a security interest. See, e.g., Section 7-503 (affording paramount rights to certain owners and secured parties as against

holder to whom a negotiable document of title has been duly negotiated). Accordingly, this section adds the clause, "to the extent provided in Articles 3, 7, and 8" to former Section 9-309.

4. Financial Assets and Security Entitlements. New subsection (b) provides explicit protection for those who deal with financial assets and security entitlements and who are immunized from liability under Article 8. See, e.g., Sections 8-502, 8-503(e), 8-510, 8-511. The new subsection makes explicit in Article 9 what is implicit in former Article 9 and explicit in several provisions of Article 8. It does not change the law.

5. Collections by Junior Secured Party. Under this section, a secured party with a junior security interest in receivables (accounts, chattel paper, promissory notes, or payment intangibles) may collect and retain the proceeds of those receivables free of the claim of a senior secured party to the same receivables, if the junior secured party is a holder in due course of the proceeds. In order to qualify as a holder in due course, the junior must satisfy the requirements of Section 3-302, which include taking in "good faith." This means that the junior not only must act "honestly" but also must observe "reasonable commercial standards of fair dealing" under the particular circumstances. See Section 9-102(a). Although "good faith" does not impose a general duty of inquiry, e.g., a search of the records in filing offices, there may be circumstances in which "reasonable commercial standards of fair dealing" would require such a search.

Consider, for example, a junior secured party in the business of financing or buying accounts who fails to undertake a search to determine the existence of prior security interests. Because a search, under the usages of trade of that business, would enable it to know or learn upon reasonable inquiry that collecting the accounts violated the rights of a senior secured party, the junior may fail to meet the good-faith standard. See Utility Contractors Financial Services, Inc. v. Amsouth Bank, NA, 985 F.2d 1554 (11th Cir.1993). Likewise, a junior secured party who collects accounts when it knows or should know under the particular circumstances that doing so would violate the rights of a senior secured party, because the debtor had agreed not to grant a junior security interest in, or sell, the accounts, may not meet the good-faith test. Thus, if a junior secured party conducted or should have conducted a search and a financing statement filed on behalf of the senior secured party states such a restriction, the junior's collection would not meet the good-faith standard. On the other hand, if there was a course of performance between the senior secured party and the debtor which placed no such restrictions on the debtor and allowed the debtor to collect and use the proceeds without any restrictions, the junior secured party may then satisfy the requirements for being a holder in due course. This would be more likely in those circumstances where the junior secured party was providing additional financing to the debtor on an on-going basis by lending against or buying the accounts and had no notice of any restrictions against doing so. Generally, the senior secured party would not be prejudiced because the practical effect of such payment to the junior secured party is little different than if the debtor itself had made the collections and subsequently paid the secured party from the debtor's general funds. Absent collusion, the junior secured party would take the funds free of the senior security interests. See Section 9-332. In contrast, the senior secured party is likely to be prejudiced if the debtor is going out of business and the junior secured party collects the accounts by notifying the account debtors to make payments directly to the junior. Those collections may not be consistent with "reasonable commercial standards of fair dealing."

Whether the junior secured party qualifies as a holder in due course is fact-sensitive and should be decided on a case-by-case basis in the light of those circumstances. Decisions such as Financial Management Services Inc. v. Familian, 905 P.2d 506 (Ariz. App.Div.1995) (finding holder in due course status) could be determined differently under this application of the good-faith requirement.

The concepts addressed in this Comment are also applicable to junior secured parties as purchasers of instruments under Section 9-330(d). See Section 9-330, Comment 7.

§ 28:9-332. Transfer of money; transfer of funds from deposit account.

(a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Scope of This Section. This section affords broad protection to transferees who take funds from a deposit account and to those who take money. The term "transferee" is not defined; however, the debtor itself is not a transferee. Thus this section does not cover the case in which a debtor withdraws money (currency) from its deposit account or the case in which a bank debits an encumbered account and credits another account it maintains for the debtor.

A transfer of funds from a deposit account, to which subsection (b) applies, normally will be made by check, by funds transfer, or by debiting the debtor's deposit account and crediting another depositor's account.

Example 1: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. Debtor draws a check on the account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit account (it is an order to pay funds from the deposit account), Lender's security interest in the deposit account does not give rise to a security interest in the check. Payee deposits the check into its own deposit account, and Bank A pays it. Unless Payee acted in collusion with Debtor in violating Lender's rights, Payee takes the funds (the credits running in favor of Payee) free of Lender's security interest. This is true regardless of whether Payee is a holder in due course of the check and even if Payee gave no value for the check.

Example 2: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. At Bank B's suggestion, Debtor moves the funds from the account at Bank A to Debtor's deposit account with Bank B. Unless Bank B acted in collusion with Debtor in violating Lender's rights, Bank B takes the funds (the credits running in favor of Bank B) free from Lender's security interest. See subsection (b). However, inasmuch as the deposit account maintained with Bank B constitutes the proceeds of the deposit account at Bank A, Lender's security interest would attach to that account as proceeds. See Section 9-315.

Subsection (b) also would apply if, in the example, Bank A debited Debtor's deposit account in exchange for the issuance of Bank A's cashier's check. Lender's security interest would attach to the cashier's check as proceeds of the deposit account, and the rules applicable to instruments would govern any competing claims to the cashier's check. See, e.g., Sections 3-306, 9-322, 9-330, 9-331.

If Debtor withdraws money (currency) from an encumbered deposit account and transfers the money to a third party, then subsection (a), to the extent not displaced by federal law relating to money, applies. It contains the same rule as subsection (b).

Subsection (b) applies to transfers of funds from a deposit account; it does not apply to transfers of the deposit account itself or of an interest therein. For example, this section does not apply to the creation of a security interest in a deposit account. Competing claims to the deposit account itself are dealt with by other Article 9 priority rules. See Sections 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit account itself. If so, the normal rules applicable to transferred collateral would apply; this section would not.

3. Policy. Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person "who in good faith changed position in reliance on the payment." Rather than adopt this standard, this section eliminates all reliance requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would object to these payments. In the vast proportion of cases, the transferee probably would be able to show a

change of position in reliance on the payment. This section does not put the transferee to the burden of having to make this proof.

4. "Bad Actors." To deal with the question of the "bad actor," this section borrows "collusion" language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g., Section 1-201(9) ("without knowledge that the sale ... is in violation of the ... security interest"); Section 1-201(19) ("honesty in fact in the conduct or transaction concerned"); Section 3-302(a)(2)(v) ("without notice of any claim").

5. Transferee Who Does Not Take Free. This section sets forth the circumstances under which certain transferees of money or funds take free of security interests. It does not determine the rights of a transferee who does not take free of a security interest.

Example 3: The facts are as in Example 2, but, in wrongfully moving the funds from the deposit account at Bank A to Debtor's deposit account with Bank B, Debtor acts in collusion with Bank B. Bank B does not take the funds free of Lender's security interest under this section. If Debtor grants a security interest to Bank B, Section 9-327 governs the relative priorities of Lender and Bank B. Under Section 9-327(3), Bank B's security interest in the Bank B deposit account is senior to Lender's security interest in the deposit account as proceeds. However, Bank B's senior security interest does not protect Bank B against any liability to Lender that might arise from Bank B's wrongful conduct.

§ 28:9-333. Priority of certain liens arising by operation of law.

(a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) Which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) Which is created by statute or rule of law in favor of the person; and

(3) Whose effectiveness depends on the person's possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-310.

2. "Possessory Liens." This section governs the relative priority of security interests arising under this Article and "possessory liens," i.e., common-law and statutory liens whose effectiveness depends on the lienor's possession of goods with respect to which the lienor provided services or furnished materials in the ordinary course of its business. As under former Section 9-310, the possessory lien has priority over a security interest unless the possessory lien is created by a statute that expressly provides otherwise. If the statute creating the possessory lien is silent as to its priority relative to a security interest, this section provides a rule of interpretation that the possessory lien takes priority, even if the statute has been construed judicially to make the possessory lien subordinate.

CASE NOTES

In general.

Under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by a judgment creditor against collateral. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C.

§ 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Where District of Columbia had already levied on the property to foreclose tax lien and secured creditor had not yet exercised its rights to retake the collateral under the applicable provisions of the Uniform Commercial Code, the lien of the secured creditor, although prior in time, was still an inchoate lien vis-a-vis the absolute priority statute. D.C. Code §§ 28:9-310, 47-1586h, 47-2609. In re Aries Enterprises, Ltd., 3 B.R. 472, 1980 Bankr. LEXIS 5362 (1980).

Secured party with prior, perfected interest in impounded automobile was entitled to possession of automobile and was not required to pay registered owner's unpaid parking tickets. D.C. Code §§ 28:9-503, 40-603(k)(3), 40-702. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

§ 28:9-334. Priority of security interests in fixtures and crops.

(a) A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.

(b) This article does not prevent creation of an encumbrance upon fixtures under real property law.

(c) In cases not governed by subsections (d) through (h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Except as otherwise provided in subsection (h), a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) The security interest is a purchase-money security interest;

(2) The interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) The security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter.

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(A) Is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(B) Has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) Before the goods become fixtures, the security interest is perfected by any method permitted by this article and the fixtures are readily removable:

(A) Factory or office machines;

(B) Equipment that is not primarily used or leased for use in the operation of the real property; or

(C) Replacements of domestic appliances that are consumer goods;

(3) The conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article; or

(4) The security interest is:

(A) Created in a manufactured home in a manufactured-home transaction; and

(B) Perfected pursuant to a statute described in § 28:9-311(a)(2).

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) The encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) The debtor has a right to remove the goods as against the encumbrancer or owner.

(g) The priority of the security interest under subsection (f)(2) continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f), a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-313.

2. Scope of This Section. This section contains rules governing the priority of security interests in fixtures and crops as against persons who claim an interest in real property. Priority contests with other Article 9 security interests are governed by the other priority rules of this Article. The provisions with respect to fixtures follow those of former Section 9-313. However, they have been rewritten to conform to Section 2A-309 and to prevailing style conventions. Subsections (i) and (j), which apply to crops, are new.

3. Security Interests in Fixtures. Certain goods that are the subject of personal-property (chattel) financing become so affixed or otherwise so related to real property that they become part of the real property. These goods are called "fixtures." See Section 9-102 (definition of "fixtures"). Some fixtures retain their personal-property nature: a security interest under this Article may be created in fixtures and may continue in goods that become fixtures. See subsection (a). However, if the goods are ordinary building materials incorporated into an improvement on land, no security interest in them exists. Rather, the priority of claims to the building materials are determined by the law governing claims to real property. (Of course, the fact that no security interest exists in ordinary building materials incorporated into an improvement on land does not prejudice any rights the secured party may have against the debtor or any other person who violated the secured party's rights by wrongfully incorporating the goods into real property.)

Thus, this section recognizes three categories of goods: (1) those that retain their chattel character entirely and are not part of the real property; (2) ordinary building materials that have become an integral part of the real property and cannot retain their chattel character for purposes of finance; and (3) an intermediate class that has become real property for certain purposes, but as to which chattel financing may be preserved.

To achieve priority under certain provisions of this section, a security interest must be perfected by making a "fixture filing" (defined in Section 9-102) in the real-property records. Because the question whether goods have become fixtures often is a difficult one under applicable real-property law, a secured party may make a fixture filing as a precaution. Courts should not infer from a fixture filing that the secured party concedes that the goods are or will become fixtures.

4. Priority in Fixtures: General. In considering priority problems under this section, one must first determine whether real-property claimants per se have an interest in the crops or fixtures as part of real property. If not, it is immaterial, so far as concerns real property parties as such, whether a security interest arising under this Article is perfected or unperfected. In no event does a real-property claimant (e.g., owner or mortgagee) acquire an interest in a "pure" chattel just because a security interest therein is unperfected. If on the other hand real-property law gives real-property parties an interest in the goods, a conflict arises and this section states the priorities.

5. Priority in Fixtures: Residual Rule. Subsection (c) states the residual priority rule, which applies only if one of the other rules does not: A security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

6. Priority in Fixtures: First to File or Record. Subsection (e)(1), which follows former Section 9-313(4)(b), contains the usual priority rule of conveyancing, that is, the first to file or record prevails. In order to achieve priority under this rule, however, the security interest must be perfected by a "fixture filing" (defined in Section 9-102), i.e., a filing for record in the real property records and indexed therein, so that it will be found in a real-property search .. The condition in subsection (e)(1)(B), that the security interest must have had priority over any conflicting interest of a predecessor in title of the conflicting encumbrancer or owner, appears to limit to the first-in-time principle. However, this apparent limitation is nothing other than an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage, even though the assignment is a later recorded instrument. Similarly if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

7. Priority in Fixtures: Purchase-Money Security Interests. Subsection (d), which follows former Section 9-313(4)(a), contains the principal exception to the first-to-file-or-record rule of subsection (e)(1). It affords priority to purchase-money security interests in fixtures as against prior recorded real-property interests, provided that the purchase-money security interest is filed as a fixture filing in the real-property records before the goods become fixtures or within 20 days thereafter. This priority corresponds to the purchase-money priority under Section 9-324(a). (Like other 10-day periods in former Article 9, the 10-day period in this section has been changed to 20 days.)

It should be emphasized that this purchase-money priority with the 20-day grace period for filing is limited to rights against real-property interests that arise before the goods become fixtures. There is no such priority with the 20-day grace period as against real-property interests that arise subsequently. The fixture security interest can defeat subsequent real-property interests only if it is filed first and prevails under the usual conveyancing rule in subsection (e)(1) or one of the other rules in this section.

8. Priority in Fixtures: Readily Removable Goods. Subsection (e)(2), which derives from Section 2A-309 and former Section 9-313(4)(d), contains another exception to the usual first-to-file-or-perfect rule. It affords priority to the holders of security interests in certain types of readily removable goods-factory and office machines, equipment that is not primarily used or leased for use in the operation of the real property, and (as discussed below) certain replacements of domestic appliances. This rule is made necessary by the confusion in the law as to whether certain machinery, equipment, and appliances become fixtures. It protects a secured party who, perhaps in the mistaken belief that the readily removable goods will not become fixtures, makes a UCC filing (or otherwise perfects under this Article) rather than making a fixture filing.

Frequently, under applicable law, goods of the type described in subsection (e)(2) will not be considered to have become part of the real property. In those cases, the fixture security interest does not conflict with a real-property interest, and resort to this section is unnecessary. However, if the goods have become part of the real property, subsection (e)(2) enables a fixture secured party to take priority over a conflicting real-property interest if the fixture

security interest is perfected by a fixture filing or by any other method permitted by this Article. If perfection is by fixture filing, the fixture security interest would have priority over subsequently recorded real-property interests under subsection (e)(1) and, if the fixture security interest is a purchase-money security interest (a likely scenario), it would also have priority over most real property interests under the purchase-money priority of subsection (d). Note, however, that unlike the purchase-money priority rule in subsection (d), the priority rules in subsection (e) override the priority given to a construction mortgage under subsection (h).

The rule in subsection (e)(2) is limited to readily removable replacements of domestic appliances. It does not apply to original installations. Moreover, it is limited to appliances that are "consumer goods" (defined in Section 9-102) in the hands of the debtor. The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial, owner-occupied contexts need not concern itself with real-property descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. See Section 9-309(1).

9. Priority in Fixtures: Judicial Liens. Subsection (e)(3), which follows former Section 9-313(4)(d), adopts a first-in-time rule applicable to conflicts between a fixture security interest and a lien on the real property obtained by legal or equitable proceedings. Such a lien is subordinate to an earlier-perfected security interest, regardless of the method by which the security interest was perfected. Judgment creditors generally are not reliance creditors who search real-property records. Accordingly, a perfected fixture security interest takes priority over a subsequent judgment lien or other lien obtained by legal or equitable proceedings, even if no evidence of the security interest appears in the relevant real-property records. Subsection (e)(3) thus protects a perfected fixture security interest from avoidance by a trustee in bankruptcy under Bankruptcy Code Section 544(a), regardless of the method of perfection.

10. Priority in Fixtures: Manufactured Homes. A manufactured home may become a fixture. New subsection (e)(4) contains a special rule granting priority to certain security interests created in a "manufactured home" as part of a "manufactured-home transaction" (both defined in Section 9-102). Under this rule, a security interest in a manufactured home that becomes a fixture has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is perfected under a certificate-of-title statute (see Section 9-311). Subsection (e)(4) is only one of the priority rules applicable to security interests in a manufactured home that becomes a fixture. Thus, a security interest in a manufactured home which does not qualify for priority under this subsection may qualify under another.

11. Priority in Fixtures: Construction Mortgages. The purchase-money priority presents a difficult problem in relation to construction mortgages. The latter ordinarily will have been recorded even before the commencement of delivery of materials to the job, and therefore would take priority over fixture security interests were it not for the purchase-money priority. However, having recorded first, the holder of a construction mortgage reasonably expects to have first priority in the improvement built using the mortgagee's advances. Subsection (g) expressly gives priority to the construction mortgage recorded before the filing of the purchase-money security interest in fixtures. A refinancing of a construction mortgage has the same priority as the construction mortgage itself. The phrase "an obligation incurred for the construction of an improvement" covers both optional advances and advances pursuant to commitment. Both types of advances have the same priority under subsection (g).

The priority under this subsection applies only to goods that become fixtures during the construction period leading to the completion of the improvement. The construction priority will not apply to additions to the building made long after completion of the improvement, even if the additions are financed by the real-property mortgagee under an open-end clause of the construction mortgage. In such case, subsections (d), (e), and (f) govern.

Although this subsection affords a construction mortgage priority over a purchase-money security interest that otherwise would have priority under subsection (d), the subsection is subject to the priority rules in subsections (e) and (f). Thus, a construction mortgage may be junior to a fixture security interest perfected by a fixture filing before the construction mortgage was recorded. See subsection (e)(1).

12. Crops. Growing crops are "goods" in which a security interest may be created and perfected under this Article. In some jurisdictions, a mortgage of real property may cover crops, as well. In the event that crops are encumbered by both a mortgage and an Article 9 security interest, subsection (i) provides that the security interest has priority. States whose real-property law provides otherwise should either amend that law directly or override it by enacting subsection (j).

CASE NOTES

In general.

As between seller of fuel tanks and landowner, fuel tanks which were installed in the ground were items of personal property and chattel, not fixtures. In re Shelton, 35 B.R. 505, 1983 Bankr. LEXIS 5014 (1983).

§ 28:9-335. Accessions.

(a) A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Except as otherwise provided in subsection (d), the other provisions of this part determine the priority of a security interest in an accession.

(d) A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under § 28:9-311(b).

(e) After default, subject to Part 6, a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) A secured party that removes an accession from other goods under subsection (e) shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-314.

2. "Accession." This section applies to an "accession," as defined in Section 9-102, regardless of the cost or difficulty of removing the accession from the other goods, and regardless of whether the original goods have come to form an integral part of the other goods. This section does not apply to goods whose identity has been lost. Goods of that kind are "commingled goods" governed by Section 9-336. Neither this section nor the following one addresses the case of collateral that changes form without the addition of other goods.

3. "Accession" vs. "Other Goods." This section distinguishes among the "accession," the "other goods," and the "whole." The last term refers to the combination of the "accession" and the "other goods." If one person's collateral becomes physically united with another person's collateral, each is an "accession."

Example 1: SP-1 holds a security interest in the debtor's tractors (which are not subject to a certificate-of-title statute), and SP-2 holds a security interest in a particular tractor engine. The engine is installed in a tractor. From the perspective of SP-1, the tractor becomes an "accession" and the engine is the "other goods." From the perspective of SP-2, the engine is the "accession" and the tractor is the "other goods." The completed tractor-tractor cum engine-constitutes the "whole."

4. Scope. This section governs only a few issues concerning accessions. Subsection (a) contains rules governing continuation of a security interest in an accession. Subsection (b) contains a rule governing continued perfection

of a security interest in goods that become an accession. Subsection (d) contains a special priority rule governing accessions that become part of a whole covered by a certificate of title. Subsections (e) and (f) govern enforcement of a security interest in an accession.

5. Matters Left to Other Provisions of This Article: Attachment and Perfection. Other provisions of this Article often govern accession-related issues. For example, this section does not address whether a secured party acquires a security interest in the whole if its collateral becomes an accession. Normally this will turn on the description of the collateral in the security agreement.

Example 2: Debtor owns a computer subject to a perfected security interest in favor of SP-1. Debtor acquires memory and installs it in the computer. Whether SP-1's security interest attaches to the memory depends on whether the security agreement covers it.

Similarly, this section does not determine whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of this Article, including the requirements for indicating the collateral covered by a financing statement, resolve that question.

6. Matters Left to Other Provisions of This Article: Priority. With one exception, concerning goods covered by a certificate of title (see subsection (d)), the other provisions of this Part, including the rules governing purchase-money security interests, determine the priority of most security interests in an accession, including the relative priority of a security interest in an accession and a security interest in the whole. See subsection (c).

Example 3: Debtor owns an office computer subject to a security interest in favor of SP-1. Debtor acquires memory and grants a perfected security interest in the memory to SP-2. Debtor installs the memory in the computer, at which time (one assumes) SP-1's security interest attaches to the memory. The first-to-file-or-perfect rule of Section 9-322 governs priority in the memory. If, however, SP-2's security interest is a purchase-money security interest, Section 9-324(a) would afford priority in the memory to SP-2, regardless of which security interest was perfected first.

7. Goods Covered by Certificate of Title. This section does govern the priority of a security interest in an accession that is or becomes part of a whole that is subject to a security interest perfected by compliance with a certificate-of-title statute. Subsection (d) provides that a security interest in the whole, perfected by compliance with a certificate-of-title statute, takes priority over a security interest in the accession. It enables a secured party to rely upon a certificate of title without having to check the UCC files to determine whether any components of the collateral may be encumbered. The subsection imposes a corresponding risk upon those who finance goods that may become part of goods covered by a certificate of title. In doing so, it reverses the priority that appeared reasonable to most pre-UCC courts.

Example 4: Debtor owns an automobile subject to a security interest in favor of SP-1. The security interest is perfected by notation on the certificate of title. Debtor buys tires subject to a perfected-by-filing purchase-money security interest in favor of SP-2 and mounts the tires on the automobile's wheels. If the security interest in the automobile attaches to the tires, then SP-1 acquires priority over SP-2. The same result would obtain if SP-1's security interest attached to the automobile and was perfected after the tires had been mounted on the wheels.

CASE NOTES

In general.

Lender's security interest in automobile engine, perfected by bailee's possession prior to installation, was superior to credit union's previously perfected security interest in the whole automobile. Johnson v. Conrail-Amtrak Fed. Credit Union, 111 WLR 2297 (Super. Ct. 1983).

§ 28:9-336. Commingled goods.

(a) In this section, "commingled goods" means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) If a security interest in collateral is perfected before the collateral

becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) is perfected.

(e) Except as otherwise provided in subsection (f), the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c).

(f) If more than one security interest attaches to the product or mass under subsection (c), the following rules determine priority:

(1) A security interest that is perfected under subsection (d) has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than 1 security interest is perfected under subsection (d), the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-315.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-315.

2. "Commingled Goods." Subsection (a) defines "commingled goods." It is meant to include not only goods whose identity is lost through manufacturing or production (e.g., flour that has become part of baked goods) but also goods whose identity is lost by commingling with other goods from which they cannot be distinguished (e.g., ball bearings).

3. Consequences of Becoming "Commingled Goods." By definition, the identity of the original collateral cannot be determined once the original collateral becomes commingled goods. Consequently, the security interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the original collateral can be created thereafter except as a part of the resulting product or mass. See subsection (b).

Once collateral becomes commingled goods, the secured party's security interest is transferred from the original collateral to the product or mass. See subsection (c). If the security interest in the original collateral was perfected, the security interest in the product or mass is a perfected security interest. See subsection (d). This perfection continues until lapse.

4. Priority of Perfected Security Interests That Attach Under This Section. This section governs the priority of competing security interests in a product or mass only when both security interests arise under this section. In that case, if both security interests are perfected by operation of this section (see subsections (c) and (d)), then the security interests rank equally, in proportion to the value of the collateral at the time it became commingled goods. See subsection (f)(2).

Example 1: SP-1 has a perfected security interest in Debtor's eggs, which have a value of $300 and secure a debt of $400, and SP-2 has a perfected security interest in Debtor's flour, which has a value of $500 and secures a debt of $600. Debtor uses the flour and eggs to make cakes, which have a value of $1000. The two security interests rank equally and share in the ratio of 3:5. Applying this ratio to the entire value of the product, SP-1 would be entitled to $375 (i.e., 3/8 x $1000), and SP-2 would be entitled to $625 (i.e., 5/8 x $1000).

Example 2: Assume the facts of Example 1, except that SP-1's collateral, worth $300, secures a debt of $200. Recall that, if the cake is worth $1000, then applying the ratio of 3:5 would entitle SP-1 to $375 and SP-2 to $625. However, SP-1 is not entitled to collect from the product more than it is owed. Accordingly, SP-1's share would be only $200, SP-2 would receive the remaining value, up to the amount it is owed ($600).

Example 3: Assume that the cakes in the previous examples have a value of only $600. Again, the parties share in the ratio of 3:5. If, as in Example 1, SP-1 is owed $400, then SP-1 is entitled to $225 (i.e., 3/8 x $600), and SP-2 is entitled to $375 (i.e., 5/8 x $600). Debtor receives nothing. If, however, as in Example 2, SP-1 is owed only $200, then SP-2 receives $400.

The results in the foregoing examples remain the same, regardless of whether SP-1 or SP-2 (or each) has a purchase-money security interest.

5. Perfection: Unperfected Security Interests. The rule explained in the preceding Comment applies only when both security interests in

original collateral are perfected when the goods become commingled goods. If a security interest in original collateral is unperfected at the time the collateral becomes commingled goods, subsection (f)(1) applies.

Example 4: SP-1 has a perfected security interest in the debtor's eggs, and SP-2 has an unperfected security interest in the debtor's flour. Debtor uses the flour and eggs to make cakes. Under subsection (c), both security interests attach to the cakes. But since SP-1's security interest was perfected at the time of commingling and SP-2's was not, only SP-1's security interest in the cakes is perfected. See subsection (d). Under subsection (f)(1) and Section 9-322(a)(2), SP-1's perfected security interest has priority over SP-2's unperfected security interest.

If both security interests are unperfected, the rule of Section 9-322(a)(3) would apply.

6. Multiple Security Interests. On occasion, a single input may be encumbered by more than one security interest. In those cases, the multiple secured parties should be treated like a single secured party for purposes of determining their collective share under subsection (f)(2). The normal priority rules would determine how that share would be allocated between them. Consider the following example, which is a variation on Example 1 above:

Example 5: SP-1A has a perfected, first-priority security interest in Debtor's eggs. SP-1B has a perfected, second-priority security interest in the same collateral. The eggs have a value of $300. Debtor owes $200 to SP-1A and $200 to SP-1B. SP-2 has a perfected security interest in Debtor's flour, which has a value of $500 and secures a debt of $600. Debtor uses the flour and eggs to make cakes, which have a value of $1000.

For purposes of subsection (f)(2), SP-1A and SP-1B should be treated like a single secured party. The collective security interest would rank equally with that of SP-2. Thus, the secured parties would share in the ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this ratio to the entire value of the product, SP-1A and SP-1B in the aggregate would be entitled to $375 (i.e., 3/8 x $1000), and SP-2 would be entitled to $625 (i.e., 5/8 x $1000).

SP-1A and SP-1B would share the $375 in accordance with their priority, as established under other rules. Inasmuch as SP-1A has first priority, it would receive $200, and SP-1B would receive $175.

7. Priority of Security Interests That Attach Other Than by Operation of This Section. Under subsection (e), the normal priority rules determine the priority of a security interest that attaches to the product or mass other than by operation of this section. For example, assume that SP-1 has a perfected security interest in Debtor's existing and after-acquired baked goods, and SP-2 has a perfected security interest in Debtor's flour. When the flour is processed into cakes, subsections (c) and (d) provide that SP-2 acquires a perfected security interest in the cakes. If SP-1 filed against the baked goods before SP-2 filed against the flour, then SP-1 will enjoy priority in the cakes. See Section 9-322 (first-to-file-or-perfect). But if SP-2 filed against the flour before SP-1 filed against the baked goods, then SP-2 will enjoy priority in the cakes to the extent of its security interest.

CASE NOTES

ANALYSIS

Possession of collateral.
Waiver.

Possession of collateral.

Fact that secured creditor did not repossess all collateral in debtor's possession, and did not sell all collateral it repossessed, did not thereby entitle creditor to deficiency judgment it was otherwise precluded from obtaining due to its failure to give debtor notice of proposed sale of repossessed collateral. D.C. Code 1981, § 28:9-501(1). Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Waiver.

Secured creditor does not necessarily waive its security interest by allowing debtor to retain possession of collateral and use it in the ordinary course of business; affirmative act implying waiver of secured interest is usually required. Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Secured creditor does not waive its right in collateral by initially suing on debt instead of seeking immediate repossession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Secured creditor's decision to rely on its suit for monetary judgment as essential means of recovering debt and its subsequent decision to repossess collateral as additional means of satisfying debt, did not mean that secured creditor waived its rights in remaining collateral in debtor's possession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

§ 28:9-337. Priority of security interests in goods covered by certificate of title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, the District issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) A buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) The security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under § 28:9-311(b), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Derived from former Section 9-103(2)(d).

2. Protection for Buyers and Secured Parties. This section affords protection to certain good-faith purchasers for value who are likely to have relied on a "clean" certificate of title, i.e., one that neither shows that the goods are subject to a particular security interest nor contains a statement that they may be subject to security interests not shown on the certificate. Under this section, a buyer can take free of, and the holder of a conflicting security interest can acquire priority over, a security interest that is perfected by any method under the law of another jurisdiction. The fact that the security interest has been reperfected by possession under Section 9-313 does not of itself disqualify the holder of a conflicting security interest from protection under paragraph (2).

§ 28:9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in § 28:9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(m), 60 DCR 2634.)

Section references. — This section is referenced in § 28:9-520.

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 substituted "tangible chattel paper, tangible documents" for "chattel paper, documents" in (2).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — See note to § 28:9-301.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Effect of Incorrect Information in Financing Statement. Section 9-520(a) requires the filing office to reject financing statements that do not contain information concerning the debtor as specified in Section 9-516(b)(5). An error in this information does not render the financing statement ineffective. On rare occasions, a subsequent purchaser of the collateral (i.e., a buyer or secured party) may rely on the misinformation to its detriment. This section subordinates a security interest or agricultural lien perfected by an effective, but flawed, financing statement to the rights of a buyer or holder of a perfected security interest to the extent that, in reasonable reliance on the incorrect information, the purchaser gives value and, in the case of tangible collateral, receives delivery of the collateral. A purchaser who has not made itself aware of the information in the filing office with respect to the debtor cannot act in "reasonable reliance" upon incorrect information.

3. Relationship to Section 9-507. This section applies to financing statements that contain information that is incorrect at the time of filing and imposes a small risk of subordination on the filer. In contrast, Section 9-507 deals with financing statements containing information that is correct at the time of filing but which becomes incorrect later. Except as provided in Section 9-507 with respect to changes in the debtor's name, an otherwise effective financing statement does not become ineffective if the information contained in it becomes inaccurate.

§ 28:9-339. Priority subject to subordination.

This article does not preclude subordination by agreement by a person entitled to priority.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-316.

2. Subordination by Agreement. The preceding sections deal elaborately with questions of priority. This section makes it entirely clear that a person entitled to priority may effectively agree to subordinate its claim. Only the person entitled to priority may make such an agreement: a person's rights cannot be adversely affected by an agreement to which the person is not a party.

CASE NOTES

Subordination agreements.

Lender bank did not subordinate its security interest in interpleaded funds through escrow agreement with borrower's subcontractors where agreement set forth its purpose as facilitating and regularizing receipt of monies from federal government under contract and distribution of monies to subcontractors and agreement disclaimed any effect beyond scope of escrow arrangement. Industrial Bank of Washington v. Techmatics Technologies, Inc., 763 F. Supp. 629, 1991 U.S. Dist. LEXIS 6294 (1991), affirmed by 955 F.2d 764, 293 U.S. App. D.C. 436, 1992 U.S. App. LEXIS 2771 (1992).

Would-be borrower waived right to insist that lender perform upon prior lienholder's execu-

tion of subordination agreement, even assuming that it had such an obligation, where lender advised borrower that it did not consider subordination agreement executed by prior lienholder as adequate subordination agreement, borrower at no time notified lender to the contrary and demanded performance, and borrower continued to negotiate with lender for more than one year without ever demanding performance or threatening suit. K-Com Micrographics v. Neighborhood Economic Dev. Corp. (In re K-Com Micrographics), 159 B.R. 61, 1993 Bankr. LEXIS 1467 (1993).

Subpart 4. Rights of Bank.

§ 28:9-340. Effectiveness of right of recoupment or set-off against deposit account.

(a) Except as otherwise provided in subsection (c), a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) Except as otherwise provided in subsection (c), the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under § 28:9-104(a)(3), if the set-off is based on a claim against the debtor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109 and § 28:9-341.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; subsection (b) is based on a nonuniform Illinois amendment.

2. Set-off vs. Security Interest. This section resolves the conflict between a security interest in a deposit account and the bank's rights of recoupment and set-off.

Subsection (a) states the general rule and provides that the bank may effectively exercise rights of recoupment and set-off against the secured party. Subsection (c) contains an exception: if the secured party has control under Section 9-104(a)(3) (i.e., if it has become the bank's customer), then any set-off exercised by the bank against a debt owed by the debtor (as opposed to a debt owed to the bank by the secured party) is ineffective. The bank may, however, exercise its recoupment rights effectively. This result is consistent with the priority rule in Section 9-327(4), under which the security interest of a bank in a deposit account is subordinate to that of a secured party who has control under Section 9-104(a)(3).

This section deals with rights of set-off and recoupment that a bank may have under other law. It does not create a right of set-off or recoupment, nor is it intended to override any limitations or restrictions that other law imposes on the exercise of those rights.

3. Preservation of Set-Off Right. Subsection (b) makes clear that a bank may hold both a right of set-off against, and an Article 9 security interest in, the same deposit account. By holding a security interest in a deposit account, a bank does not impair any right of set-off it would otherwise enjoy. This subsection does not pertain to accounts evidenced by an instrument (e.g., certain certificates of deposit), which are excluded from the definition of "deposit accounts."

§ 28:9-341. Bank's rights and duties with respect to deposit account.

Except as otherwise provided in § 28:9-340(c), and unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

(1) The creation, attachment, or perfection of a security interest in the deposit account;

(2) The bank's knowledge of the security interest; or

(3) The bank's receipt of instructions from the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Free Flow of Funds. This section is designed to prevent security interests in deposit accounts from impeding the free flow of funds through the payment system. Subject to two exceptions, it leaves the bank's rights and duties with respect to the deposit account and the funds on deposit unaffected by the creation or perfection of a security interest or by the bank's knowledge of the security interest. In addition, the section permits the bank to ignore the instructions of the secured party unless it had agreed to honor them or unless other law provides to the contrary. A secured party who wishes to deprive the debtor of access to funds on deposit or to appropriate those funds for itself needs to obtain the agreement of the bank, utilize the judicial process, or comply with procedures set forth in other law. Section 4-303(a), concerning the effect of notice on a bank's right and duty to pay items, is not to the contrary. That section addresses only whether an otherwise effective notice comes too late; it does not determine whether a timely notice is otherwise effective.

3. Operation of Rule. The general rule of this section is subject to Section 9-340(c), under which a bank's right of set-off may not be exercised against a deposit account in the secured party's name if the right is based on a claim against the debtor. This result reflects current law in many jurisdictions and does not appear to have unduly disrupted banking practices or the payments system. The more important function of this section, which is not impaired by Section 9-340, is the bank's right to follow the debtor's (customer's) instructions (e.g., by honoring checks, permitting withdrawals, etc.) until such time as the depository institution is served with judicial process or receives instructions with respect to the funds on deposit from a secured party who has control over the deposit account.

4. Liability of Bank. This Article does not determine whether a bank that pays out funds from an encumbered deposit is liable to the holder of a security interest. Although the fact that a secured party has control over the deposit account and the manner by which control was achieved may be relevant to the imposition of liability, whatever rule applies generally when a bank pays out funds in which a third party has an interest would determine liability to a secured party. Often, this rule is found in a non-UCC adverse claim statute.

5. Certificates of Deposit. This section does not address the obligations of banks that issue instruments evidencing deposits (e.g., certain certificates of deposit).

§ 28:9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

This article does not require a bank to enter into an agreement of the kind described in § 28:9-104(a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the

existence of the agreement to another person unless requested to do so by its customer.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived from Section 8-106(g).

2. Protection for Bank. This section protects banks from the need to enter into agreements against their will and from the need to respond to inquiries from persons other than their customers.

Part 4. Rights of Third Parties.

§ 28:9-401. Alienability of debtor's rights.

(a) Except as otherwise provided in subsection (b) and §§ 28:9-406, 28:9-407, 28:9-408, and 28:9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article.

(b) An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:11-106.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-311.

2. Scope of This Part. This Part deals with several issues affecting third parties (i.e., parties other than the debtor and the secured party). These issues are not addressed in Part 3, Subpart 3, which deals with priorities. This Part primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.

3. Governing Law. There was some uncertainty under former Article 9 as to which jurisdiction's law (usually, which jurisdiction's version of Article 9) applied to the matters that this Part addresses. Part 3, Subpart 1, does not determine the law governing these matters because they do not relate to perfection, the effect of perfection or nonperfection, or priority. However, it might be inappropriate for a designation of applicable law by a debtor and secured party under Section 1-105 to control the law applicable to an independent transaction or relationship between the debtor and an account debtor.

Consider an example under Section 9-408.

Example 1: State X has adopted this Article; former Article 9 is the law of State Y. A general intangible (e.g., a franchise agreement) between a debtor-franchisee, D, and an account debtor-franchisor, AD, is governed by the law of State Y. D grants to SP a security interest in its rights under the franchise agreement. The franchise agreement contains a term prohibiting D's assignment of its rights under the agreement. D and SP agree that their secured transaction is governed by the law of State X. Under State X's Section 9-408, the restriction on D's assignment is ineffective to prevent the creation, attachment, or perfection of SP's security interest. State Y's former Section 9-318(4), however, does not address restrictions on the creation of security interests in general intangibles other than general intangibles for money due or to become due. Accordingly, it

does not address restrictions on the assignment to SP of D's rights under the franchise agreement. The non-Article-9 law of State Y, which does address restrictions, provides that the prohibition on assignment is effective.

This Article does not provide a specific answer to the question of which State's law applies to the restriction on assignment in the example. However, assuming that under non-UCC choice-of-law principles the effectiveness of the restriction would be governed by the law of State Y, which governs the franchise agreement, the fact that State X's Article 9 governs the secured transaction between SP and D would not override the otherwise applicable law governing the agreement. Of course, to the extent that jurisdictions eventually adopt identical versions of this Article and courts interpret it consistently, the inability to identify the applicable law in circumstances such as those in the example may be inconsequential.

4. Inalienability Under Other Law. Subsection (a) addresses the question whether property necessarily is transferable by virtue of its inclusion (i.e., its eligibility as collateral) within the scope of Article 9. It gives a negative answer, subject to the identified exceptions. The substance of subsection (a) was implicit under former Article 9.

5. Negative Pledge Covenant. Subsection (b) is an exception to the general rule in subsection (a). It makes clear that in secured transactions under this Article the debtor has rights in collateral (whether legal title or equitable) which it can transfer and which its creditors can reach. It is best explained with an example.

Example 2: A debtor, D, grants to SP a security interest to secure a debt in excess of the value of the collateral. D agrees with SP that it will not create a subsequent security interest in the collateral and that any security interest purportedly granted in violation of the agreement will be void. Subsequently, in violation of its agreement with SP, D purports to grant a security interest in the same collateral to another secured party.

Subsection (b) validates D's creation of the subsequent (prohibited) security interest, which might even achieve priority over the earlier security interest. See Comment 7. However, unlike some other provisions of this Part, such as Section 9-406, subsection (b) does not provide that the agreement restricting assignment itself is "ineffective." Consequently, the debtor's breach may create a default.

6. Rights of Lien Creditors. Difficult problems may arise with respect to attachment, levy, and other judicial procedures under which a debtor's creditors may reach collateral subject to a security interest. For example, an obligation may be secured by collateral worth many times the amount of the obligation. If a lien creditor has caused all or a portion of the collateral to be seized under judicial process, it may be difficult to determine the amount of the debtor's "equity" in the collateral that has been seized. The section leaves resolution of this problem to the courts. The doctrine of marshaling may be appropriate.

7. Sale of Receivables. If a debtor sells an account, chattel paper, payment intangible, or promissory note outright, as against the buyer the debtor has no remaining rights to transfer. If, however, the buyer fails to perfect its interest, then solely insofar as the rights of certain third parties are concerned, the debtor is deemed to retain its rights and title. See Section 9-318. The debtor has the power to convey these rights to a subsequent purchaser. If the subsequent purchaser (buyer or secured lender) perfects its interest, it will achieve priority over the earlier, unperfected purchaser. See Section 9-322(a)(1).

CASE NOTES

Writs of attachment.

Under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by a judgment creditor against collateral. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Although under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by judgment creditor of borrower against collateral, bank could exercise common-law right of setoff against borrower's demand accounts on deposit with bank. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

§ 28:9-402. Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a

debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:11-105.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-317.
2. Nonliability of Secured Party. This section, like former Section 9-317, rejects theories on which a secured party might be held liable on a debtor's contracts or in tort merely because a security interest exists or because the debtor is entitled to dispose of or use collateral. This section expands former Section 9-317 to cover agricultural liens.

CASE NOTES

In general.

Secured party with prior, perfected interest in impounded automobile was entitled to possession of automobile and was not required to pay registered owner's unpaid parking tickets. D.C. Code §§ 28:9-503, 40-603(k)(3), 40-702. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

§ 28:9-403. Agreement not to assert defenses against assignee.

(a) In this section, "value" has the meaning provided in § 28:3-303(a).

(b) Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) For value;

(2) In good faith;

(3) Without notice of a claim of a property or possessory right to the property assigned; and

(4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under § 28:3-305(a).

(c) Subsection (b) does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under § 28:3-305(b).

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) The record has the same effect as if the record included such a statement; and

(2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) This section is subject to law other than this article which establishes a

different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) Except as otherwise provided in subsection (d), this section does not displace law other than this article which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:11-106.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-206.

2. Scope and Purpose. Subsection (b), like former Section 9-206, generally validates an agreement between an account debtor and an assignor that the account debtor will not assert against an assignee claims and defenses that it may have against the assignor. These agreements are typical in installment sale agreements and leases. However, this section expands former Section 9-206 to apply to all account debtors; it is not limited to account debtors that have bought or leased goods. This section applies only to the obligations of an "account debtor," as defined in Section 9-102. Thus, it does not determine the circumstances under which and the extent to which a person who is obligated on a negotiable instrument is disabled from asserting claims and defenses. Rather, Article 3 must be consulted. See, e.g., Sections 3-305, 3-306. Article 3 governs even when the negotiable instrument constitutes part of chattel paper. See Section 9-102 (an obligor on a negotiable instrument constituting part of chattel paper is not an "account debtor").

3. Conditions of Validation; Relationship to Article 3. Subsection (b) validates an account debtor's agreement only if the assignee takes an assignment for value, in good faith, and without notice of conflicting claims to the property assigned or of certain claims or defenses of the account debtor. Like former Section 9-206, this section is designed to put the assignee in a position that is no better and no worse than that of a holder in due course of a negotiable instrument under Article 3. However, former Section 9-206 left open certain issues, e.g., whether the section incorporated the special Article 3 definition of "value" in Section 3-303 or the generally applicable definition in Section 1-201(44). Subsection (a) addresses this question; it provides that "value" has the meaning specified in Section 3-303(a). Similarly, subsection (c) provides that subsection (b) does not validate an agreement with respect to defenses that could be asserted against a holder in due course under Section 3-305(b) (the so-called "real" defenses). In 1990, the definition of "holder in due course" (Section 3-302) and the articulation of the rights of a holder in due course (Sections 3-305 and 3-306) were revised substantially. This section tracks more closely the rules of Sections 3-302, 3-305, and 3-306.

4. Relationship to Terms of Assigned Property. Former Section 9-206(2), concerning warranties accompanying the sale of goods, has been deleted as unnecessary. This Article does not regulate the terms of the account, chattel paper, or general intangible that is assigned, except insofar as the account, chattel paper, or general intangible itself creates a security interest (as often is the case with chattel paper). Thus, Article 2, and not this Article, determines whether a seller of goods makes or effectively disclaims warranties, even if the sale is secured. Similarly, other law, and not this Article, determines the effectiveness of an account debtor's undertaking to pay notwithstanding, and not to assert, any defenses or claims against an assignor-e.g., a "hell-or-high-water" provision in the underlying agreement that is assigned. If other law gives effect to this undertaking, then, under principles of nemo dat, the undertaking would be enforceable by the assignee (secured party). If other law prevents the assignor from enforcing the undertaking, this section nevertheless might permit the assignee to do so. The right of the assignee to enforce would depend upon whether, under the particular facts, the account debtor's undertaking fairly could be construed as an agreement that falls within the scope of this section and whether the assignee meets the requirements of this section.

5. Relationship to Federal Trade Commission Rule. Subsection (d) is new. It applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the "Holder-in-Due-Course Regulations"). Under this subsection, an assignee of such a record takes subject to the consumer account debtor's claims and defenses to the same extent as it would have if the writing had

contained the required notice. Thus, subsection (d) effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies.

6. Relationship to Other Law. Like former Section 9-206(1), this section takes no position on the enforceability of waivers of claims and defenses by consumer account debtors, leaving that question to other law. However, the reference to "law other than this article" in subsection (e) encompasses administrative rules and regulations; the reference in former Section 9-206(1) that it replaces ("statute or decision") arguably did not.

This section does not displace other law that gives effect to a non-consumer account debtor's agreement not to assert defenses against an assignee, even if the agreement would not qualify under subsection (b). See subsection (f). It validates, but does not invalidate, agreements made by a non-consumer account debtor. This section also does not displace other law to the extent that the other law permits an assignee, who takes an assignment with notice of a claim of a property or possessory right, a defense, or a claim in recoupment, to enforce an account debtor's agreement not to assert claims and defenses against the assignor (e.g., a "hell-or-high-water" agreement). See Comment 4. It also does not displace an assignee's right to assert that an account debtor is estopped from asserting a claim or defense. Nor does this section displace other law with respect to waivers of potential future claims and defenses that are the subject of an agreement between the account debtor and the assignee. Finally, it does not displace Section 1-107, concerning waiver of a breach that allegedly already has occurred.

§ 28:9-404. Rights acquired by assignee; claims and defenses against assignee.

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:

(1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this article requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health-care-insurance receivable.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109, § 41-202, and § 41-204.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-318(1).

2. Purpose; Rights of Assignee in General. Subsection (a), like former Section 9-318(1), provides that an assignee generally takes an assignment subject to defenses and claims of an account debtor. Under subsection (a)(1), if the account debtor's defenses on an assigned claim arise from the transaction that gave rise to the contract with the assignor, it makes no difference whether the defense or claim accrues before or after the account debtor is notified of the assignment. Under subsection (a)(2), the assignee takes subject to other defenses or claims only if they accrue before the account debtor has been notified of the assignment. Of course, an account debtor may waive its right to assert defenses or claims against an assignee under Section 9-403 or other applicable law. Subsection (a) tracks Section 3-305(a)(3) more closely than its predecessor.

3. Limitation on Affirmative Claims. Subsection (b) is new. It limits the claim that the account debtor may assert against an assignee. Borrowing from Section 3-305(a)(3) and cases construing former Section 9-318, subsection (b) generally does not afford the account debtor the right to an affirmative recovery from an assignee.

4. Consumer Account Debtors; Relationship to Federal Trade Commission Rule. Subsections (c) and (d) also are new. Subsection (c) makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors. An "account debtor who is an individual" as used in subsection (c) includes individuals who are jointly or jointly and severally obligated. Subsection (d) applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the "Holder-in-Due-Course Regulations"). Under subsection (d), a consumer account debtor has the same right to an affirmative recovery from an assignee of such a record as the consumer would have had against the assignee had the record contained the required notice.

5. Scope; Application to "Account Debtor." This section deals only with the rights and duties of "account debtors"-and for the most part only with account debtors on accounts, chattel paper, and payment intangibles. Subsection (e) provides that the obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. References in this section to an "account debtor" include account debtors on collateral that is proceeds. Neither this section nor any other provision of this Article, including Sections 9-408 and 9-409, provides analogous regulation of the rights and duties of other obligors on collateral, such as the maker of a negotiable instrument (governed by Article 3), the issuer of or nominated person under a letter of credit (governed by Article 5), or the issuer of a security (governed by Article 8). Article 9 leaves those rights and duties untouched; however, Section 9-409 deals with the special case of letters of credit. When chattel paper is composed in part of a negotiable instrument, the obligor on the instrument is not an "account debtor," and Article 3 governs the rights of the assignee of the chattel paper with respect to the issues that this section addresses. See, e.g., Section 3-601 (dealing with discharge of an obligation to pay a negotiable instrument).

CASE NOTES

ANALYSIS

Rights and liabilities of assignee.
Setoff.

Rights and liabilities of assignee.

Student loan guaranty agencies and other secondary holders of student loan instruments, as assignees, stepped into the shoes of the lender from whom they had taken the promissory notes and were subject to any defenses that the student/obligee could assert against the assignor/lender. D.C. Code 1981, § 28:9-318(1). Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Under Uniform Commercial Code provisions governing assignment of accounts, if account debtor continues to pay assignor after receiving notification that amount due has been assigned, debtor will remain liable to assignee for same amount. D.C. Code 1981, §§ 28:9-102, 28:9-104(f), 28:9-318(3); U.C.C. §§ 9-102, 9-102 comment, 9-104, 9-104 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Assignee of chose in action takes it subject to all defenses, including set-offs, existing at time

of assignment. Hudson Supply & Equipment Co. v. Home Factors Corp., 210 A.2d 837, 1965 D.C. App. LEXIS 201 (App. 1965).

Setoff.

Where asserted claims of buyer against seller existed at time seller assigned accounts receivable, credits to which buyer was entitled should have been set off against assignee's claim against buyer based on accounts. Hudson Supply & Equipment Co. v. Home Factors Corp., 210 A.2d 837, 1965 D.C. App. LEXIS 201 (App. 1965).

§ 28:9-405. Modification of assigned contract.

(a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b) through (d).

(b) Subsection (a) applies to the extent that:

(1) The right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) The right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under § 28:9-406(a).

(c) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) This section does not apply to an assignment of a health-care-insurance receivable.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-318(2).

2. Modification of Assigned Contract. The ability of account debtors and assignors to modify assigned contracts can be important, especially in the case of government contracts and complex contractual arrangements (e.g., construction contracts) with respect to which modifications are customary. Subsections (a) and (b) provide that good-faith modifications of assigned contracts are binding against an assignee to the extent that (i) the right to payment has not been fully earned or (ii) the right to payment has been earned and notification of the assignment has not been given to the account debtor. Former Section 9-318(2) did not validate modifications of fully-performed contracts under any circumstances, whether or not notification of the assignment had been given to the account debtor. Subsection (a) protects the interests of assignees by (i) limiting the effectiveness of modifications to those made in good faith, (ii) affording the assignee with corresponding rights under the contract as modified, and (iii) recognizing that the modification may be a breach of the assignor's agreement with the assignee.

3. Consumer Account Debtors. Subsection (c) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

4. Account Debtors on Health-Care-Insurance Receivables. Subsection (d) also is new. It provides that this section does not apply to an assignment of a health-care-insurance receivable. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law.

§ 28:9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

(a) Subject to subsections (b) through (i) of this section, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) Subject to subsection (h), notification is ineffective under subsection (a):

(1) If it does not reasonably identify the rights assigned;

(2) To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) Only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) A portion has been assigned to another assignee; or

(C) The account debtor knows that the assignment to that assignee is limited.

(c) Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

(d) Except as otherwise provided in subsection (e) and §§ 28:2A-303 and 28:9-407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Subsection (d) does not apply to the sale of a payment intangible or

promissory note, other than a sale pursuant to a disposition under § 28:9-610 or an acceptance of collateral under § 28:9-620.

(f) Except as otherwise provided in §§ 28:2A-303 and 28:9-407 and subject to subsections (h) and (i), a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account or chattel paper; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subject to subsection (h), an account debtor may not waive or vary its option under subsection (b)(3).

(h) This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) This section does not apply to an assignment of a health-care-insurance receivable.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:2-210, § 28:9-209, § 28:9-401, and § 28:9-405.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 added "other than a sale pursuant to a disposition under § 28:9-610 or an acceptance of collateral under § 28:9-620" in (e).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-318(3), (4).

2. Account Debtor's Right to Pay Assignor Until Notification. Subsection (a) provides the general rule concerning an account debtor's right to pay the assignor until the account debtor receives appropriate notification. The revision makes clear that once the account debtor receives the notification, the account debtor cannot discharge its obligation by paying the assignor. It also makes explicit that payment to the assignor before notification, or payment to the assignee after notification, discharges the obligation. No change in meaning from former Section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification on the identity of the person who gives it. An account debtor that doubts whether the right to payment has been assigned may avail itself of the procedures in subsection (c). See Comment 4.

An effective notification under subsection (a) must be authenticated. This requirement normally could be satisfied by sending notification on the notifying person's letterhead or on a form on which the notifying person's name appears. In each case the printed name would be a symbol adopted by the notifying person for the purpose of identifying the person and adopting the notification. See Section 9-102 (defining "authenticate").

Subsection (a) applies only to account debtors on accounts, chattel paper, and payment intangibles. (Section 9-102 defines the term "account debtor" more broadly, to include those obligated on all general intangibles.) Although subsection (a) is more precise than its predecessor, it

probably does not change the rule that applied under former Article 9. Former Section 9-318(3) referred to the account debtor's obligation to "pay," indicating that the subsection was limited to account debtors on accounts, chattel paper, and other payment obligations.

3. Limitations on Effectiveness of Notification. Subsection (b) contains some special rules concerning the effectiveness of a notification under subsection (a).

Subsection (b)(1) tracks former Section 9-318(3) by making ineffective a notification that does not reasonably identify the rights assigned. A reasonable identification need not identify the right to payment with specificity, but what is reasonable also is not left to the arbitrary decision of the account debtor. If an account debtor has doubt as to the adequacy of a notification, it may not be safe in disregarding the notification unless it notifies the assignee with reasonable promptness as to the respects in which the account debtor considers the notification defective.

Subsection (b)(2), which is new, applies only to sales of payment intangibles. It makes a notification ineffective to the extent that other law gives effect to an agreement between an account debtor and a seller of a payment intangible that limits the account debtor's duty to pay a person other than the seller. Payment intangibles are substantially less fungible than accounts and chattel paper. In some (e.g., commercial bank loans), account debtors customarily and legitimately expect that they will not be required to pay any person other than the financial institution that has advanced funds.

It has become common in financing transactions to assign interests in a single obligation to more than one assignee. Requiring an account debtor that owes a single obligation to make multiple payments to multiple assignees would be unnecessarily burdensome. Thus, under subsection (b)(3), an account debtor that is notified to pay an assignee less than the full amount of any installment or other periodic payment has the option to treat the notification as ineffective, ignore the notice, and discharge the assigned obligation by paying the assignor. Some account debtors may not realize that the law affords them the right to ignore certain notices of assignment with impunity. By making the notification ineffective at the account debtor's option, subsection (b)(3) permits an account debtor to pay the assignee in accordance with the notice and thereby to satisfy its obligation pro tanto. Under subsection (g), the rights and duties created by subsection (b)(3) cannot be waived or varied.

4. Proof of Assignment. Subsection (c) links payment with discharge, as in subsection (a). It follows former Section 9-318(3) in referring to the right of the account debtor to pay the assignor if the requested proof of assignment is not seasonably forthcoming. Even if the proof is not forthcoming, the notification of assignment would remain effective, so that, in the absence of reasonable proof of the assignment, the account debtor could discharge the obligation by paying either the assignee or the assignor. Of course, if the assignee did not in fact receive an assignment, the account debtor cannot discharge its obligation by paying a putative assignee who is a stranger. The observations in Comment 3 concerning the reasonableness of an identification of a right to payment also apply here. An account debtor that questions the adequacy of proof submitted by an assignee would be well advised to promptly inform the assignee of the defects.

An account debtor may face another problem if its obligation becomes due while the account debtor is awaiting reasonable proof of the assignment that it has requested from the assignee. This section does not excuse the account debtor from timely compliance with its obligations. Consequently, an account debtor that has received a notification of assignment and who has requested reasonable proof of the assignment may discharge its obligation by paying the assignor at the time (or even earlier if reasonably necessary to avoid risk of default) when a payment is due, even if the account debtor has not yet received a response to its request for proof. On the other hand, after requesting reasonable proof of the assignment, an account debtor may not discharge its obligation by paying the assignor substantially in advance of the time that the payment is due unless the assignee has failed to provide the proof seasonably.

5. Contractual Restrictions on Assignment. Former Section 9-318(4) rendered ineffective an agreement between an account debtor and an assignor which prohibited assignment of an account (whether outright or to secure an obligation) or prohibited a security assignment of a general intangible for the payment of money due or to become due. Subsection (d) essentially follows former Section 9-318(4), but expands the rule of free assignability to chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly overrides both restrictions and prohibitions of assignment. The policies underlying the ineffectiveness of contractual restrictions under this section build on common-law developments that essentially have eliminated legal restrictions on assignments of rights to payment as security and other assignments of rights to payment such as accounts and chattel paper. Any that might linger for accounts and chattel paper are addressed by new subsection (f). See Comment 6.

Former Section 9-318(4) did not apply to a sale of a payment intangible (as described in the former provision, "a general intangible for money due or to become due") but did apply to

an assignment of a payment intangible for security. Subsection (e) continues this approach and also makes subsection (d) inapplicable to sales of promissory notes. Section 9-408 addresses anti-assignment clauses with respect to sales of payment intangibles and promissory notes.

Like former Section 9-318(4), subsection (d) provides that anti-assignment clauses are "ineffective." The quoted term means that the clause is of no effect whatsoever; the clause does not prevent the assignment from taking effect between the parties and the prohibited assignment does not constitute a default under the agreement between the account debtor and assignor. However, subsection (d) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, subsection (d) reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might "impair" an assignment in fact.

Example: Buyer enters into an agreement with Seller to buy equipment that Seller is to manufacture according to Buyer's specifications. Buyer agrees to make a series of prepayments during the construction process. In return, Seller agrees to set aside the prepaid funds in a special account and to use the funds solely for the manufacture of the designated equipment. Seller also agrees that it will not assign any of its rights under the sale agreement with Buyer. Nevertheless, Seller grants to Secured Party a security interest in its accounts. Seller's anti-assignment agreement is ineffective under subsection (d); its agreement concerning the use of prepaid funds, which is not a restriction or prohibition on assignment, is not. However, if Secured Party notifies Buyer to make all future payments directly to Secured Party, Buyer will be obliged to do so under subsection (a) if it wishes the payments to discharge its obligation. Unless Secured Party releases the funds to Seller so that Seller can comply with its use-of-funds covenant, Seller will be in breach of that covenant.

In the example, there appears to be a plausible business purpose for the use-of-funds covenant. However, a court may conclude that a covenant with no business purpose other than imposing an impediment to an assignment actually is a direct restriction that is rendered ineffective by subsection (d).

6. Legal Restrictions on Assignment. Former Section 9-318(4), like subsection (d) of this section, addressed only contractual restrictions on assignment. The former section was grounded on the reality that legal, as opposed to contractual, restrictions on assignments of rights to payment had largely disappeared. New subsection (f) codifies this principle of free assignability for accounts and chattel paper. For the most part the discussion of contractual restrictions in Comment 5 applies as well to legal restrictions rendered ineffective under subsection (f).

7. Multiple Assignments. This section, like former Section 9-318, is not a complete codification of the law of assignments of rights to payment. In particular, it is silent concerning many of the ramifications for an account debtor in cases of multiple assignments of the same right. For example, an assignor might assign the same receivable to multiple assignees (which assignments could be either inadvertent or wrongful). Or, the assignor could assign the receivable to assignee-1, which then might reassign it to assignee-2, and so forth. The rights and duties of an account debtor in the face of multiple assignments and in other circumstances not resolved in the statutory text are left to the common-law rules. See, e.g., Restatement (2d), Contracts §§ 338(3), 339. The failure of former Article 9 to codify these rules does not appear to have caused problems.

8. Consumer Account Debtors. Subsection (h) is new. It makes clear that the rules of this section are subject to other law establishing special rules for consumer account debtors.

9. Account Debtors on Health-Care-Insurance Receivables. Subsection (i) also is new. The obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. Section 9-408 addresses contractual and legal restrictions on the assignment of a health-care-insurance receivable.

CASE NOTES

ANALYSIS

Assignment of rights, generally.

Generally, all contractual rights may be assigned, including right to sue for enforcement of claim. D.C. Code §§ 28:9-102(1)(b), 28:9-104(f), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Rights of assignor.

Under Uniform Commercial Code provisions governing assignment of accounts, taxpayer that assigned its right to receive payments under contract with District of Columbia retained property interests in accounts upon which Internal Revenue Service (IRS) lien could attach, prior to perfection of assignee's

security interest. U.C.C. § 9-318(3); D.C. Code 1981, §§ 28:9-301(1)(b), 28:9-318(3). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Under Uniform Commercial Code provisions governing assignment of accounts, taxpayer that entered into contract with District of Columbia did not have right to payment from District after it assigned its right to receive payment under factoring agreement and District received notice of assignment and request that payment be made to assignor. U.C.C. § 9-318(3); D.C. Code 1981, § 28:9-318(3). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.

(a) Except as otherwise provided in subsection (b), a term in a lease agreement is ineffective to the extent that it:

(1) Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Except as otherwise provided in § 28:2A-303(7), a term described in subsection (a)(2) Is effective to the extent that there is:

(1) A transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) A delegation of a material performance of either party to the lease contract in violation of the term.

(c) The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of § 28:2A-303(4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:2A-303, § 28:9-401, and § 28:9-406.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Section 2A-303.

2. Restrictions on Assignment Generally Ineffective. Under subsection (a), as under former Section 2A-303(3), a term in a lease agreement which prohibits or restricts the creation of a security interest generally is ineffective. This reflects the general policy of Section 9-406(d) and former Section 9-318(4). This section has been conformed in several respects to analogous provisions in Sections 9-406, 9-408, and 9-409, including the substitution of "ineffective" for "not enforceable" and the substitution of "assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest" for "creation or enforcement of a security interest."

3. Exceptions for Certain Transfers and Delegations. Subsection (b) provides exceptions to the general ineffectiveness of restrictions under subsection (a). A term that otherwise is ineffective under subsection (a)(2) is effective to the extent that a lessee transfers its right to possession and use of goods or if either party delegates material performance of the lease contract in violation of the term. However, under subsection (c), as under former Section 2A-303(3), a lessor's creation of a security interest in its interest in a lease contract or its residual interest in the leased goods is not a material impairment under Section 2A-303(4) (former Section 2A-303(5)), absent an actual delegation of the lessor's material performance. The terms of the lease contract determine whether the lessor, in fact, has any remaining obligations to perform. If it does, it is then necessary to determine whether there has been an actual delegation of "material performance." See Section 2A-303, Comments 3 and 4.

§ 28:9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note, other than a sale pursuant to a disposition under § 28:9-610 or an acceptance of collateral under § 28:9-620.

(c) A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) Would impair the creation, attachment, or perfection of a security interest; or

(2) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-

insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) would be effective under law other than this article but is ineffective under subsection (a) or (c) of this section, the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) Is not enforceable against the person obligated on the promissory note or the account debtor;

(2) Does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) Does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) Does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) Does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) Does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(j), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-401.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 added "other than a sale pursuant to a disposition under § 28:9-610 or an acceptance of collateral under § 28:9-620" in (b).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Free Assignability. This section makes ineffective any attempt to restrict the assignment of a general intangible, health-care-insurance receivable, or promissory note, whether the restriction appears in the terms of a promissory note or the agreement between an account debtor and a debtor (subsection (a)) or in a rule of law, including a statute or governmental rule or regulation (subsection (c)). This result allows the creation, attachment, and perfection of a security interest in a general intangible, such as an agreement for the nonexclusive license of software, as well as sales of certain receivables, such as a health-care-insurance receivable (which is an "account"), payment intangible, or promissory note, without giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor or person obligated on a promissory note. This enhances the ability of certain debtors to obtain credit. On the other hand, subsection (d) protects the other party-the "account debtor" on a general intangible or the person obligated on a promissory note-from adverse effects arising from the security interest. It leaves the account debtor's or obligated person's rights and obligations unaffected in all material respects if a restriction rendered ineffective by subsection (a) or (c) would be effective under law other than Article 9.

Example 1: A term of an agreement for the nonexclusive license of computer software prohibits the licensee from assigning any of its rights as licensee with respect to the software. The agreement also provides that an attempt to assign rights in violation of the restriction is a default entitling the licensor to terminate the

license agreement. The licensee, as debtor, grants to a secured party a security interest in its rights under the license and in the computers in which it is installed. Under this section, the term prohibiting assignment and providing for a default upon an attempted assignment is ineffective to prevent the creation, attachment, or perfection of the security interest or entitle the licensor to terminate the license agreement. However, under subsection (d), the secured party (absent the licensor's agreement) is not entitled to enforce the license or to use, assign, or otherwise enjoy the benefits of the licensed software, and the licensor need not recognize (or pay any attention to) the secured party. Even if the secured party takes possession of the computers on the debtor's default, the debtor would remain free to remove the software from the computer, load it on another computer, and continue to use it, if the license so permits. If the debtor does not remove the software, other law may require the secured party to remove it before disposing of the computer. Disposition of the software with the computer could violate an effective prohibition on enforcement of the security interest. See subsection (d).

3. Nature of Debtor's Interest. Neither this section nor any other provision of this Article determines whether a debtor has a property interest. The definition of the term "security interest" provides that it is an "interest in personal property." See Section 1-201(37). Ordinarily, a debtor can create a security interest in collateral only if it has "rights in the collateral." See Section 9-203(b). Other law determines whether a debtor has a property interest ("rights in the collateral") and the nature of that interest. For example, the nonexclusive license addressed in Example 1 may not create any property interest whatsoever in the intellectual property (e.g., copyright) that underlies the license and that effectively enables the licensor to grant the license. The debtor's property interest may be confined solely to its interest in the promises made by the licensor in the license agreement (e.g., a promise not to sue the debtor for its use of the software).

4. Scope: Sales of Payment Intangibles and Other General Intangibles; Assignments Unaffected by this Section. Subsections (a) and (c) render ineffective restrictions on assignments only "to the extent" that the assignments restrict the "creation, attachment, or perfection of a security interest," including sales of payment intangibles and promissory notes. This section does not render ineffective a restriction on an assignment that does not create a security interest. For example, if the debtor in Comment 2, Example 1 purported to assign the license to another entity that would use the computer software itself, other law would govern the effectiveness of the anti-assignment provisions.

Subsection (a) applies to a security interest in payment intangibles only if the security interest arises out of sale of the payment intangibles. Contractual restrictions directed to security interests in payment intangibles which secure an obligation are subject to Section 9-406(d). Subsection (a) also deals with sales of promissory notes which also create security interests. See Section 9-109(a). Subsection (c) deals with all security interests in payment intangibles or promissory notes, whether or not arising out of a sale.

Subsection (a) does not render ineffective any term, and subsection (c) does not render ineffective any law, statute or regulation, that restricts outright sales of general intangibles other than payment intangibles. They deal only with restrictions on security interests. The only sales of general intangibles that create security interests are sales of payment intangibles.

5. Terminology: "Account Debtor"; "Person Obligated on a Promissory Note." This section uses the term "account debtor" as it is defined in Section 9-102. The term refers to the party, other than the debtor, to a general intangible, including a permit, license, franchise, or the like, and the person obligated on a health-care-insurance receivable, which is a type of account. The definition of "account debtor" does not limit the term to persons who are obligated to pay under a general intangible. Rather, the term includes all persons who are obligated on a general intangible, including those who are obligated to render performance in exchange for payment. In some cases, e.g., the creation of a security interest in a franchisee's rights under a franchise agreement, the principal payment obligation may be owed by the debtor (franchisee) to the account debtor (franchisor). This section also refers to a "person obligated on a promissory note," inasmuch as those persons do not fall within the definition of "account debtor."

Example 2: A licensor and licensee enter into an agreement for the nonexclusive license of computer software. The licensee's interest in the license agreement is a general intangible. If the licensee grants to a secured party a security interest in its rights under the license agreement, the licensee is the debtor and the licensor is the account debtor. On the other hand, if the licensor grants to a secured party a security interest in its right to payment (an account) under the license agreement, the licensor is the debtor and the licensee is the account debtor. (This section applies to the security interest in the general intangible but not to the security interest in the account, which is not a health-care-insurance receivable.)

6. Effects on Account Debtors and Persons Obligated on Promissory Notes. Subsections (a) and (c) affect two classes of persons. These subsections affect account debtors on general

intangibles and health-care-insurance receivables and persons obligated on promissory notes. Subsection (c) also affects governmental entities that enact or determine rules of law. However, subsection (d) ensures that these affected persons are not affected adversely. That provision removes any burdens or adverse effects on these persons for which any rational basis could exist to restrict the effectiveness of an assignment or to exercise any remedies. For this reason, the effects of subsections (a) and (c) are immaterial insofar as those persons are concerned.

Subsection (a) does not override terms that do not directly prohibit, restrict, or require consent to an assignment but which might, nonetheless, present a practical impairment of the assignment. Properly read, however, this section, like Section 9-406(d), reaches only covenants that prohibit, restrict, or require consents to assignments; it does not override all terms that might "impair" an assignment in fact.

Example 3: A licensor and licensee enter into an agreement for the nonexclusive license of valuable business software. The license agreement includes terms (i) prohibiting the licensee from assigning its rights under the license, (ii) prohibiting the licensee from disclosing to anyone certain information relating to the software and the licensor, and (iii) deeming prohibited assignments and prohibited disclosures to be defaults. The licensee wishes to obtain financing and, in exchange, is willing to grant a security interest in its rights under the license agreement. The secured party, reasonably, refuses to extend credit unless the licensee discloses the information that it is prohibited from disclosing under the license agreement. The secured party cannot determine the value of the proposed collateral in the absence of this information. Under this section, the terms of the license prohibiting the assignment (grant of the security interest) and making the assignment a default are ineffective. However, the nondisclosure covenant is not a term that prohibits the assignment or creation of a security interest in the license. Consequently, the nondisclosure term is enforceable even though the practical effect is to restrict the licensee's ability to use its rights under the license agreement as collateral.

The nondisclosure term also would be effective in the factual setting of Comment 2, Example 1. If the secured party's possession of the computers loaded with software would put it in a position to discover confidential information that the debtor was prohibited from disclosing, the licensor should be entitled to enforce its rights against the secured party. Moreover, the licensor could have required the debtor to obtain the secured party's agreement that (i) it would immediately return all copies of software loaded on the computers and that (ii) it would not examine or otherwise acquire any information contained in the software.

This section does not prevent an account debtor from protecting by agreement its independent interests that are unrelated to the "creation, attachment, or perfection" of a security interest. In Example 1, moreover, the secured party is not in possession of copies of software by virtue of its security interest or in connection with enforcing its security interest in the debtor's license of the software. Its possession is incidental to its possession of the computers, in which it has a security interest. Enforcing against the secured party a restriction relating to the software in no way interferes with its security interest in the computers.

7. Effect in Assignor's Bankruptcy. This section could have a substantial effect if the assignor enters bankruptcy. Roughly speaking, Bankruptcy Code Section 552 invalidates security interests in property acquired after a bankruptcy petition is filed, except to the extent that the postpetition property constitutes proceeds of prepetition collateral.

Example 4: A debtor is the owner of a cable television franchise that, under applicable law, cannot be assigned without the consent of the municipal franchisor. A lender wishes to extend credit to the debtor, provided that the credit is secured by the debtor's "going business" value. To secure the loan, the debtor grants a security interest in all its existing and after-acquired property. The franchise represents the principal value of the business. The municipality refuses to consent to any assignment for collateral purposes. If other law were given effect, the security interest in the franchise would not attach; and if the debtor were to enter bankruptcy and sell the business, the secured party would receive but a fraction of the business's value. Under this section, however, the security interest would attach to the franchise. As a result, the security interest would attach to the proceeds of any sale of the franchise while a bankruptcy is pending. However, this section would protect the interests of the municipality by preventing the secured party from enforcing its security interest to the detriment of the municipality.

8. Effect Outside of Bankruptcy. The principal effects of this section will take place outside of bankruptcy. Compared to the relatively few debtors that enter bankruptcy, there are many more that do not. By making available previously unavailable property as collateral, this section should enable debtors to obtain additional credit. For purposes of determining whether to extend credit, under some circumstances a secured party may ascribe value to the collateral to which its security interest has attached, even if this section precludes the

secured party from enforcing the security interest without the agreement of the account debtor or person obligated on the promissory note. This may be the case where the secured party sees a likelihood of obtaining that agreement in the future. This may also be the case where the secured party anticipates that the collateral will give rise to a type of proceeds as to which this section would not apply.

Example 5: Under the facts of Example 4, the debtor does not enter bankruptcy. Perhaps in exchange for a fee, the municipality agrees that the debtor may transfer the franchise to a buyer. As consideration for the transfer, the debtor receives from the buyer its check for part of the purchase price and its promissory note for the balance. The security interest attaches to the check and promissory note as proceeds. See Section 9-315(a)(2). This section does not apply to the security interest in the check, which is not a promissory note, health-care-insurance receivable, or general intangible. Nor does it apply to the security interest in the promissory note, inasmuch as it was not sold to the secured party.

9. Contrary Federal Law. This section does not override federal law to the contrary. However, it does reflect an important policy judgment that should provide a template for future federal law reforms.

§ 28:9-409. Restrictions on assignment of letter-of-credit rights ineffective.

(a) A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) Would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or

(2) Provides that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.

(b) To the extent that a term in a letter of credit is ineffective under subsection (a) but would be effective under law other than this article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(1) Is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) Imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) Does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-401.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Purpose and Relevance. This section, patterned on Section 9-408, limits the effectiveness of attempts to restrict the creation, attachment, or perfection of a security interest in letter-of-credit rights, whether the restriction appears in the letter of credit or a rule of law, custom, or practice applicable to the letter of credit. It protects the creation, attachment, and perfection of a security interest while preventing these events from giving rise to a default or breach by the assignor or from triggering a remedy or defense of the issuer or other person obligated on a letter of credit. Letter-of-credit rights are a type of supporting obligation. See Section 9-102. Under Sections 9-203 and 9-308, a security interest in a supporting obligation attaches and is perfected automatically if the security interest in the supported obligation attaches and is perfected. See Section 9-107, Comment 5. The automatic attachment and perfection under Article 9 would be anomalous or misleading if, under other law (e.g., Article 5), a restriction on transfer or assignment were effective to block attachment and perfection.

3. Relationship to Letter-of-Credit Law. Although restrictions on an assignment of a letter of credit are ineffective to prevent creation, attachment, and perfection of a security interest, subsection (b) protects the issuer and other parties from any adverse effects of the security interest by preserving letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance (Section 5-112) and limits the obligation of an issuer or nominated person to recognize a beneficiary's assignment of letter-of-credit proceeds (Section 5-114). Thus, this section's treatment of letter-of-credit rights differs from this Article's treatment of instruments and investment property. Moreover, under Section 9-109(c)(4), this Article does not apply to the extent that the rights of a transferee beneficiary or nominated person are independent and superior under Section 5-114, thereby preserving the "independence principle" of letter-of-credit law.

Part 5. Filing.

Subpart 1. Filing Office; Contents and Effectiveness of Financing Statement.

§ 28:9-501. Filing office.

(a) Except as otherwise provided in subsection (b), if the local law of the District governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) The Recorder of Deeds, if:

(A) The collateral is as-extracted collateral or timber to be cut; or

(B) The financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) The Mayor in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the Office of the Mayor. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-102, § 28:9-109, § 28:9-502, § 28:9-512, § 28:9-516, § 28:9-706, § 28:9-707, § 28:9-806, and § 28:9-807.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Derived from former Section 9-401.

2. Where to File. Subsection (a) indicates where in a given State a financing statement is to be filed. Former Article 9 afforded each State three alternative approaches, depending on the extent to which the State desires central filing (usually with the Secretary of State), local filing (usually with a county office), or both. As Comment 1 to former Section 9-401 observed, "The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide. Consider for example the national distributor who wishes to have current information about the credit standing of the thousands of persons he sells to on credit. The more completely the files are centralized on a state-wide basis, the easier and cheaper it becomes to procure credit information; the more the files are scattered in local filing units, the more burdensome and costly." Local filing increases the net costs of secured transactions also by increasing uncertainty and the number of required filings. Any benefit that local filing may have had in the 1950's is now insubstantial. Accordingly, this Article dictates central filing for most situations, while retaining local filing for real-estate-related collateral and special filing provisions for transmitting utilities.

3. Minerals and Timber. Under subsection (a)(1), a filing in the office where a record of a mortgage on the related real property would be filed will perfect a security interest in as-extracted collateral. Inasmuch as the security interest does not attach until extraction, the filing continues to be effective after extraction. A different result occurs with respect to timber to be cut, however. Unlike as-extracted collateral, standing timber may be goods before it is cut. See Section 9-102 (defining "goods"). Once cut, however, it is no longer timber to be cut, and the filing in the real-property-mortgage office ceases to be effective. The timber then becomes ordinary goods, and filing in the office specified in subsection (a)(2) is necessary for perfection. Note also that after the timber is cut the law of the debtor's location, not the location of the timber, governs perfection under Section 9-301.

4. Fixtures. There are two ways in which a secured party may file a financing statement to perfect a security interest in goods that are or are to become fixtures. It may file in the Article 9 records, as with most other goods. See subsection (a)(2). Or it may file the financing statement as a "fixture filing," defined in Section 9-102, in the office in which a record of a mortgage on the related real property would be filed. See subsection(a)(1)(B).

5. Transmitting Utilities. The usual filing rules do not apply well for a transmitting utility (defined in Section 9-102). Many pre-UCC statutes provided special filing rules for railroads and in some cases for other public utilities, to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. Former Section 9-401(5) recreated and broadened these provisions, and subsection (b) follows this approach. The nature of the debtor will inform persons searching the record as to where to make a search.

§ 28:9-502. Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

(a) Subject to subsection (b), a financing statement is sufficient only if it:

(1) Provides the name of the debtor;

(2) Provides the name of the secured party or a representative of the secured party; and

(3) Indicates the collateral covered by the financing statement.

(b) Except as otherwise provided in § 28:9-501(b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) and also:

(1) Indicate that it covers this type of collateral;

(2) Indicate that it is to be filed in the real property records;

(3) Provide a description of the real property to which the collateral is related; and

(4) If the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

(1) The record indicates the goods or accounts that it covers;

(2) The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;

(3) The record satisfies the requirements for a financing statement in this section, but:

(A) The record need not indicate that it is to be filed in the real property records; and

(B) The record sufficiently provides the name of a debtor who is an individual if it provides the individual name of the debtor or the surname and first personal name of the debtor, even if the debtor is an individual to whom § 28:9-503(a)(4) applies; and

(4) The record is recorded.

(d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(k), 60 DCR 2688.)

Section references. — This section is referenced in § 28:2A-309, § 28:9-102, § 28:9-109, § 28:9-512, § 28:9-514, § 28:9-515, § 28:9-520, and § 28:9-525.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote (c)(3), which read: "The record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and".

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-402(1), (5), (6).

2. "Notice Filing." This section adopts the system of "notice filing." What is required to be filed is not, as under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself, but only a simple record providing a limited amount of information (financing statement). The financing statement may be filed before the security interest attaches or thereafter. See subsection (d). See also Section 9-308(a) (contemplating situations in which a financing statement is filed before a security interest attaches).

The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-210 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. However, in many cases, information may be forthcoming without the need to resort to the formalities of that section.

Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement un-

der which the collateral changes from day to day. However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed.

3. Debtor's Signature; Required Authorization. Subsection (a) sets forth the simple formal requirements for an effective financing statement. These requirements are: (1) the debtor's name; (2) the name of a secured party or representative of the secured party; and (3) an indication of the collateral.

Whereas former Section 9-402(1) required the debtor's signature to appear on a financing statement, this Article contains no signature requirement. The elimination of the signature requirement facilitates paperless filing. (However, as PEB Commentary No. 15 indicates, a paperless financing statement was sufficient under former Article 9.) Elimination of the signature requirement also makes the exceptions provided by former Section 9-402(2) unnecessary.

The fact that this Article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. Rather, Section 9-509(a) entitles a person to file an initial financing statement, an amendment that adds collateral, or an amendment that adds a debtor only if the debtor authorizes the filing, and Section 9-509(d) entitles a person other than the debtor to file a termination statement only if the secured party of record authorizes the filing. Of course, a filing has legal effect only to the extent it is authorized. See Section 9-510.

Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this Article. See Section 1-103. However, under Section 9-509(b), the debtor's authentication of (or becoming bound by) a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization.

Section 9-625 provides a remedy for unauthorized filings. Making an unauthorized filing also may give rise to civil or criminal liability under other law. In addition, this Article contains provisions that assist in the discovery of unauthorized filings and the amelioration of their practical effect. For example, Section 9-518 provides a procedure whereby a person may add to the public record a statement to the effect that a financing statement indexed under the person's name was wrongfully filed, and Section 9-509(d) entitles any person to file a termination statement if the secured party of record fails to comply with its obligation to file or send one to the debtor, the debtor authorizes the filing, and the termination statement so indicates. However, the filing office is neither obligated nor permitted to inquire into issues of authorization. See Section 9-520(a).

4. Certain Other Requirements. Subsection (a) deletes other provisions of former Section 9-402(1) because they seems unwise (real-property description for financing statements covering crops), unnecessary (adequacy of copies of financing statements), or both (copy of security agreement as financing statement). In addition, the filing office must reject a financing statement lacking certain other information formerly required as a condition of perfection (e.g., an address for the debtor or secured party). See Sections 9-516(b), 9-520(a). However, if the filing office accepts the record, it is effective nevertheless. See Section 9-520(c).

5. Real-Property-Related Filings. Subsection (b) contains the requirements for financing statements filed as fixture filings and financing statements covering timber to be cut or minerals and minerals-related accounts constituting as-extracted collateral. A description of the related real property must be sufficient to reasonably identify it. See Section 9-108. This formulation rejects the view that the real property description must be by metes and bounds, or otherwise conforming to traditional real-property practice in conveyancing, but, of course, the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test is that a description of real property must be sufficient so that the financing statement will fit into the real-property search system and be found by a real-property searcher. Under the optional language in subsection (b)(3), the test of adequacy of the description is whether it would be adequate in a record of a mortgage of the real property. As suggested in the Legislative Note, more detail may be required if there is a tract indexing system or a land registration system.

If the debtor does not have an interest of record in the real property, a real-property-related financing statement must show the

name of a record owner, and Section 9-519(d) requires the financing statement to be indexed in the name of that owner. This requirement also enables financing statements covering as-extracted collateral or timber to be cut and financing statements filed as fixture filings to fit into the real-property search system.

6. Record of Mortgage Effective as Financing Statement. Subsection (c) explains when a record of a mortgage is effective as a financing statement filed as a fixture filing or to cover timber to be cut or as-extracted collateral. Use of the term "record of a mortgage" recognizes that in some systems the record actually filed is not the record pursuant to which a mortgage is created. Moreover, "mortgage" is defined in Section 9-102 as an "interest in real property," not as the record that creates or evidences the mortgage or the record that is filed in the public recording systems. A record creating a mortgage may also create a security interest with respect to fixtures (or other goods) in conformity with this Article. A single agreement creating a mortgage on real property and a security interest in chattels is common and useful for certain purposes. Under subsection (c), the recording of the record evidencing a mortgage (if it satisfies the requirements for a financing statement) constitutes the filing of a financing statement as to the fixtures (but not, of course, as to other goods). Section 9-515(g) makes the usual five-year maximum life for financing statements inapplicable to mortgages that operate as fixture filings under Section 9-502(c). Such mortgages are effective for the duration of the real-property recording.

Of course, if a combined mortgage covers chattels that are not fixtures, a regular financing statement filing is necessary with respect to the chattels, and subsection (c) is inapplicable. Likewise, a financing statement filed as a "fixture filing" is not effective to perfect a security interest in personal property other than fixtures.

In some cases it may be difficult to determine whether goods are or will become fixtures. Nothing in this Part prohibits the filing of a "precautionary" fixture filing, which would provide protection in the event goods are determined to be fixtures. The fact of filing should not be a factor in the determining whether goods are fixtures. Cf. Section 9-505(b).

CASE NOTES

Description of property.

Under District of Columbia law, financing statement filed as fixture filing must indicate on its face that it is to be filed in land records and must contain description of property that would be adequate on valid mortgage. D.C. Code 1981, § 28:9-402(5). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

§ 28:9-503. Name of debtor and secured party.

(a) A financing statement sufficiently provides the name of the debtor:

(1) Except as otherwise provided in paragraph (3) of this subsection, if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name that is stated to be the registered organization's name on the public organic record most recently filed with or issued or enacted by the registered organization's jurisdiction of organization which purports to state, amend, or restate the registered organization's name;

(2) Subject to subsection (f) of this section, if the collateral is being administered by the personal representative of a decedent, only if the financing statement provides, as the name of the debtor, the name of the decedent and, in a separate part of the financing statement, indicates that the collateral is being administered by a personal representative;

(3) If the collateral is held in a trust that is not a registered organization, only if the financing statement:

(A) Provides, as the name of the debtor:

(i) If the organic record of the trust specifies a name for the trust, the name specified; or

(ii) If the organic record of the trust does not specify a name for the trust, the name of the settlor or testator; and

(B) In a separate part of the financing statement:

(i) If the name is provided in accordance with subparagraph (A)(i) of this paragraph, indicates that the collateral is held in a trust; or

(ii) If the name is provided in accordance with subparagraph (A)(ii) of this paragraph, provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors or the same testator and indicates that the collateral is held in a trust, unless the additional information so indicates;

(4) Subject to subsection (g) of this section, if the debtor is an individual to whom the District has issued a driver's license that has not expired, or to whom the agency of the District that issues driver's licenses has issued, instead of a driver's license, a special identification card that has not become invalid, only if the financing statement provides the name of the individual which is indicated on the driver's license or special identification card;

(5) If the debtor is an individual to whom paragraph (4) of this subsection does not apply, only if the financing statement provides the individual name of the debtor or the surname and first personal name of the debtor; and

(6) In other cases:

(A) If the debtor has a name, only if the financing statement provides the organizational name of the debtor; and

(B) If the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor, in a manner that each name provided would be sufficient if the person named were the debtor.

(b) A financing statement that provides the name of the debtor in accordance with subsection (a) of this section is not rendered ineffective by the absence of:

(1) A trade name or other name of the debtor; or

(2) Unless required under subsection (a)(6)(B) of this section, names of partners, members, associates, or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one debtor and the name of more than one secured party.

(f) The name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the "name of the decedent" under subsection (a)(2) of this section.

(g) If the District has issued to an individual more than one driver's license, or special identification card, of a kind described in subsection (a)(4) of this section, the one that was issued most recently is the one to which subsection (a)(4) of this section refers.

(h) In this section, the "name of the settlor or testator" means:

(1) If the settlor is a registered organization, the name that is stated to be the settlor's name on the public organic record most recently filed with or

issued or enacted by the settlor's jurisdiction of organization which purports to state, amend, or restate the settlor's name; or

(2) In other cases, the name of the settlor or testator indicated in the trust's organic record.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(l), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-502, § 28:9-506, § 28:9-507, and § 28:9-805.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote the section.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Subsections (a)(4)(A), (b), and (c) derive from former Section 9-402(7); otherwise, new.

2. Debtor's Name. The requirement that a financing statement provide the debtor's name is particularly important. Financing statements are indexed under the name of the debtor, and those who wish to find financing statements search for them under the debtor's name. Subsection (a) explains what the debtor's name is for purposes of a financing statement. If the debtor is a "registered organization" (defined in Section 9-102 so as to ordinarily include corporations, limited partnerships, and limited liability companies), then the debtor's name is the name shown on the public records of the debtor's "jurisdiction of organization" (also defined in Section 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates and common-law trusts.

(Subsection (a)(1) applies to business trusts that are registered organizations.)

Subsection (a)(4)(A) essentially follows the first sentence of former Section 9-402(7). Section 1-201(28) defines the term "organization," which appears in subsection (a)(4), very broadly, to include all legal and commercial entities as well as associations that lack the status of a legal entity. Thus, the term includes corporations, partnerships of all kinds, business trusts, limited liability companies, unincorporated associations, personal trusts, governments, and estates. If the organization has a name, that name is the correct name to put on a financing statement. If the organization does not have a name, then the financing statement should name the individuals or other entities who comprise the organization.

Together with subsections (b) and (c), subsection (a) reflects the view prevailing under former Article 9 that the actual individual or organizational name of the debtor on a financing statement is both necessary and sufficient, whether or not the financing statement provides trade or other names of the debtor and, if the debtor has a name, whether or not the financing statement provides the names of the partners, members, or associates who comprise the debtor.

Note that, even if the name provided in an initial financing statement is correct, the filing office nevertheless must reject the financing statement if it does not identify an individual debtor's last name (e.g., if it is not clear whether the debtor's name is Perry Mason or Mason Perry). See Section 9-516(b)(3)(C).

3. Secured Party's Name. New subsection (d) makes clear that when the secured party is a representative, a financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party is sufficient, even if it does not indicate the representative capacity.

Example: Debtor creates a security interest in favor of Bank X, Bank Y, and Bank Z, but not to their representative, the collateral agent (Bank A). The collateral agent is not itself a secured party. See Section 9-102. Under Sections 9-502(a) and 9-503(d), however, a financing statement is effective if it names as secured party Bank A and not the actual secured parties, even if it omits Bank A's representative capacity.

Each person whose name is provided in an initial financing statement as the name of the secured party or representative of the secured party is a secured party of record. See Section 9-511.

4. Multiple Names. Subsection (e) makes explicit what is implicit under former Article 9:

a financing statement may provide the name of more than one debtor and secured party. See Section 1-102(5)(a) (words in the singular include the plural). With respect to records relating to more than one debtor, see Section 9-520(d). With respect to financing statements providing the name of more than one secured party, see Sections 9-509(e) and 9-510(b).

CASE NOTES

Debtor's name.

To perfect security interest in collateral under District of Columbia Uniform Commercial Code, name of owner of collateral must appear on financing statement and owner must sign it to ensure that subsequent creditors of owner of collateral will have notice of possible prior security interest. D.C. Code 1981, §§ 28:9-105(1)(d), 28:9-402(1). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Creditor failed to perfect her lien in corporation's leasehold interest and fixtures under District of Columbia Uniform Commercial Code, where corporation's name did not appear on creditor's financing statement, but instead the statement merely listed and was signed by corporation's president. D.C. Code 1981, §§ 28:9-105(1)(d), 28:9-402(1). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Reference to corporation's name at beginning of attachment to financing statement listing fixtures and equipment covered by statement did not cure defect in financing statement arising from corporation's name not appearing on financing statement, which merely listed and was signed by corporation's president. D.C. Code 1981, §§ 28:9-105(1)(d), 28:9-402(1). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Under District of Columbia law, creditor's financing statement did not meet requirements for fixture filing, where financing statement did not list name of corporate debtor, and thus third party searching under corporation's name would not have discovered financing statement by using grantor-grantee index. D.C. Code 1981, §§ 28:9-402(1, 5), 28:9-403(7). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Mere fact that subsequent creditors could have protected themselves by searching under name of lessor as record owner of real estate did not show that security interest in fixtures was perfected despite financing statement's failure to list name of corporate debtor, and fact that third party searching under debtor's name in grantor-grantee index would not have discovered financing statement. D.C. Code 1981, §§ 28:9-402(1, 5), 28:9-403(7). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Mortgage filing that fails to list owner of collateral is no more effective to constitute valid financing statement than a similar defective financing statement would be. D.C. Code 1981, § 28:9-402(1, 6). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Even if creditor's lien on corporate debtor's fixtures could be viewed as mortgage, creditor's failure to list corporation as owner of collateral would not give notice to innocent third parties searching grantor-grantee index, and thus such failure would preclude perfection of lien. D.C. Code 1981, §§ 28:9-402(1, 6), 45-701, 45-801. In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

§ 28:9-504. Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

(1) A description of the collateral pursuant to § 28:9-108; or

(2) An indication that the financing statement covers all assets or all personal property.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-402(1).

2. Indication of Collateral. To comply with Section 9-502(a), a financing statement must "indicate" the collateral it covers. A financing statement sufficiently indicates collateral claimed to be covered by the financing state-

ment if it satisfies the purpose of conditioning perfection on the filing of a financing statement, i.e., if it provides notice that a person may have a security interest in the collateral claimed. See Section 9-502, Comment 2. In particular, an indication of collateral that would have satisfied the requirements of former Section 9-402(l) (i.e., "a statement indicating the types, or describing the items, of collateral") suffices under Section 9-502(a). An indication may satisfy the requirements of Section 9-502(a), even if it would not have satisfied the requirements of former Section 9-402(l).

This section provides two safe harbors. Under paragraph (l), a "description" of the collateral (as the term is explained in Section 9-108) suffices as an indication for purposes of the sufficiency of a financing statement.

Debtors sometimes create a security interest in all, or substantially all, of their assets. To accommodate this practice, paragraph (2) expands the class of sufficient collateral references to embrace "an indication that the financing statement covers all assets or all personal property." If the property in question belongs to the debtor and is personal property, any searcher will know that the property is covered by the financing statement. Of course, regardless of its breadth, a financing statement has no effect with respect to property indicated but to which a security interest has not attached. Note that a broad statement of this kind (e.g., "all debtor's personal property") would not be a sufficient "description" for purposes of a security agreement. See Sections 9-203(b)(3)(A), 9-108. It follows that a somewhat narrower description than "all assets," e.g., "all assets other than automobiles," is sufficient for purposes of this section, even if it does not suffice for purposes of a security agreement.

CASE NOTES

In general.

Although agreement between debtor and creditor stated that creditor was granted security interest in named newsletter since formal steps mandated by Uniform Commercial Code to perfect that security interest were never taken, trustee was able to avoid creditor's security interest by reason of his status as judgment lien creditor and the plaintiff was not entitled to have an equitable lien imposed on proceeds of sale of newsletter. Bankr.Code, 11 U.S.C. §§ 101 et seq., 544(a), 546(b), 547; D.C. Code §§ 28:9-105(1)(h), 28:9-106, 28:9-203(1)(b), 28:9-302, 28:9-402, 28:9-403. In re Washington Communications Group, Inc., 10 B.R. 676, 1981 Bankr. LEXIS 3903 (1981).

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). Heller v. Buchbinder, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

§ 28:9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

(a) A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in § 28:9-311(a), using the terms "consignor", "consignee", "lessor", "lessee", "bailor", "bailee", "licensor", "licensee", "owner", "registered owner", "buyer", "seller", or words of similar import, instead of the terms "secured party", and "debtor".

(b) This part applies to the filing of a financing statement under subsection (a) and, as appropriate, to compliance that is equivalent to filing a financing statement under § 28:9-311(b), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a

security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-408.

2. Precautionary Filing. Occasionally, doubts arise concerning whether a transaction creates a relationship to which this Article or its filing provisions apply. For example, questions may arise over whether a "lease" of equipment in fact creates a security interest or whether the "sale" of payment intangibles in fact secures an obligation, thereby requiring action to perfect the security interest. This section, which derives from former Section 9-408, affords the option of filing of a financing statement with appropriate changes of terminology but without affecting the substantive question of classification of the transaction.

3. Changes from Former Section 9-408. This section expands the rule of Section 9-408 to embrace more generally other bailments and transactions, as well as sales transactions, primarily sales of payment intangibles and promissory notes. It provides the same benefits for compliance with a statute or treaty described in Section 9-311(a) that former Section 9-408 provided for filing, in connection with the use of terms such as "lessor," "consignor," etc. The references to "owner" and "registered owner" are intended to address, for example, the situation where a putative lessor is the registered owner of an automobile covered by a certificate of title and the transaction is determined to create a security interest. Although this section provides that the security interest is perfected, the relevant certificate-of-title statute may expressly provide to the contrary or may be ambiguous. If so, it may be necessary or advisable to amend the certificate-of-title statute to ensure that perfection of the security interest will be achieved.

As does Section 1-201, former Article 9 referred to transactions, including leases and consignments, "intended as security." This misleading phrase created the erroneous impression that the parties to a transaction can dictate how the law will classify it (e.g., as a bailment or as a security interest) and thus affect the rights of third parties. This Article deletes the phrase wherever it appears. Subsection (b) expresses the principle more precisely by referring to a security interest that "secures an obligation."

4. Consignments. Although a "true" consignment is a bailment, the filing and priority provisions of former Article 9 applied to "true" consignments. See former Sections 2-326(3), 9-114. A consignment "intended as security" created a security interest that was in all respects subject to former Article 9. This Article subsumes most true consignments under the rubric of "security interest." See Sections 9-102 (definition of "consignment"), 9-109(a)(4), 1-201(37) (definition of "security interest"). Nevertheless, it maintains the distinction between a (true) "consignment," as to which only certain aspects of Article 9 apply, and a so-called consignment that actually "secures an obligation," to which Article 9 applies in full. The revisions to this section reflect the change in terminology.

§ 28:9-506. Effect of errors or omissions.

(a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 28:9-503(a) is seriously misleading.

(c) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 28:9-503(a), the name provided does not make the financing statement seriously misleading.

(d) For purposes of § 28:9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-507 and § 28:9-508.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-402(8).

2. Errors. Like former Section 9-402(8), subsection (a) is in line with the policy of this Article to simplify formal requisites and filing requirements. It is designed to discourage the fanatical and impossibly refined reading of statutory requirements in which courts occasionally have indulged themselves. Subsection (a) provides the standard applicable to indications of collateral. Subsections (b) and (c), which are new, concern the effectiveness of financing statements in which the debtor's name is incorrect. Subsection (b) contains the general rule: a financing statement that fails sufficiently to provide the debtor's name in accordance with Section 9-503(a) is seriously misleading as a matter of law. Subsection (c) provides an exception: If the financing statement nevertheless would be discovered in a search under the debtor's correct name, using the filing office's standard search logic, if any, then as a matter of law the incorrect name does not make the financing statement seriously misleading. A financing statement that is seriously misleading under this section is ineffective even if it is disclosed by (i) using a search logic other than that of the filing office to search the official records, or (ii) using the filing office's standard search logic to search a data base other than that of the filing office.

In addition to requiring the debtor's name and an indication of the collateral, Section 9-502(a) requires a financing statement to provide the name of the secured party or a representative of the secured party. Inasmuch as searches are not conducted under the secured party's name, and no filing is needed to continue the perfected status of security interest after it is assigned, an error in the name of the secured party or its representative will not be seriously misleading. However, in an appropriate case, an error of this kind may give rise to an estoppel in favor of a particular holder of a conflicting claim to the collateral. See Section 1-103.

3. New Debtors. Subsection (d) provides that, in determining the extent to which a financing statement naming an original debtor is effective against a new debtor, the sufficiency of the financing statement should be tested against the name of the new debtor.

CASE NOTES

Misspelled names or typographical errors.
Assignee of taxpayer's right to receive payments from District of Columbia did not obtain perfected security interest in taxpayer's accounts by filing financing statement that misspelled taxpayer's name, where misspelling was sufficiently serious that Recorder of Deeds certified that no financing statement against taxpayer had been filed. D.C. Code 1981, §§ 28:9-402, 28:9-402(1, 8), 28:9-403(4); U.C.C. §§ 9-402, 9-402(8), 9-402 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Under subsection (8) of former § 28:9-402, party could not assert that it was misled by typographical error in view of the fact that it had actual notice of assignment. Thomas Funding Corp. v. District of Columbia, 117 WLR 1441 (Super. Ct. 1988).

§ 28:9-507. Effect of certain events on effectiveness of financing statement.

(a) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Except as otherwise provided in subsection (c) of this section and

§ 28:9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under § 28:9-506.

(c) If the name that a filed financing statement provides for a debtor becomes insufficient as the name of the debtor under § 28:9-503(a) so that the financing statement becomes seriously misleading under § 28:9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within 4 months after, the filed financing statement becomes seriously misleading; and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than 4 months after the filed financing statement becomes seriously misleading, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within 4 months after the financing statement became seriously misleading.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(m), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-508.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote (c).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-402(7).

2. Scope of Section. This section deals with situations in which the information in a proper financing statement becomes inaccurate after the financing statement is filed. Compare Section 9-338, which deals with situations in which a financing statement contains a particular kind of information concerning the debtor (i.e., the information described in Section 9-516(b)(5)) that is incorrect at the time it is filed.

3. Post-Filing Disposition of Collateral. Under subsection (a), a financing statement remains effective even if the collateral is sold or otherwise disposed of. This subsection clarifies the third sentence of former Section 9-402(7) by providing that a financing statement remains effective following the disposition of collateral only when the security interest or agricultural lien continues in that collateral. This result is consistent with the conclusion of PEB Commentary No. 3. Normally, a security interest does continue after disposition of the collateral. See Section 9-315(a). Law other than this Article determines whether an agricultural lien survives disposition of the collateral.

As a consequence of the disposition, the collateral may be owned by a person other than the debtor against whom the financing statement was filed. Under subsection (a), the secured party remains perfected even if it does not correct the public record. For this reason, any person seeking to determine whether a debtor owns collateral free of security interests must inquire as to the debtor's source of title and, if circumstances seem to require it, search in the name of a former owner. Subsection (a) addresses only the sufficiency of the information contained in the financing statement. A disposition of collateral may result in loss of perfection for other reasons. See Section 9-316.

Example: Dee Corp. is an Illinois corporation. It creates a security interest in its equipment in favor of Secured Party. Secured Party files a proper financing statement in Illinois. Dee Corp. sells an item of equipment to Bee Corp., a Pennsylvania corporation, subject to the security interest. The security interest continues, see Section 9-315(a), and remains perfected, see Section 9-507(a), notwithstanding that the financing statement is filed under "D" (for Dee Corp.) and not under "B." However, because Bee Corp. is located in Pennsylvania and not Illinois, see Section 9-307, unless Secured Party perfects under Pennsylvania law within one year after the transfer, its security interest will

become unperfected and will be deemed to have been unperfected against purchasers of the collateral. See Section 9-316.

4. Other Post-Filing Changes. Subsection (b) provides that, as a general matter, post-filing changes that render a financing statement inaccurate and seriously misleading have no effect on a financing statement. The financing statement remains effective. It is subject to two exceptions: Section 9-508 and Section 9-507(c). Section 9-508 addresses the effectiveness of a financing statement filed against an original debtor when a new debtor becomes bound by the original debtor's security agreement.

It is discussed in the Comments to that section. Section 9-507(c) addresses a "pure" change of the debtor's name, i.e., a change that does not implicate a new debtor. It clarifies former Section 9-402(7). If a name change renders a filed financing statement seriously misleading, the financing statement is not effective as to collateral acquired more than four months after the change, unless before the expiration of the four months an amendment is filed that specifies the debtor's new correct name (or provides an incorrect name that renders the financing statement not seriously misleading under Section 9-506). As under former Section 9-402(7), the original financing statement would continue to be effective with respect to collateral acquired before the name change as well as collateral acquired within the four-month period.

§ 28:9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.

(a) Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) to be seriously misleading under § 28:9-506:

(1) The financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within 4 months after, the new debtor becomes bound under § 28:9-203(d); and

(2) The financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than 4 months after the new debtor becomes bound under § 28:9-203(d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under § 28:9-507(a).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-326, § 28:9-506, and § 28:9-507.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. The Problem. Section 9-203(d) and (e) and this section deal with situations where one party (the "new debtor") becomes bound as debtor by a security agreement entered into by another person (the "original debtor"). These situations often arise as a consequence of changes in business structure. For example, the original debtor may be an individual debtor who operates a business as a sole proprietorship and then incorporates it. Or, the original debtor may be a corporation that is merged into another corporation. Under both former Article 9 and this Article, collateral that is transferred in the course of the incorporation or merger normally would remain subject to a perfected security interest. See Sections 9-315(a), 9-507(a). Former Article 9 was less clear with

respect to whether an after-acquired property clause in a security agreement signed by the original debtor would be effective to create a security interest in property acquired by the new corporation or the merger survivor and, if so, whether a financing statement filed against the original debtor would be effective to perfect the security interest. This section and Sections 9-203(d) and (e) are a clarification.

3. How New Debtor Becomes Bound. Normally, a security interest is unenforceable unless the debtor has authenticated a security agreement describing the collateral. See Section 9-203(b). New Section 9-203(e) creates an exception, under which a security agreement entered into by one person is effective with respect to the property of another. This exception comes into play if a "new debtor" becomes bound as debtor by a security agreement entered into by another person (the "original debtor"). (The quoted terms are defined in Section 9-102.) If a new debtor does become bound, then the security agreement entered into by the original debtor satisfies the security-agreement requirement of Section 9-203(b)(3) as to existing or after-acquired property of the new debtor to the extent the property is described in the security agreement. In that case, no other agreement is necessary to make a security interest enforceable in that property. See Section 9-203(e).

Section 9-203(d) explains when a new debtor becomes bound by an original debtor's security agreement. Under Section 9-203(d)(1), a new debtor becomes bound as debtor if, by contract or operation of other law, the security agreement becomes effective to create a security interest in the new debtor's property. For example, if the applicable corporate law of mergers provides that when A Corp merges into B Corp, B Corp becomes a debtor under A Corp's security agreement, then B Corp would become bound as debtor following such a merger. Similarly, B Corp would become bound as debtor if B Corp contractually assumes A's obligations under the security agreement.

Under certain circumstances, a new debtor becomes bound for purposes of this Article even though it would not be bound under other law. Under Section 9-203(d)(2), a new debtor becomes bound when, by contract or operation of other law, it (i) becomes obligated not only for the secured obligation but also generally for the obligations of the original debtor and (ii) acquires or succeeds to substantially all the assets of the original debtor. For example, some corporate laws provide that, when two corporations merge, the surviving corporation succeeds to the assets of its merger partner and "has all liabilities" of both corporations. In the case where, for example, A Corp merges into B Corp (and A Corp ceases to exist), some people have questioned whether A Corp's grant of a security interest in its existing and after-acquired property becomes a "liability" of B Corp, such that B Corp's existing and after-acquired property becomes subject to a security interest in favor of A Corp's lender. Even if corporate law were to give a negative answer, under Section 9-203(d)(2), B Corp would become bound for purposes of Section 9-203(e) and this section. The "substantially all of the assets" requirement of Section 9-203(d)(2) excludes sureties and other secondary obligors as well as persons who become obligated through veil piercing and other non-successorship doctrines. In most cases, it will exclude successors to the assets and liabilities of a division of a debtor.

4. When Financing Statement Effective Against New Debtor. Subsection (a) provides that a filing against the original debtor generally is effective to perfect a security interest in collateral that a new debtor has at the time it becomes bound by the original debtor's security agreement and collateral that it acquires after the new debtor becomes bound. Under subsection (b), however, if the filing against the original debtor is seriously misleading as to the new debtor's name, the filing is effective as to collateral acquired by the new debtor more than four months after the new debtor becomes bound only if a person files during the four-month period an initial financing statement providing the name of the new debtor. Compare Section 9-507(c) (four-month period of effectiveness with respect to collateral acquired by a debtor after the debtor changes its name). Moreover, if the original debtor and the new debtor are located in different jurisdictions, a filing against the original debtor would not be effective to perfect a security interest in collateral that the new debtor acquires or has acquired from a person other than the original debtor. See Example 5, Section 9-316, Comment 2.

5. Transferred Collateral. This section does not apply to collateral transferred by the original debtor to a new debtor. See subsection (c). Under those circumstances, the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason. See Sections 9-316, 9-507(a).

6. Priority. Section 9-326 governs the priority contest between a secured creditor of the original debtor and a secured creditor of the new debtor.

§ 28:9-509. Persons entitled to file a record.

(a) A person may file an initial financing statement, amendment that adds

collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) The debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c) of this section; or

(2) The person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) The collateral described in the security agreement; and

(2) Property that becomes collateral under § 28:9-315(a)(2), whether or not the security agreement expressly covers proceeds.

(c) By acquiring collateral in which a security interest or agricultural lien continues under § 28:9-315(a)(1), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under § 28:9-315(a)(2).

(d) A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) The secured party of record authorizes the filing; or

(2) The amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by § 28:9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-510, § 28:9-512, § 28:9-518, and § 28:9-625.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Scope and Approach of This Section. This section collects in one place most of the rules determining whether a record may be filed. Section 9-510 explains the extent to which a filed record is effective. Under these sections, the identity of the person who effects a filing is immaterial. The filing scheme contemplated by this Part does not contemplate that the identity of a "filer" will be a part of the searchable records. This is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system. (Note that the 1972 amendments to this Article eliminated the requirement that a financing statement contain the signature of the secured party.) As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is insignificant whether the secured party or another person files any given record. The question of authorization is one for the court, not the filing office. However, a filing office may choose to employ authentication procedures in connection with electronic communications, e.g., to verify the identity of a filer who seeks to charge the filing fee.

3. Unauthorized Filings. Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for

the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625 for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3.

4. Ipso Facto Authorization. Under subsection (b), the authentication of a security agreement ipso facto constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security agreement ipso facto constitutes the new debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement by which the new debtor has become bound. And, under subsection (c), the acquisition of collateral in which a security interest continues after disposition under Section 9-315(a)(1) ipso facto constitutes an authorization to file an initial financing statement against the person who acquired the collateral. The authorization to file an initial financing statement also constitutes an authorization to file a record covering actual proceeds of the original collateral, even if the security agreement is silent as to proceeds.

Example 1: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory and accounts. The financing statement is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the financing statement will be effective to perfect a security interest in accounts constituting proceeds of the inventory to the same extent as a financing statement covering only inventory.)

Example 2: Debtor authenticates a security agreement creating a security interest in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement covering inventory. Debtor sells some inventory, deposits the buyer's payment into a deposit account, and withdraws the funds to purchase equipment. As long as the equipment can be traced to the inventory, the security interest continues in the equipment. See Section 9-315(a)(2). However, because the equipment was acquired with cash proceeds, the financing statement becomes ineffective to perfect the security interest in the equipment on the 21st day after the security interest attaches to the equipment unless Secured Party continues perfection beyond the 20-day period by filing a financing statement against the equipment or amending the filed financing statement to cover equipment. See Section 9-315(d). Debtor's authentication of the security agreement authorizes the filing of an initial financing statement or amendment covering the equipment, which is "property that becomes collateral under Section 9-315(a)(2)." See Section 9-509(b)(2).

5. Agricultural Liens. Under subsection (a)(2), the holder of an agricultural lien may file a financing statement covering collateral subject to the lien without obtaining the debtor's authorization. Because the lien arises as matter of law, the debtor's consent is not required. A person who files an unauthorized record in violation of this subsection is liable under Section 9-625(e) for a statutory penalty and damages.

6. Amendments; Termination Statements Authorized by Debtor. Most amendments may not be filed unless the secured party of record, as determined under Section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by Section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates.

7. Multiple Secured Parties of Record. Subsection (e) deals with multiple secured parties of record. It permits each secured party of record to authorize the filing of amendments. However, Section 9-510(b) protects the rights and powers of one secured party of record from the effects of filings made by another secured party of record. See Section 9-510, Comment 3.

8. Successor to Secured Party of Record. A person may succeed to the powers of the secured party of record by operation of other law, e.g., the law of corporate mergers. In that case, the successor has the power to authorize filings within the meaning of this section.

§ 28:9-510. Effectiveness of filed record.

(a) A filed record is effective only to the extent that it was filed by a person that may file it under § 28:9-509.

(b) A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record.

(c) A continuation statement that is not filed within the 6-month period prescribed by § 28:9-515(d) is ineffective.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-513 and § 28:9-515.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Ineffectiveness of Unauthorized or Overbroad Filings. Subsection (a) provides that a filed financing statement is effective only to the extent it was filed by a person entitled to file it.

Example 1: Debtor authorizes the filing of a financing statement covering inventory. Under Section 9-509, the secured party may file a financing statement covering only inventory; it may not file a financing statement covering other collateral. The secured party files a financing statement covering inventory and equipment. This section provides that the financing statement is effective only to the extent the secured party may file it. Thus, the financing statement is effective to perfect a security interest in inventory but ineffective to perfect a security interest in equipment.

3. Multiple Secured Parties of Record. Section 9-509(e) permits any secured party of record to authorize the filing of most amendments. Subsection (b) of this section prevents a filing authorized by one secured party of record from affecting the rights and powers of another secured party of record without the latter's consent.

Example 2: Debtor creates a security interest in favor of A and B. The filed financing statement names A and B as the secured parties. An amendment deleting some collateral covered by the financing statement is filed pursuant to B's authorization. Although B's security interest in the deleted collateral becomes unperfected, A's security interest remains perfected in all the collateral.

Example 3: Debtor creates a security interest in favor of A and B. The financing statement names A and B as the secured parties.

A termination statement is filed pursuant to B's authorization. Although the effectiveness of the financing statement terminates with respect to B's security interest, A's rights are unaffected. That is, the financing statement continues to be effective to perfect A's security interest.

4. Continuation Statements. A continuation statement may be filed only within the six months immediately before lapse. See Section 9-515(d). The filing office is obligated to reject a continuation statement that is filed outside the six-month period. See Sections 9-520(a), 9-516(b)(7). Subsection (c) provides that if the filing office fails to reject a continuation statement that is not filed in a timely manner, the continuation statement is ineffective nevertheless.

§ 28:9-511. Secured party of record.

(a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under § 28:9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under § 28:9-514(b), the assignee named in the amendment is a secured party of record.

(c) A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Secured Party of Record. This new section explains how the secured party of record is to be determined. If SP-1 is named as the secured party in an initial financing statement, it is the secured party of record. Similarly, if an initial financing statement reflects a total assignment from SP-0 to SP-1, then SP-1 is the secured party of record. See subsection (a). If, subsequently, an amendment is filed assigning SP-1's status to SP-2, then SP-2 becomes the secured party of record in place of SP-1. The same result obtains if a subsequent amendment deletes the reference to SP-1 and substitutes therefor a reference to SP-2. If, however, a subsequent amendment adds SP-2 as a secured party but does not purport to remove SP-1 as a secured party, then SP-2 and SP-1 each is a secured party of record. See subsection (b). An amendment purporting to remove the only secured party of record without providing a successor is ineffective. See Section 9-512(e). At any point in time, all effective records that comprise a financing statement must be examined to determine the person or persons that have the status of secured party of record.

3. Successor to Secured Party of Record. Application of other law may result in a person succeeding to the powers of a secured party of record. For example, if the secured party of record (A) merges into another corporation (B) and the other corporation (B) survives, other law may provide that B has all of A's powers. In that case, B is authorized to take all actions under this Part that A would have been authorized to take. Similarly, acts taken by a person who is authorized under generally applicable principles of agency to act on behalf of the secured party of record are effective under this Part.

§ 28:9-512. Amendment of financing statement.

(a) Subject to § 28:9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e), otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) Identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) If the amendment relates to an initial financing statement filed or recorded in a filing office described in § 28:9-501(a)(1), provides the information specified in § 28:9-502(b).

(b) Except as otherwise provided in § 28:9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) An amendment is ineffective to the extent it:

(1) Purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) Purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109 and § 28:9-516.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former 9-402(4).

2. Changes to Financing Statements. This section addresses changes to financing statements, including addition and deletion of collateral. Although termination statements, assignments, and continuation statements are types of amendment, this Article follows former Article 9 and contains separate sections containing additional provisions applicable to particular types of amendments. See Section 9-513 (termination statements); 9-514 (assignments); 9-515 (continuation statements). One should not infer from this separate treatment that this Article requires a separate amendment to accomplish each change. Rather, a single amendment would be legally sufficient to, e.g., add collateral and continue the effectiveness of the financing statement.

3. Amendments. An amendment under this Article may identify only the information contained in a financing statement that is to be changed; alternatively, it may take the form of an amended and restated financing statement. The latter would state, for example, that the financing statement "is amended and restated to read as follows: ..." References in this Part to an "amended financing statement" are to a financing statement as amended by an amendment using either technique.

This section revises former Section 9-402(4) to permit secured parties of record to make changes in the public record without the need to obtain the debtor's signature. However, the filing of an amendment that adds collateral or adds a debtor must be authorized by the debtor or it will not be effective. See Sections 9-509(a), 9-510(a).

4. Amendment Adding Debtor. An amendment that adds a debtor is effective, provided that the added debtor authorizes the filing. See Section 9-509(a). However, filing an amendment adding a debtor to a previously filed financing statement affords no advantage over filing an initial financing statement against that debtor and may be disadvantageous. With respect to the added debtor, for purposes of determining the priority of the security interest, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement. See subsection (d). However, the effectiveness of the financing statement lapses with respect to added debtor at the time it lapses with respect to the original debtor. See subsection (b).

5. Deletion of All Debtors or Secured Parties of Record. Subsection (e) assures that there will be a debtor and secured party of record for every financing statement.

Example: A filed financing statement names A and B as secured parties of record and covers inventory and equipment. An amendment deletes equipment and purports to delete A and B as secured parties of record without adding a substitute secured party. The amendment is ineffective to the extent it purports to delete the secured parties of record but effective with respect to the deletion of collateral. As a consequence, the financing statement, as amended, covers only inventory, but A and B remain as secured parties of record.

§ 28:9-513. Termination statement.

(a) A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) There is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) The debtor did not authorize the filing of the initial financing statement.

(b) To comply with subsection (a), a secured party shall cause the secured party of record to file the termination statement:

(1) Within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) If earlier, within 20 days after the secured party receives an authenticated demand from a debtor.

(c) In cases not governed by subsection (a), within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) The debtor did not authorize the filing of the initial financing statement.

(d) Except as otherwise provided in § 28:9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in § 28:9-510, for purposes of §§ 28:9-519(g), 28:9-522(a), and 28:9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-315, § 28:9-509, and § 28:9-625.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-404.

2. Duty to File or Send. This section specifies when a secured party must cause the secured party of record to file or send to the debtor a termination statement for a financing statement. Because most financing statements expire in five years unless a continuation statement is filed (Section 9-515), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance to them of clearing the public record, an affirmative duty is put on the secured party in that case. But many purchase-money security interests in consumer goods will not be filed, except for motor vehicles. See Section 9-309(1). Under Section 9-311(b), compliance with a certificate-of-title statute is "equivalent to the filing of a financing statement under this article." Thus, this section applies to a certificate of title unless the section is superseded by a certificate-of-title statute that contains a specific rule addressing a secured party's duty to cause a notation of a security interest to be removed from a certificate of title. In the context of a certificate of title, however, the secured party could comply with this section by causing the removal itself or providing the debtor with documentation sufficient to enable the debtor to effect the removal.

Subsections (a) and (b) apply to a financing statement covering consumer goods. Subsection (c) applies to other financing statements. Subsection (a) and (c) each makes explicit what was implicit under former Article 9: If the debtor did not authorize the filing of a financing statement in the first place, the secured party

of record should file or send a termination statement. The liability imposed upon a secured party that fails to comply with subsection (a) or (c) is identical to that imposed for the filing of an unauthorized financing statement or amendment. See Section 9-625(e).

3. "Bogus" Filings. A secured party's duty to send a termination statement arises when the secured party "receives" an authenticated demand from the debtor. In the case of an unauthorized financing statement, the person named as debtor in the financing statement may have no relationship with the named secured party and no reason to know the secured party's address. Inasmuch as the address in the financing statement is "held out by [the person named as secured party in the financing statement] as the place for receipt of such communications [i.e., communications relating to security interests]," the putative secured party is deemed to have "received" a notification delivered to that address. See Section 1-201(26). If a termination statement is not forthcoming, the person named as debtor itself may authorize the filing of a termination statement, which will be effective if it indicates that the person authorized it to be filed. See Sections 9-509(d)(2), 9-510(c).

4. Buyers of Receivables. Applied literally, former Section 9-404(1) would have required many buyers of receivables to file a termination statement immediately upon filing a financing statement because "there is no outstanding secured obligation and no commitment to make advances, incur obligations, or otherwise give value." Subsections (c)(1) and (2) remedy this problem. While the security interest of a buyer of accounts or chattel paper (B-1) is perfected, the debtor is not deemed to retain an interest in the sold receivables and thus could transfer no interest in them to another buyer (B-2) or to a lien creditor (LC). However, for purposes of determining the rights of the debtor's creditors and certain purchasers of accounts or chattel paper from the debtor, while B-1's security interest is unperfected, the debtor-seller is deemed to have rights in the sold receivables, and a competing security interest or judicial lien may attach to those rights. See Sections 9-318, 9-109, Comment 5. Suppose that B-1's security interest in certain accounts and chattel paper is perfected by filing, but the effectiveness of the financing statement lapses. Both before and after lapse, B-1 collects some of the receivables. After lapse, LC acquires a lien on the accounts and chattel paper. B-1's unperfected security interest in the accounts and chattel paper is subordinate to LC's rights. See Section 9-317(a)(2). But collections on accounts and chattel paper are not "accounts" or "chattel paper." Even if B-1's security interest in the accounts and chattel paper is or becomes unperfected, neither the debtor nor LC acquires rights to the collections that B-1 collects (and owns) before LC acquires a lien.

5. Effect of Filing. Subsection (d) states the effect of filing a termination statement: the related financing statement ceases to be effective. If one of several secured parties of record files a termination statement, subsection (d) applies only with respect to the rights of the person who authorized the filing of the termination statement. See Section 9-510(b). The financing statement remains effective with respect to the rights of the others. However, even if a financing statement is terminated (and thus no longer is effective) with respect to all secured parties of record, the financing statement, including the termination statement, will remain of record until at least one year after it lapses with respect to all secured parties of record. See Section 9-519(g).

CASE NOTES

In general.

Secured creditor's UCC-3 Termination Statement filed after creditor sold collateral to third party did not affect creditor's rights, where statement was filed only as required by purchase and sale agreement between creditor and third party and only after creditor had foreclosed on its security interest. Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Whether secured creditor's UCC-3 Termination Statement filed after it sold collateral to third party extinguished creditor's security interest in collateral was irrelevant to whether purchaser of collateral from creditor could remove collateral from leased premises, where settlement agreement between creditor and debtor gave creditor possessory interest in collateral through foreclosure. Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

§ 28:9-514. Assignment of powers of secured party of record.

(a) Except as otherwise provided in subsection (c), an initial financing statement may reflect an assignment of all of the secured party's power to

authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Except as otherwise provided in subsection (c), a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:

(1) Identifies, by its file number, the initial financing statement to which it relates;

(2) Provides the name of the assignor; and

(3) Provides the name and mailing address of the assignee.

(c) An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under § 28:9-502(c) may be made only by an assignment of record of the mortgage in the manner provided by law of the District other than Subtitle I of Title 28.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-511, § 28:9-516, and § 28:9-519.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-405.

2. Assignments. This section provides a permissive device whereby a secured party of record may effectuate an assignment of its power to affect a financing statement. It may also be useful for a secured party who has assigned all or part of its security interest or agricultural lien and wishes to have the fact noted of record, so that inquiries concerning the transaction would be addressed to the assignee. See Section 9-502, Comment 2. Upon the filing of an assignment, the assignee becomes the "secured party of record" and may authorize the filing of a continuation statement, termination statement, or other amendment. Note that under Section 9-310(c) no filing of an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. However, if an assignment is not filed, the assignor remains the secured party of record, with the power (even if not the right) to authorize the filing of effective amendments. See Sections 9-511(c), 9-509(d).

Where a record of a mortgage is effective as a financing statement filed as a fixture filing (Section 9-502(c)), then an assignment of record of the security interest may be made only in the manner in which an assignment of record of the mortgage may be made under local real-property law.

3. Comparison to Prior Law. Most of the changes reflected in this section are for clarification or to embrace medium-neutral drafting. As a general matter, this section preserves the opportunity given by former Section 9-405 to assign a security interest of record in one of two different ways. Under subsection (a), a secured party may assign all of its power to affect a financing statement by naming an assignee in the initial financing statement. The secured party of record may accomplish the same result under subsection (b) by making a subsequent filing. Subsection (b) also may be used for an assignment of only some of the secured party of record's power to affect a financing statement, e.g., the power to affect the financing statement as it relates to particular items of collateral or as it relates to an undivided interest in a security interest in all the collateral. An initial financing statement may not be used to change the secured party of record under these circumstances. However, an amendment adding the assignee as a secured party of record may be used.

CASE NOTES

Analysis

Construction and application.
Perfection of security interest.
Rights of assignor.

Construction and application.

Assignment to creditor of right to receive amount owed debtor by another as payment of past-due obligation did not create "security interest" so as to trigger applicability of article of District of Columbia code governing secured transactions; thus, section of that article directing court to apply law of jurisdiction where debtor was located, Maryland, did not apply and under District of Columbia's general choice of law provision, District of Columbia law was applicable, in that assignment was prepared and executed in District of Columbia, debt was incurred and paid in District, and two of three parties to transactions were based on District. D.C. Code 1981, § 28:9-103. Goldstein v. Madison Nat'l Bank, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

Assignment of account that falls within scope of Uniform Commercial Code provisions governing assignments, which is not perfected, leaves property interest in assignor against which third-party lien creditor can attach. D.C. Code 1981, §§ 28:9-203(1), 28:9-301(1)(b), 28:9-302(1), 28:9-303(1), 28:9-304(1), 28:9-305; U.C.C. §§ 9-302, 9-302 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Perfection of security interest.

Under District of Columbia law, assignment created for security purposes gives rise to interest that cannot be perfected until assignee directly or indirectly takes possession of the property. In re 1301 Connecticut Ave. Assoc., 126 B.R. 1, 1991 U.S. Dist. LEXIS 4304 (1991).

Assignee of taxpayer's right to receive payments from District of Columbia did not obtain perfected security interest in taxpayer's accounts by filing financing statement that misspelled taxpayer's name, where misspelling was sufficiently serious that Recorder of Deeds certified that no financing statement against taxpayer had been filed. D.C. Code 1981, §§ 28:9-402, 28:9-402(1, 8), 28:9-403(4); U.C.C. §§ 9-402, 9-402(8), 9-402 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Rights of assignor.

Under Uniform Commercial Code provisions governing assignment of accounts, taxpayer that assigned its right to receive payments under contract with District of Columbia retained property interests in accounts upon which Internal Revenue Service (IRS) lien could attach, prior to perfection of assignee's security interest. U.C.C. § 9-318(3); D.C. Code 1981, §§ 28:9-301(1)(b), 28:9-318(3). District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-515. Duration and effectiveness of financing statement; effect of lapsed financing statement.

(a) Except as otherwise provided in subsections (b), (e), (f), and (g), a filed financing statement is effective for a period of 5 years after the date of filing.

(b) Except as otherwise provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

(c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) A continuation statement may be filed only within 6 months before the

expiration of the 5-year period specified in subsection (a) or the 30-year period specified in subsection (b), whichever is applicable.

(e) Except as otherwise provided in § 28:9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of 5 years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the 5-year period, the financing statement lapses in the same manner as provided in subsection (c), unless, before the lapse, another continuation statement is filed pursuant to subsection (d). Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) A record of a mortgage that is effective as a financing statement filed as a fixture filing under § 28:9-502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(n), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-315, § 28:9-510, § 28:9-512, § 28:9-516, § 28:9-519, § 28:9-522, § 28:9-523, § 28:9-706, and § 28:9-806.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 substituted "filed initial financing statement" for "filed financing statement" in (f).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-403(2), (3), (6).

2. Period of Financing Statement's Effectiveness. Subsection (a) states the general rule: a financing statement is effective for a five-year period unless its effectiveness is continued under this section or terminated under Section 9-513. Subsection (b) provides that if the financing statement relates to a public-finance transaction or a manufactured-home transaction and so indicates, the financing statement is effective for 30 years. These financings typically extend well beyond the standard, five-year period. Under subsection (f), a financing statement filed against a transmitting utility remains effective indefinitely, until a termination statement is filed. Likewise, under subsection (g), a mortgage effective as a fixture filing remains effective until its effectiveness terminates under real-property law.

3. Lapse. When the period of effectiveness under subsection (a) or (b) expires, the effectiveness of the financing statement lapses. The last sentence of subsection (c) addresses the effect of lapse. The deemed retroactive unperfection applies only with respect to purchasers for value; unlike former Section 9-403(2), it does not apply with respect to lien creditors.

Example 1: SP-1 and SP-2 both hold security interests in the same collateral. Both security interests are perfected by filing. SP-1 filed first and has priority under Section 9-322(a)(1). The effectiveness of SP-1's filing lapses. As long as SP-2's security interest remains perfected thereafter, SP-2 is entitled to priority over SP-1's security interest, which is deemed never to have been perfected as against a purchaser for value (SP-2). See Section 9-322(a)(2).

Example 2: SP holds a security interest perfected by filing. On July 1, LC acquires a judicial lien on the collateral. Two weeks later, the effectiveness of the financing statement lapses. Although the security interest becomes unperfected upon lapse, it was perfected when LC acquired its lien. Accordingly, notwithstanding the lapse, the perfected security interest

has priority over the rights of LC, who is not a purchaser. See Section 9-317(a)(2).

4. Effect of Debtor's Bankruptcy. Under former Section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3). Of course, if the debtor enters bankruptcy before lapse, the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition).

5. Continuation Statements. Subsection (d) explains when a continuation statement may be filed. A continuation statement filed at a time other than that prescribed by subsection (d) is ineffective, see Section 9-510(c), and the filing office may not accept it. See Sections 9-520(a), 9-516(b). Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

§ 28:9-516. What constitutes filing; effectiveness of filing.

(a) Except as otherwise provided in subsection (b), communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) The record is not communicated by a method or medium of communication authorized by the filing office;

(2) An amount equal to or greater than the applicable filing fee is not tendered;

(3) The filing office is unable to index the record because:

(A) In the case of an initial financing statement, the record does not provide a name for the debtor;

(B) In the case of an amendment or information statement, the record:

(i) Does not identify the initial financing statement as required by § 28:9-512 or 28:9-518, as applicable; or

(ii) Identifies an initial financing statement whose effectiveness has lapsed under § 28:9-515;

(C) In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's surname; or

(D) In the case of a record filed or recorded in the filing office described in § 28:9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) Provide a mailing address for the debtor; or

(B) Indicate whether the name provided as the name of the debtor is the name of an individual or an organization.

(C) If the financing statement indicates that the debtor is an organization, provide:

(i) A type of organization for the debtor;

(ii) A jurisdiction of organization for the debtor; or

(iii) An organizational identification number for the debtor or indicate that the debtor has none;

(6) In the case of an assignment reflected in an initial financing statement under § 28:9-514(a) or an amendment filed under § 28:9-514(b), the record does not provide a name and mailing address for the assignee; or

(7) In the case of a continuation statement, the record is not filed within the 6-month period prescribed by § 28:9-515(d).

(c) For purposes of subsection (b):

(1) A record does not provide information if the filing office is unable to read or decipher the information; and

(2) A record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by § 28:9-512, 28:9-514, or 28:9-518, is an initial financing statement.

(d) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b), is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(o), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-109, § 28:9-338, § 28:9-520, § 28:9-521, and § 28:9-528.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 substituted "information" for "correction" in (b)(3)(B); substituted "surname" for "last name" in (b)(3)(C); added "or" at the end of (b)(5)(A); and rewrote (b)(5)(B), which read: "Indicate whether the debtor is an individual or an organization; or".

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Subsection (a): former Section 9-403(1); the remainder is new.

2. What Constitutes Filing. Subsection (a) deals generically with what constitutes filing of a record, including an initial financing statement and amendments of all kinds (e.g., assignments, termination statements, and continuation statements). It follows former Section 9-403(1), under which either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing.

3. Effectiveness of Rejected Record. Subsection (b) provides an exclusive list of grounds upon which the filing office may reject a record. See Section 9-520(a). Although some of these grounds would also be grounds for rendering a filed record ineffective (e.g., an initial financing statement does not provide a name for the debtor), many others would not be (e.g., an initial financing statement does not provide a mailing address for the debtor or secured party of record). Neither this section nor Section 9-520 requires or authorizes the filing office to determine, or even consider, the accuracy of information provided in a record. For example,

the State A filing office may not reject under subsection (b)(5)(C) an initial financing statement indicating that the debtor is a State A corporation and providing a three-digit organizational identification number, even if all State A organizational identification numbers contain at least five digits and two letters.

A financing statement or other record that is communicated to the filing office but which the filing office refuses to accept provides no public notice, regardless of the reason for the rejection. However, this section distinguishes between records that the filing office rightfully rejects and those that it wrongfully rejects. A filer is able to prevent a rightful rejection by complying with the requirements of subsection (b). No purpose is served by giving effect to records that justifiably never find their way into the system, and subsection (b) so provides.

Subsection (d) deals with the filing office's unjustified refusal to accept a record. Here, the filer is in no position to prevent the rejection and as a general matter should not be prejudiced by it. Although wrongfully rejected records generally are effective, subsection (d) contains a special rule to protect a third-party purchaser of the collateral (e.g., a buyer or competing secured party) who gives value in reliance upon the apparent absence of the record from the files. As against a person who searches the public record and reasonably relies on what the public record shows, subsection (d) imposes upon the filer the risk that a record failed to make its way into the filing system because of the filing office's wrongful rejection of it. (Compare Section 9-517, under which a mis-indexed financing statement is fully effective.) This risk is likely to be small, particularly when a record is presented electronically, and the filer can guard against this risk by conducting a post-filing search of the records. Moreover, Section 9-520(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

4. Method or Medium of Communication. Rejection pursuant to subsection (b)(1) for failure to communicate a record properly should be understood to mean noncompliance with procedures relating to security, authentication, or other communication-related requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing office to impose additional substantive requirements. See Section 9-520, Comment 2.

5. Address for Secured Party of Record. Under subsection (b)(4) and Section 9-520(a), the lack of a mailing address for the secured party of record requires the filing office to reject an initial financing statement. The failure to include an address for the secured party of record no longer renders a financing statement ineffective. See Section 9-502(a). The function of the address is not to identify the secured party of record but rather to provide an address to which others can send required notifications, e.g., of a purchase-money security interest in inventory or of the disposition of collateral. Inasmuch as the address shown on a filed financing statement is an "address that is reasonable under the circumstances," a person required to send a notification to the secured party may satisfy the requirement by sending a notification to that address, even if the address is or becomes incorrect. See Section 9-102 (definition of "send"). Similarly, because the address is "held out by [the secured party] as the place for receipt of such communications [i.e., communications relating to security interests]," the secured party is deemed to have received a notification delivered to that address. See Section 1-201(26).

6. Uncertainty Concerning Individual Debtor's Last Name. Subsection (b)(3)(C) requires the filing office to reject an initial financing statement or amendment adding an individual debtor if the office cannot index the record because it does not identify the debtor's last name (e.g., it is unclear whether the debtor's name is Elton John or John Elton).

7. Inability of Filing Office to Read or Decipher Information. Under subsection (c)(1), if the filing office cannot read or decipher information, the information is not provided by a record for purposes of subsection (b).

8. Classification of Records. For purposes of subsection (b), a record that does not indicate it is an amendment or identify an initial financing statement to which it relates is deemed to be an initial financing statement. See subsection (c)(2).

9. Effectiveness of Rejectable But Unrejected Record. Section 9-520(a) requires the filing office to refuse to accept an initial financing statement for a reason set forth in subsection (b). However, if the filing office accepts such a financing statement nevertheless, the financing statement generally is effective if it complies with the requirements of Section 9-502(a) and (b). See Section 9-520(c). Similarly, an otherwise effective financing statement generally remains so even though the information in the financing statement becomes incorrect. See Section 9-507(b). (Note that if the information required by subsection (b)(5) is incorrect when the financing statement is filed, Section 9-338 applies.)

§ 28:9-517. Effect of indexing errors.

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Effectiveness of Mis-Indexed Records. This section provides that the filing office's error in mis-indexing a record does not render ineffective an otherwise effective record. As did former Section 9-401, this section imposes the risk of filing-office error on those who search the files rather than on those who file.

§ 28:9-518. Claim concerning inaccurate or wrongfully filed record.

(a) A person may file in the filing office an information statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

(b) An information statement under subsection (a) of this section shall:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) A person may file in the filing office an information statement with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under § 28:9-509(d).

(d) An information statement under subsection (c) of this section shall:

(1) Identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;

(2) Indicate that it is an information statement; and

(3) Provide the basis for the person's belief that the person that filed the record was not entitled to do so under § 28:9-509(d).

(e) The filing of an information statement does not affect the effectiveness of an initial financing statement or other filed record.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(p), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-516.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote the section.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law

19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Correction Statements. Former Article 9 did not afford a nonjudicial means for a debtor to correct a financing statement or other record that was inaccurate or wrongfully filed. Subsection (a) affords the debtor the right to file a correction statement. Among other requirements, the correction statement must provide the basis for the debtor's belief that the public record should be corrected. See subsection (b). These provisions, which resemble the analogous remedy in the Fair Credit Reporting Act, 15 U.S.C. § 1681i, afford an aggrieved person the opportunity to state its position on the public record. They do not permit an aggrieved person to change the legal effect of the public record. Thus, although a filed correction statement becomes part of the "financing statement," as defined in Section 9-102, the filing does not affect the effectiveness of the initial financing statement or any other filed record. See subsection (c).

This section does not displace other provisions of this Article that impose liability for making unauthorized filings or failing to file or send a termination statement (see Section 9-625(e)), nor does it displace any available judicial remedies.

3. Resort to Other Law. This Article cannot provide a satisfactory or complete solution to problems caused by misuse of the public records. The problem of "bogus" filings is not limited to the UCC filing system but extends to the real-property records, as well. A summary judicial procedure for correcting the public record and criminal penalties for those who misuse the filing and recording systems are likely to be more effective and put less strain on the filing system than provisions authorizing or requiring action by filing and recording offices.

Subpart 2. Duties and Operation of Filing Office.

§ 28:9-519. Numbering, maintaining, and indexing records; communicating information provided in records.

(a) For each record filed in a filing office, the filing office shall:

(1) Assign a unique number to the filed record;

(2) Create a record that bears the number assigned to the filed record and the date and time of filing;

(3) Maintain the filed record for public inspection; and

(4) Index the filed record in accordance with subsections (c), (d), and (e) of this section.

(b) A file number must include a digit that:

(1) Is mathematically derived from or related to the other digits of the file number; and

(2) Aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

(c) Except as otherwise provided in subsections (d) and (e), the filing office shall:

(1) Index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) Index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index it:

(1) Under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) To the extent that the law of the District provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under § 28:9-514(a) or an amendment filed under § 28:9-514(b):

(1) Under the name of the assignor as grantor; and

(2) To the extent that the law of the District provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) The filing office shall maintain a capability:

(1) To retrieve a record by the name of the debtor and by the file number assigned to the initial financing statement to which the record relates; and

(2) To associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) The filing office may not remove a debtor's name from the index until one year after the effectiveness of a financing statement naming the debtor lapses under § 28:9-515 with respect to all secured parties of record.

(h) The filing office shall perform the acts required by subsections (a) through (e) at the time and in the manner prescribed by filing-office rule, but not later than 2 business days after the filing office receives the record in question.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-102, § 28:9-109, § 28:9-513, and § 28:9-523.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-403(4), (7), 9-405(2).

2. Filing Office's Duties. Subsections (a) through (e) set forth the duties of the filing office with respect to filed records. Subsection (h), which is new, imposes a minimum standard of performance for those duties. Prompt indexing is crucial to the effectiveness of any filing system. An accepted but un-indexed record affords no public notice. Subsection (f) requires the filing office to maintain appropriate storage and retrieval facilities, and subsection (g) contains minimum requirements for the retention of records.

3. File Number. Subsection (a)(1) requires the filing office to assign a unique number to each filed record. That number is the "file number" only if the record is an initial financing statement. See Section 9-102.

4. Time of Filing. Subsection (a)(2) and Section 9-523 refer to the "date and time" of filing. The statutory text does not contain any instructions to a filing office as to how the time of filing is to be determined. The method of determining or assigning a time of filing is an appropriate matter for filing-office rules to address.

5. Related Records. Subsections (c) and (f) are designed to ensure that an initial financing statement and all filed records relating to it are associated with one another, indexed under the

name of the debtor, and retrieved together. To comply with subsection (f), a filing office (other than a real-property recording office in a State that enacts subsection (f), Alternative B) must be capable of retrieving records in each of two ways: by the name of the debtor and by the file number of the initial financing statement to which the record relates.

6. Prohibition on Deleting Names from Index. This Article contemplates that the filing office will not delete the name of a debtor from the index until at least one year passes after the effectiveness of the financing statement lapses as to all secured parties of record. See subsection (g). This rule applies even if the filing office accepts an amendment purporting to delete or modify the name of a debtor or terminate the effectiveness of the financing statement. If an amendment provides a modified name for a debtor, the amended name should be added to the index, see subsection (c)(2), but the pre-amendment name should remain in the index.

Compared to former Article 9, the rule in subsection (g) increases the amount of information available to those who search the public records. The rule also contemplates that searchers-not the filing office-will determine the significance and effectiveness of filed records.

CASE NOTES

ANALYSIS

Failure to perfect security interest, generally.
Misspelled names.

Failure to perfect security interest, generally.

Mere fact that search under lot and square number records might have disclosed security interest in fixture did not show that security interest was perfected, where corporate debtor's name was not listed on financing statement, and thus third party searching under corporation's name in grantor-grantee index would not have discovered financing statement. D.C. Code 1981, §§ 28:9-402(1, 5), 28:9-403(7). In re New 5510, Inc., 114 B.R. 317, 1990 Bankr. LEXIS 1085 (1990).

Although agreement between debtor and creditor stated that creditor was granted security interest in named newsletter since formal steps mandated by Uniform Commercial Code to perfect that security interest were never taken, trustee was able to avoid creditor's security interest by reason of his status as judgment lien creditor and the plaintiff was not entitled to have an equitable lien imposed on proceeds of sale of newsletter. Bankr.Code, 11 U.S.C. §§ 101 et seq., 544(a), 546(b), 547; D.C. Code §§ 28:9-105(1)(h), 28:9-106, 28:9-203(1)(b), 28:9-302, 28:9-402, 28:9-403. In re Washington Communications Group, Inc., 10 B.R. 676, 1981 Bankr. LEXIS 3903 (1981).

Misspelled names.

Assignee of taxpayer's right to receive payments from District of Columbia did not obtain perfected security interest in taxpayer's accounts by filing financing statement that misspelled taxpayer's name, where misspelling was sufficiently serious that Recorder of Deeds certified that no financing statement against taxpayer had been filed. D.C. Code 1981, §§ 28:9-402, 28:9-402(1, 8), 28:9-403(4); U.C.C. §§ 9-402, 9-402(8), 9-402 comment. District of Columbia v. Thomas Funding Corp., 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

§ 28:9-520. Acceptance and refusal to accept record.

(a) A filing office shall refuse to accept a record for filing for a reason set forth in § 28:9-516(b) and may refuse to accept a record for filing only for a reason set forth in § 28:9-516(b).

(b) If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing-office rule, but in no event more than 2 business days after the filing office receives the record.

(c) A filed financing statement satisfying § 28:9-502(a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a). However, § 28:9-338 applies to a filed financing statement providing information described in § 28:9-516(b)(5) which is incorrect at the time the financing statement is filed.

(d) If a record communicated to a filing office provides information that relates to more than 1 debtor, this part applies as to each debtor separately.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Refusal to Accept Record for Filing. In some States, filing offices considered themselves obligated by former Article 9 to review the form and content of a financing statement and to refuse to accept those that they determine are legally insufficient. Some filing offices imposed requirements for or conditions to filing that do not appear in the statute. Under this section, the filing office is not expected to make legal judgments and is not permitted to impose additional conditions or requirements.

Subsection (a) both prescribes and limits the bases upon which the filing office must and may reject records by reference to the reasons set forth in Section 9-516(b). For the most part, the bases for rejection are limited to those that prevent the filing office from dealing with a record that it receives-because some of the requisite information (e.g., the debtor's name) is missing or cannot be deciphered, because the record is not communicated by a method (e.g., it is MIME-rather than UU-encoded) or medium (e.g., it is written rather than electronic) that the filing office accepts, or because the filer fails to tender an amount equal to or greater than the filing fee.

3. Consequences of Accepting Rejectable Record. Section 9-516(b) includes among the reasons for rejecting an initial financing statement the failure to give certain information that is not required as a condition of effectiveness. In conjunction with Section 9-516(b)(5), this section requires the filing office to refuse to accept a financing statement that is legally sufficient to perfect a security interest under Section 9-502 but does not contain a mailing address for the debtor, does not disclose whether the debtor is an individual or an organization (e.g., a partnership or corporation) or, if the debtor is an organization, does not give certain specified information concerning the organization. The information required by Section 9-516(b)(5) assists searchers in weeding out "false positives," i.e., records that a search reveals but which do not pertain to the debtor in question. It assists filers by helping to ensure that the debtor's name is correct and that the financing statement is filed in the proper jurisdiction.

If the filing office accepts a financing statement that does not give this information at all, the filing is fully effective. Section 9-520(c). The financing statement also generally is effective if the information is given but is incorrect; however, Section 9-338 affords protection to buyers and holders of perfected security interests who give value in reasonable reliance upon the incorrect information.

4. Filing Office's Duties with Respect to Rejected Record. Subsection (b) requires the filing office to communicate the fact of rejection and the reason therefor within a fixed period of time. Inasmuch as a rightfully rejected record is ineffective and a wrongfully rejected record is not fully effective, prompt communication concerning any rejection is important.

5. Partial Effectiveness of Record. Under subsection (d), the provisions of this Part apply to each debtor separately. Thus, a filing office may reject an initial financing statement or other record as to one named debtor but accept it as to the other.

Example: An initial financing statement is communicated to the filing office. The financing statement names two debtors, John Smith and Jane Smith. It contains all of the information described in Section 9-516(b)(5) with respect to John but lacks some of the information with respect to Jane. The filing office must accept the financing statement with respect to John, reject it with respect to Jane, and notify the filer of the rejection.

§ 28:9-521. Uniform form of written financing statement and amendment.

(a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the following form and format except for a reason set forth in § 28:9-516(b):

"UCC FINANCING STATEMENT

"FOLLOW INSTRUCTIONS

"A. NAME & PHONE OF CONTACT AT FILER (optional)

"..

"B. E-MAIL CONTACT AT FILER (optional)

"..

"C. SEND ACKNOWLEDGMENT TO: (Name and Address)

"..

"THE ABOVE SPACE IS FOR
"FILING OFFICE USE ONLY

"1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of itme 2 blank, check here [ ] and provide the Individual Debtor information in item 19 of the Finance Statement Addendum Form (Form UCC1Ad)

"1a. ORGANIZATION'S NAME

"..

"OR

"1b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

"... ....

"ADDITIONAL NAME(S)/INITIAL(S) THAT ARE PART OF THE NAME OF THIS DEBTOR SUFFIX

"..

"1c. MAILING ADDRESS

"..

"CITY STATE POSTAL CODE COUNTRY

"........... ....

"2. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name; if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1blank, check here [ ] and provide the Individual Debtor information in item 10 of the Finance Statement Addendum Form (Form UCC1Ad)

"2a. ORGANIZATION'S NAME

"..

"OR

"2b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

"... ....

"ADDITIONAL NAME(S)/INITIAL(S) THAT ARE PART OF THE NAME OF THIS DEBTOR SUFFIX

".. ....

"2c. MAILING ADDRESS

"...

"CITY STATE POSTAL CODE COUNTRY

"............ ....

"3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

"3a. ORGANIZATION'S NAME

"...

"3b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

"...

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

".. ....

"3c. MAILING ADDRESS

"...

"CITY STATE POSTAL CODE COUNTRY

"............ ....

"4. COLLATERAL: This financing statement covers the following collateral:

"..

"5. Check only if applicable and check only one box:

"Collateral is ☐ held in a Trust (see Instructions)

"☐ being administered by a Decedent's Personal Representative.

"6a. Check only if applicable and check only one box:

"☐ Public-Finance Transaction ☐ Manufactured-Home Transaction

"☐ A Debtor is a Transmitting Utility

"6b. Check only if applicable and check only one box:

"☐ Agricultural Lien ☐ Non-UCC Filing

"7. ALTERNATIVE DESIGNATION (if applicable): ☐ Lessee/Lessor ☐ Consignee/Consignor ☐ Seller/Buyer ☐ Bailer/Bailor ☐ Licensee/Licensor

"8. OPTIONAL FILER REFERENCE DATA

"...

[UCC FINANCING STATEMENT (Form UCC1)]

"**UCC FINANCING STATEMENT ADDENDUM**

"FOLLOW INSTRUCTIONS

"9. NAME OF FIRST DEBTOR: Same as item 1a or 1b on Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here [ ].

"9a. ORGANIZATION'S NAME

"..

"OR

"9b. INDIVIDUAL'S SURNAME

"..

"FIRST PERSONAL NAME

"..

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

".. ....

"THE ABOVE SPACE IS FOR
"FILING OFFICE USE ONLY

"10.DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name or Debtor name that did not fit in line 1b or 2b of the Financing Statement (Form UCC1) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name and enter the mailing address in line 10c)

"10a. ORGANIZATION'S NAME

"..

"OR

INDIVIDUAL'S SURNAME

"..

FIRST PERSONAL NAME

"..

"ADDITIONAL NAME(S)/INITIAL(S) THAT ARE PART OF THE NAME OF THIS DEBTOR SUFFIX

".. ....

"10c. MAILING ADDRESS

".

CITY STATE POSTAL CODE COUNTRY

"............ ....

"11. ☐ ADDITIONAL SECURED PARTY'S NAME or ☐ ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

"11a. ORGANIZATION'S NAME

"..

"OR

"INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

"............................ ....

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

".. ....

"11c. MAILING ADDRESS

"...

"CITY STATE POSTAL CODE COUNTRY

"............ ....

"12. ADDITIONAL SPACE FOR ITEM 4 (Collateral)

"..

"13. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS (if applicable)

"14. This FINANCING STATEMENT:

"☐ covers timber to be cut ☐ covers as-extracted collateral ☐ is filed as a fixture filing

"15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have a record interest):

"..

"16. Description of real estate:

"..

"17. MISCELLANEOUS:

"..

[UCC FINANCING STATEMENT ADDENDUM (Form UCC1Ad)]."

(b) A filing office that accepts written records may not refuse to accept a written record in the following form and format except for a reason set forth in § 28:9-516(b):

"UCC FINANCING STATEMENT AMENDMENT

"FOLLOW INSTRUCTIONS

"A. NAME & PHONE OF CONTACT AT FILER (optional)

"..

"B. E-MAIL CONTACT AT FILER (optional)

"..

"C. SEND ACKNOWLEDGMENT TO: (Name and Address)

"..

"THE ABOVE SPACE IS FOR
"FILING OFFICE USE ONLY

"INITIAL FINANCING STATEMENT FILE NUMBER

"..

"1b. ☐ This FINANCING STATEMENT AMENDMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS.

"Filer: attach Amendment Addendum (Form UCC3Ad) and provide Debtor's name in item 13.

"2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to the security interest(s) of

"Secured Party authorizing this Termination Statement.

"3. ☐ ASSIGNMENT (full or partial): Provide name of Assignee in item 7a or 7b, and address of Assignee in item 7c and name of Assignor in item 9. For partial assignment, complete items 7 and 9 and also indicate affected collateral in item 8

"4. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to the security interest(s) of Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law

"5. ☐ PARTY INFORMATION CHANGE:

"Check one of these two boxes:
"This Change affects ☐ Debtor or ☐ Secured Party of record.
"AND
'Check one of these three boxes to:
'☐ CHANGE name and/or address: Complete item 6a or 6b, and item 7a or 7b and item 7c.
'☐ ADD name: Complete item 7a or 7b, and item 7c.
'☐ DELETE name: Give record name to be deleted in item 6a or 6b.

'6. CURRENT RECORD INFORMATION: Complete for Party Information Change — provide only one name (6a or 6b) (use exact, full name; do not omit, modify, or abbreviate any word in the Debtor's name)

"ORGANIZATION'S NAME
"..

"OR

"INDIVIDUAL'S SURNAME FIRST PERSONAL NAME
"................................... ....

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX
".. ....

"7. CHANGED OR ADDED INFORMATION: Complete for Assignment or Party Information Change — provide only one name (7a or 7b) (use exact full name; do not omit, modify, or abbreviate any part of the Debtor's name)

"7a. ORGANIZATION'S NAME
"..

"OR

"7b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME
....

"ADDITIONAL NAME(S)/INITIAL(S) THAT ARE PART OF THE NAME OF THIS DEBTOR SUFFIX

....

"7c. MAILING ADDRESS

....

"CITY STATE POSTAL CODE COUNTRY

"............ ....

"8. ☐ COLLATERAL CHANGE:

"Also check one of these four boxes:

"☐ ADD collateral ☐ DELETE collateral ☐ RESTATE covered collateral

"☐ ASSIGN collateral

"Indicate collateral:

"9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT — provide only one name (9a or 9b) (name of Assignor, if this is an Assignment)

"If this is an Amendment authorized by a DEBTOR, check here ☐ and provide name of authorizing Debtor

"9a. ORGANIZATION'S NAME

....

"OR

"INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

....

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

"... ....

"10. OPTIONAL FILER REFERENCE DATA

"..

[UCC FINANCING STATEMENT AMENDMENT (Form UCC3)]

"UCC FINANCING STATEMENT AMENDMENT ADDENDUM

"FOLLOW INSTRUCTIONS

"11. INITIAL FINANCING STATEMENT FILE NUMBER (same as item 1a on Amendment form)

....

"12. NAME OF PARTY AUTHORIZING THIS AMENDMENT (same as item 9 on Amendment form)

"12a. ORGANIZATION'S NAME

....

"OR

"12b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

....

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

....

" THE ABOVE SPACE IS FOR
"FILING OFFICE USE ONLY

"13. Name of DEBTOR on related financing statement (Name of a current Debtor of record required for indexing purposes only in some filing offices — see Instruction for item 13; Provide only one Debtor name (13a or 13b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name; see Instructions if name does not fit)

"13a. ORGANIZATION'S NAME

....

OR

"13b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME

....

"ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

....

"14. ADDITIONAL SPACE FOR ITEM 8 (Collateral)

....

"15. This FINANCING STATEMENT AMENDMENT: ☐ covers timber to be cut

"☐ covers as-extracted collateral ☐ is filed as a fixture filing

"16. Name and address of a RECORD OWNER of real estate described in item 17 (if Debtor does not have a record interest):

....

"17. Description of real estate

....

"18. MISCELLANEOUS:

....

[UCC FINANCING STATEMENT AMENDMENT ADDENDUM (Form UCC3Ad)]."

(c) A form that a filing office may not refuse to accept under subsection (a) or (b) of this section must conform to the format prescribed for the form by the National Conference of Commissioners on Uniform State Laws.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(q), 60 DCR 2688.)

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 rewrote (a) and (b).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. "Safe Harbor" Written Forms. Although Section 9-520 limits the bases upon which the filing office can refuse to accept records, this section provides sample written forms that must be accepted in every filing office in the country, as long as the filing office's rules permit it to accept written communications. By completing one of the forms in this section, a secured party can be certain that the filing office is obligated to accept it.

The forms in this section are based upon national financing statement forms that were in use under former Article 9. Those forms were developed over an extended period and reflect the comments and suggestions of filing officers, secured parties and their counsel, and service companies. The formatting of those forms and of the ones in this section has been designed to reduce error by both filers and filing offices.

A filing office that accepts written communications may not reject, on grounds of form or format, a filing using these forms. Although filers are not required to use the forms, they are encouraged and can be expected to do so, inasmuch as the forms are well designed and avoid the risk of rejection on the basis of form or format. As their use expands, the forms will rapidly become familiar to both filers and filing-office personnel. Filing offices may and should encourage the use of these forms by declaring them to be the 'standard' (but not exclusive) forms for each jurisdiction, albeit without in any way suggesting that alternative forms are unacceptable.

The multi-purpose form in subsection (b) covers changes with respect to the debtor, the secured party, the collateral, and the status of the financing statement (termination and continuation). A single form may be used for several different types of amendments at once (e.g., both to change a debtor's name and continue the effectiveness of the financing statement).

§ 28:9-522. Maintenance and destruction of records.

(a) The filing office shall maintain a record of the information provided in a filed financing statement for at least one year after the effectiveness of the financing statement has lapsed under § 28:9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and by using the file number assigned to the initial financing statement to which the record relates.

(b) Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-513 and § 28:9-523.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-403(3), revised substantially.

2. Maintenance of Records. Section 9-523 requires the filing office to provide information concerning certain lapsed financing statements. Accordingly, subsection (a) requires the filing office to maintain a record of the information in a financing statement for at least one year after lapse. During that time, the filing office may not delete any information with respect to a filed financing statement; it may only add information. This approach relieves the filing office from any duty to determine whether to substitute or delete information upon receipt of an amendment. It also assures searchers that they will receive all information with respect to financing statements filed against a debtor and thereby be able themselves to determine the state of the public record.

The filing office may maintain this information in any medium. Subsection (b) permits the filing office immediately to destroy written records evidencing a financing statement, pro-

vided that the filing office maintains another record of the information contained in the financing statement as required by subsection (a).

§ 28:9-523. Information from filing office; sale or license of records.

(a) If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to § 28:9-519(a)(1) and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) Note upon the copy the number assigned to the record pursuant to § 28:9-519(a)(1) and the date and time of the filing of the record; and

(2) Send the copy to the person.

(b) If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) The information in the record;

(2) The number assigned to the record pursuant to § 28:9-519(a)(1); and

(3) The date and time of the filing of the record.

(c) The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) Whether there is on file on a date and time specified by the filing office, but not a date earlier than 3 business days before the filing office receives the request, any financing statement that:

(A) Designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request;

(B) Has not lapsed under § 28:9-515 with respect to all secured parties of record; and

(C) If the request so states, has lapsed under § 28:9-515 and a record of which is maintained by the filing office under § 28:9-522(a);

(2) The date and time of filing of each financing statement; and

(3) The information provided in each financing statement.

(d) In complying with its duty under subsection (c), the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing a record that can be admitted into evidence in the courts of the District without extrinsic evidence of its authenticity.

(e) The filing office shall perform the acts required by subsections (a) through (d) at the time and in the manner prescribed by filing-office rule, but not later than 2 business days after the filing office receives the request.

(f) At least weekly, the Mayor shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-513.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-407; subsections (d) and (e) are new.

2. Filing Office's Duty to Provide Information. Former Section 9-407, dealing with obtaining information from the filing office, was bracketed to suggest to legislatures that its enactment was optional. Experience has shown that the method by which interested persons can obtain information concerning the public records should be uniform. Accordingly, the analogous provisions of this Article are not in brackets.

Most of the other changes from former Section 9-407 are for clarification, to embrace medium-neutral drafting, or to impose standards of performance on the filing office.

3. Acknowledgments of Filing. Subsections (a) and (b) require the filing office to acknowledge the filing of a record. Under subsection (a), the filing office is required to acknowledge the filing of a written record only upon request of the filer. Subsection (b) requires the filing office to acknowledge the filing of a non-written record even in the absence of a request from the filer.

4. Response to Search Request. Subsection (c)(3) requires the filing office to provide "the information contained in each financing statement" to a person who requests it. This requirement can be satisfied by providing copies, images, or reports. The requirement does not in any manner inhibit the filing office from also offering to provide less than all of the information (presumably for a lower fee) to a person who asks for less. Thus, subsection (c) accommodates the practice of providing only the type of record (e.g., initial financing statement, continuation statement), number assigned to the record, date and time of filing, and names and addresses of the debtor and secured party when a requesting person asks for no more (i.e., when the person does not ask for copies of financing statements). In contrast, the filing office's obligation under subsection (b) to provide an acknowledgment containing "the information contained in the record" is not defined by a customer's request. Thus unless the filer stipulates otherwise, to comply with subsection (b) the filing office's acknowledgment must contain all of the information in a record.

Subsection (c) assures that a minimum amount of information about filed records will be available to the public. It does not preclude a filing office from offering additional services.

5. Lapsed and Terminated Financing Statements. This section reflects the policy that terminated financing statements will remain part of the filing office's data base. The filing office may remove from the data base only lapsed financing statements, and then only when at least a year has passed after lapse. See Section 9-519(g). Subsection (c)(1)(C) requires a filing office to conduct a search and report as to lapsed financing statements that have not been removed from the data base, when requested.

6. Search by Debtor's Address. Subsection (c)(1)(A) contemplates that, by making a single request, a searcher will receive the results of a search of the entire public record maintained by any given filing office. Addition of the bracketed language in subsection (c)(1)(A) would permit a search report limited to financing statements showing a particular address for the debtor, but only if the search request is so limited. With or without the bracketed language, this subsection does not permit the filing office to compel a searcher to limit a request by address.

7. Medium of Communication; Certificates. Former Article 9 provided that the filing office respond to a request for information by providing a certificate. The principle of medium-neutrality would suggest that the statute not require a written certificate. Subsection (d) follows this principle by permitting the filing office to respond by communicating "in any medium." By permitting communication "in any medium," subsection (d) is not inconsistent with a system in which persons other than filing office staff conduct searches of the filing office's (computer) records.

Some searchers find it necessary to introduce the results of their search into evidence. Because official written certificates might be introduced into evidence more easily than official communications in another medium, subsection (d) affords States the option of requiring the filing office to issue written certificates upon request. The alternative bracketed language in subsection (d) recognizes that some States may prefer to permit the filing office to respond in another medium, as long as the response can be admitted into evidence in the courts of that State without extrinsic evidence of its authenticity.

8. Performance Standard. The utility of the filing system depends on the ability of searchers to get current information quickly. Accordingly, subsection (e) requires that the filing office respond to a request for information no later than two business days after it receives the request. The information contained in the response must be current as of a date no earlier than three business days before the filing office receives the request. See subsection (c)(1). The failure of the filing office to comply with performance standards, such as subsection (e), has no effect on the private rights of persons affected by the filing of records.

9. Sales of Records in Bulk. Subsection (f), which is new, mandates that the appropriate

official or the filing office sell or license the filing records to the public in bulk, on a nonexclusive basis, in every medium available to the filing office. The details of implementation are left to filing-office rules.

§ 28:9-524. Delay by filing office.

Delay by the filing office beyond a time limit prescribed by this part is excused if:

(1) The delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) The filing office exercises reasonable diligence under the circumstances.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

Source. New; derived from Section 4-109.

§ 28:9-525. Fees.

(a) The Mayor shall promulgate rules, in accordance with subchapter I of Chapter 5 of Title 2, setting fees for filing and indexing initial financing statements and for other services rendered under this part.

(b) The rules promulgated under subsection (a) shall set a basic fee for filing and indexing an initial filing statement in cases in which the record is communicated electronically or by another nonwritten medium authorized by filing-office rule. If the record is communicated in writing and consists of one or 2 pages, the fee shall be 2 times the basic fee. If the record is in writing and consists of more than 2 pages, the fee shall be 4 times the basic fee.

(c) The number of names required to be indexed does not affect the amount of the fee in subsection (b).

(d) This section does not require a fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under § 28:9-502(c). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Various sections of former Part 4.

2. Fees. This section contains all fee requirements for filing, indexing, and responding to requests for information. Uniformity in the fee structure (but not necessarily in the amount of fees) makes this Article easier for secured parties to use and reduces the likelihood that a filed record will be rejected for failure to pay at

least the correct amount of the fee. See Section 9-516(b)(2).

The costs of processing electronic records are less than those with respect to written records. Accordingly, this section mandates a lower fee as an incentive to file electronically and imposes the additional charge (if any) for multiple debtors only with respect to written records. When written records are used, this Article encourages the use of the uniform forms in Section 9-521. The fee for filing these forms should be no greater than the fee for other written records.

To make the relevant information included in a filed record more accessible once the record is found, this section mandates a higher fee for longer written records than for shorter ones. Finally, recognizing that financing statements naming more than one debtor are most often filed against a husband and wife, any additional charge for multiple debtors applies to records filed with respect to more than two debtors, rather than with respect to more than one.

§ 28:9-526. Filing-office rules.

(a) The Mayor shall adopt and publish rules to implement this article. The filing-office rules must be adopted and published in accordance with subchapter I of Chapter 5 of Title 2.

(b) To keep the filing-office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part, the Mayor, so far as is consistent with the purposes, policies, and provisions of this article, in adopting, amending, and repealing filing-office rules, shall:

(1) Consult with filing offices in other jurisdictions that enact substantially this part;

(2) Consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and

(3) Take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-102.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; subsection (b) derives in part from the Uniform Consumer Credit Code (1974).

2. Rules Required. Operating a filing office is a complicated business, requiring many more rules and procedures than this Article can usefully provide. Subsection (a) requires the adoption of rules to carry out the provisions of Article 9. The filing-office rules must be consistent with the provisions of the statute and adopted in accordance with local procedures. The publication requirement informs secured parties about filing-office practices, aids secured parties in evaluating filing-related risks and costs, and promotes regularity of application within the filing office.

3. Importance of Uniformity. In today's national economy, uniformity of the policies and practices of the filing offices will reduce the costs of secured transactions substantially. The International Association of Corporate Administrators (IACA), referred to in subsection (b), is an organization whose membership includes filing officers from every State. These individuals are responsible for the proper functioning of the Article 9 filing system and have worked diligently to develop model filing-office rules, with a view toward efficiency and uniformity.

Although uniformity is an important desideratum, subsection (a) affords considerable flexibility in the adoption of filing-office rules. Each State may adopt a version of subsection (a) that reflects the desired relationship between the statewide filing office described in Section 9-501(a)(2) and the local filing offices described in Section 9-501(a)(1) and that takes into account the practices of its filing offices. Subsection (a) need not designate a single official or agency to adopt rules applicable to all filing offices, and the rules applicable to the statewide filing office need not be identical to those applicable to the local filing office. For example, subsection (a) might provide for the statewide filing office to adopt filing-office rules, and, if not prohibited by other law, the filing office might adopt one set of rules for itself and another for local offices. Or, subsection (a) might designate one official or agency to adopt rules for the statewide filing office and another to adopt rules for local filing offices.

§ 28:9-527. Duty to report.

The Mayor shall report annually on or before April 1 to the Council on the operation of the filing office. The report must contain a statement of the extent to which:

(1) The filing-office rules are not in harmony with the rules of filing offices in other jurisdictions that enact substantially this part and the reasons for these variations; and

(2) The filing-office rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators, or any successor organization, and the reasons for these variations.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New; derived in part from the Uniform Consumer Credit Code (1974).
2. Duty to Report. This section is designed to promote compliance with the standards of performance imposed upon the filing office and with the requirement that the filing office's policies, practices, and technology be consistent and compatible with the policies, practices, and technology of other filing offices.

Part 6. Default.

Subpart 1. Default and Enforcement of Security Interest.

§ 28:9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) After default, a secured party has the rights provided in this part and, except as otherwise provided in § 28:9-602, those provided by agreement of the parties. A secured party:

(1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) A secured party in possession of collateral or control of collateral under § 28:7-106, [§] 28:9-104, § 28:9-105, § 28:9-106, or § 28:9-107 has the rights and duties provided in § 28:9-207.

(c) The rights under subsections (a) and (b) are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) and § 28:9-605, after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) The date of perfection of the security interest or agricultural lien in the collateral;

(2) The date of filing a financing statement covering the collateral; or

(3) Any date specified in a statute under which the agricultural lien was created.

(f) A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(g) Except as otherwise provided in § 28:9-607(c), this part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; Apr. 27, 2013, D.C. Law 19-299, § 11(n), 60 DCR 2634.)

Effect of amendments. — The 2013 amendment by D.C. Law 19-299 inserted "28:7-106" in (b).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-299. — Law 19-299, the "Uniform Commercial Code Revision Act of 2012," was introduced in Council and assigned Bill No. 19-136. The Bill was adopted on first reading on Dec. 4, 2012. Signed by the Mayor on Feb. 8, 2013, it was assigned Act No. 19-667 and transmitted to Congress for its review. D.C. Law 19-299 became effective on Apr. 27, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-501(1), (2), (5).

2. Enforcement: In General. The rights of a secured party to enforce its security interest in collateral after the debtor's default are an important feature of a secured transaction. (Note that the term "rights," as defined in Section 1-201, includes "remedies.") This Part provides those rights as well as certain limitations on their exercise for the protection of the defaulting debtor, other creditors, and other affected persons. However, subsections (a) and (d) make clear that the rights provided in this Part do not exclude other rights provided by agreement.

3. When Remedies Arise. Under subsection (a) the secured party's rights arise "[a]fter default." As did former Section 9-501, this Article leaves to the agreement of the parties the circumstances giving rise to a default. This Article does not determine whether a secured party's post-default conduct can constitute a waiver of default in the face of an agreement stating that such conduct shall not constitute a waiver. Rather, it continues to leave to the parties' agreement, as supplemented by law other than this Article, the determination whether a default has occurred or has been waived. See Section 1-103.

4. Possession of Collateral; Section 9-207. After a secured party takes possession of collat-

eral following a default, there is no longer any distinction between a security interest that before default was nonpossessory and a security interest that was possessory before default, as under a common-law pledge. This Part generally does not distinguish between the rights of a secured party with a nonpossessory security interest and those of a secured party with a possessory security interest. However, Section 9-207 addresses rights and duties with respect to collateral in a secured party's possession. Under subsection (b) of this section, Section 9-207 applies not only to possession before default but also to possession after default. Subsection (b) also has been conformed to Section 9-207, which, unlike former Section 9-207, applies to secured parties having control of collateral.

5. Cumulative Remedies. Former Section 9-501(1) provided that the secured party's remedies were cumulative, but it did not explicitly provide whether the remedies could be exercised simultaneously. Subsection (c) permits the simultaneous exercise of remedies if the secured party acts in good faith. The liability scheme of Subpart 2 affords redress to an aggrieved debtor or obligor. Moreover, permitting the simultaneous exercise of remedies under subsection (c) does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability.

6. Judicial Enforcement. Under subsection (a) a secured party may reduce its claim to judgment or foreclose its interest by any available procedure outside this Article under applicable law. Subsection (e) generally follows former Section 9-501(5). It makes clear that any judicial lien that the secured party may acquire against the collateral effectively is a continuation of the original security interest (if perfected) and not the acquisition of a new interest or a transfer of property on account of a preexisting obligation. Under former Section 9-501(5), the judicial lien was stated to relate back to the date of perfection of the security interest. Subsection (e), however, provides that the lien relates back to the earlier of the date of filing or the date of perfection. This provides a secured party who enforces a security interest by judicial process with the benefit of the "first-to-file-or-perfect" priority rule of Section 9-322(a)(1).

7. Agricultural Liens. Part 6 provides parallel treatment for the enforcement of agricultural liens and security interests. Because agricultural liens are statutory rather than consensual, this Article does draw a few distinctions between these liens and security interests. Under subsection (e), the statute creating an agricultural lien would govern whether and the date to which an execution lien relates back. Section 9-606 explains when a "default" occurs in the agricultural lien context.

8. Execution Sales. Subsection (f) also follows former Section 9-501(5). It makes clear that an execution sale is an appropriate method of foreclosure contemplated by this Part. However, the sale is governed by other law and not by this Article, and the limitations under Section 9-610 on the right of a secured party to purchase collateral do not apply.

9. Sales of Receivables; Consignments. Subsection (g) provides that, except as provided in Section 9-607(c), the duties imposed on secured parties do not apply to buyers of accounts, chattel paper, payment intangibles, or promissory notes. Although denominated "secured parties," these buyers own the entire interest in the property sold and so may enforce their rights without regard to the seller ("debtor") or the seller's creditors. Likewise, a true consignor may enforce its ownership interest under other law without regard to the duties that this Part imposes on secured parties. Note, however, that Section 9-615 governs cases in which a consignee's secured party (other than a consignor) is enforcing a security interest that is senior to the security interest (i.e., ownership interest) of a true consignor.

CASE NOTES

ANALYSIS

Conditional vendees.

Conditional vendee's ownership right in collateral are not cut off as a result of failure to make payment and entry of default judgment, but rather such default merely satisfies a condition precedent to the conditional vendor's right to invoke certain remedies. D.C. Code § 28:9-501(1). Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Upon failure of conditional vendee to make payment, conditional vendor has right to replevy the goods and either keep them as his own or dispose of them by sale provided conditional vendor adheres to notice provisions of the Uniform Commercial Code. D.C. Code § 28:9-501(1). Roebuck v. Walker--Thomas Furniture

Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Federal provisions.

Federal Deposit Insurance Corporation's (FDIC) broad powers as receiver of failed institution include power to foreclose on property of debtor held by failed bank as collateral, and no court may enjoin exercise of that power. Federal Deposit Insurance Act, § 2[11](j), as amended, 12 U.S.C. § 1821(j). Freeman v. FDIC, 56 F.3d 1394, 1995 U.S. App. LEXIS 14479 (C.A.D.C. 1995).

Because debtors had actual notice of impending deprivation, which was foreclosure of their home, some four and one-half months before deadline for filing administrative claims against assets of the foreclosing financial institution, which was taken over by Federal Deposit Insurance Corporation (FDIC), debtors' due process rights, including opportunity to be heard predeprivation, were not violated even though court could not hear their claim against institution because debtors had not exhausted their administrative remedies. U.S. Const.Amend. 5; Federal Deposit Insurance Act, § 2[11](d, j), as amended, 12 U.S.C. § 1821(d, j). Freeman v. FDIC, 56 F.3d 1394, 1995 U.S. App. LEXIS 14479 (C.A.D.C. 1995).

Foreclosure.

Settlement agreement between debtor and creditor holding security interest in debtor's equipment was functional equivalent of strict foreclosure pursuant to statute allowing retention of collateral in satisfaction of obligation, thereby giving creditor possessory interest in collateral, and was not alternative to foreclosure, where agreement described process by which creditor was to take possession of collateral, provided notice to debtor of intent to foreclose, described requirements of commercial code that other secured creditors received notice of proposed foreclosure, stated that debtor renounced its rights to collateral and consented to foreclosure, and clearly stated that foreclosure was in full satisfaction of debtor's obligation. D.C. Code 1981, §§ 28:9-501, 28:9-503, 28:9-504, 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Priority of liens arising by operation of law.

Under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by a judgment creditor against collateral. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Although under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by judgment creditor of borrower against collateral, bank could exercise common-law right of setoff against borrower's demand accounts on deposit with bank. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Repossession and sale of property.

Fact that secured creditor did not repossess all collateral in debtor's possession, and did not sell all collateral it repossessed, did not thereby entitle creditor to deficiency judgment it was otherwise precluded from obtaining due to its failure to give debtor notice of proposed sale of repossessed collateral. D.C. Code 1981, § 28:9-501(1). Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, neither principles of waiver nor estoppel precluded debtor from asserting lack of notice, since, if trial court considered and rejected waiver and estoppel issues, its conclusions were supported by evidence, and since, if, to contrary, such issues were not raised and considered at trial, there was no perceived injustice in refusing, on appeal, to honor creditor's arguments concerning such issues. D.C. Code §§ 17-305(a), 28:9-501(3), 28:9-504(3), 40-901 et seq., 40-902(f); D.C. Code SCR, Civil Rule 52. Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

Waiver by secured creditor.

Secured creditor does not waive its right in collateral by initially suing on debt instead of seeking immediate repossession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Secured creditor's decision to rely on its suit for monetary judgment as essential means of recovering debt and its subsequent decision to repossess collateral as additional means of satisfying debt, did not mean that secured creditor waived its rights in remaining collateral in debtor's possession. D.C. Code 1981, § 28:9-501(5). Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

§ 28:9-602. Waiver and variance of rights and duties.

Except as otherwise provided in § 28:9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) § 28:9-207(b)(4)(C), which deals with use and operation of the collateral by the secured party;

(2) § 28:9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;

(3) § 28:9-607(c), which deals with collection and enforcement of collateral;

(4) §§ 28:9-608(a) and 28:9-615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) §§ 28:9-608(a) and 28:9-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral;

(6) § 28:9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(7) §§ 28:9-610(b), 28:9-611, 28:9-613, and 28:9-614, which deal with disposition of collateral;

(8) § 28:9-615(f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;

(9) § 28:9-616, which deals with explanation of the calculation of a surplus or deficiency;

(10) §§ 28:9-620, 28:9-621, and 28:9-622, which deal with acceptance of collateral in satisfaction of obligation;

(11) § 28:9-623, which deals with redemption of collateral;

(12) § 28:9-624, which deals with permissible waivers; and

(13) §§ 28:9-625 and 28:9-626, which deal with the secured party's liability for failure to comply with this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-601 and § 28:9-603.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-501(3).

2. Waiver: In General. Section 1-102(3) addresses which provisions of the UCC are mandatory and which may be varied by agreement. With exceptions relating to good faith, diligence, reasonableness, and care, immediate parties, as between themselves, may vary its provisions by agreement. However, in the context of rights and duties after default, our legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. As stated in former Section 9-501, Comment 4, "no mortgage clause has ever been allowed to clog the equity of redemption." The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense. This section, like former Section 9-501(3), codifies this longstanding and deeply rooted attitude. The specified rights of the debtor and duties of the secured party may not be waived or varied

except as stated. Provisions that are not specified in this section are subject to the general rules in Section 1-102(3).

3. Nonwaivable Rights and Duties. This section revises former Section 9-501(3) by restricting the ability to waive or modify additional specified rights and duties: (i) duties under Section 9-207(b)(4)(C), which deals with the use and operation of consumer goods, (ii) the right to a response to a request for an accounting, concerning a list of collateral, or concerning a statement of account (Section 9-210), (iii) the duty to collect collateral in a commercially reasonable manner (Section 9-607), (iv) the implicit duty to refrain from a breach of the peace in taking possession of collateral under Section 9-609, (v) the duty to apply noncash proceeds of collection or disposition in a commercially reasonable manner (Sections 9-608 and 9-615), (vi) the right to a special method of calculating a surplus or deficiency in certain dispositions to a secured party, a person related to secured party, or a secondary obligor (Section 9-615), (vii) the duty to give an explanation of the calculation of a surplus or deficiency (Section 9-616), (viii) the right to limitations on the effectiveness of certain waivers (Section 9-624), and (ix) the right to hold a secured party liable for failure to comply with this Article (Sections 9-625 and 9-626). For clarity and consistency, this Article uses the term "waive or vary" instead of "renounc[e] or modify," which appeared in former Section 9-504(3).

This section provides generally that the specified rights and duties "may not be waived or varied." However, it does not restrict the ability of parties to agree to settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express "waiver."

4. Waiver by Debtors and Obligors. The restrictions on waiver contained in this section apply to obligors as well as debtors. This resolves a question under former Article 9 as to whether secondary obligors, assuming that they were "debtors" for purposes of former Part 5, were permitted to waive, under the law of suretyship, rights and duties under that Part.

5. Certain Post-Default Waivers. Section 9-624 permits post-default waivers in limited circumstances. These waivers must be made in agreements that are authenticated. Under Section 1-201, an " 'agreement' means the bargain of the parties in fact." In considering waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully scrutinize putative agreements that appear in records that also address many additional or unrelated matters.

§ 28:9-603. Agreement on standards concerning rights and duties.

(a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in § 28:9-602 if the standards are not manifestly unreasonable.

(b) Subsection (a) does not apply to the duty under § 28:9-609 to refrain from breaching the peace.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-501(3).

2. Limitation on Ability to Set Standards. Subsection (a), like former Section 9-501(3), permits the parties to set standards for compliance with the rights and duties under this Part if the standards are not "manifestly unreasonable." Under subsection (b), the parties are not permitted to set standards measuring fulfillment of the secured party's duty to take collateral without breaching the peace.

§ 28:9-604. Procedure if security agreement covers real property or fixtures.

(a) If a security agreement covers both personal and real property, a secured party may proceed:

(1) Under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) As to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) Subject to subsection (c), if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) Under this part; or

(2) In accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-109.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-501(4), 9-313(8).

2. Real-Property-Related Collateral. The collateral in many transactions consists of both real and personal property. In the interest of simplicity, speed, and economy, subsection (a), like former Section 9-501(4), permits (but does not require) the secured party to proceed as to both real and personal property in accordance with its rights and remedies with respect to the real property. Subsection (a) also makes clear that a secured party who exercises rights under Part 6 with respect to personal property does not prejudice any rights under real-property law.

This Article does not address certain other real-property-related problems. In a number of States, the exercise of remedies by a creditor who is secured by both real property and non-real property collateral is governed by special legal rules. For example, under some anti-deficiency laws, creditors risk loss of rights against personal property collateral if they err in enforcing their rights against the real property. Under a "one-form-of-action" rule (or rule against splitting a cause of action), a creditor who judicially enforces a real property mortgage and does not proceed in the same action to enforce a security interest in personalty may (among other consequences) lose the right to proceed against the personalty. Although statutes of this kind create impediments to enforcement of security interests, this Article does not override these limitations under other law.

3. Fixtures. Subsection (b) is new. It makes clear that a security interest in fixtures may be enforced either under real-property law or under any of the applicable provisions of Part 6, including sale or other disposition either before

or after removal of the fixtures (see subsection (c)). Subsection (b) also serves to overrule cases holding that a secured party's only remedy after default is the removal of the fixtures from the real property. See, e.g., Maplewood Bank & Trust v. Sears, Roebuck & Co., 625 A.2d 537 (N.J.Super. Ct. App.Div.1993).

Subsection (c) generally follows former Section 9-313(8). It gives the secured party the right to remove fixtures under certain circumstances. A secured party whose security interest in fixtures has priority over owners and encumbrancers of the real property may remove the collateral from the real property. However, subsection (d) requires the secured party to reimburse any owner (other than the debtor) or encumbrancer for the cost of repairing any physical injury caused by the removal. This right to reimbursement is implemented by the last sentence of subsection (d), which gives the owner or encumbrancer a right to security or indemnity as a condition for giving permission to remove.

§ 28:9-605. Unknown debtor or secondary obligor.

A secured party does not owe a duty based on its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-601.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Duties to Unknown Persons. This section relieves a secured party from duties owed to a debtor or obligor, if the secured party does not know about the debtor or obligor. Similarly, it relieves a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor, if the secured party does not know about the debtor. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. This section should be read in conjunction with the exculpatory provisions in Section 9-628. Note that it relieves a secured party not only from duties arising under this Article but also from duties arising under other law by virtue of the secured party's status as such under this Article, unless the other law otherwise provides.

§ 28:9-606. Time of default for agricultural lien.

For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.
2. Time of Default. Remedies under this Part become available upon the debtor's "default." See Section 9-601. This section explains when "default" occurs in the agricultural-lien context. It requires one to consult the enabling statute to determine when the lienholder is entitled to enforce the lien.

§ 28:9-607. Collection and enforcement by secured party.

(a) If so agreed, and in any event after default, a secured party:

(1) May notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) May take any proceeds to which the secured party is entitled under § 28:9-315;

(3) May enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) If it holds a security interest in a deposit account perfected by control under § 28:9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) If it holds a security interest in a deposit account perfected by control under § 28:9-104(a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) A copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) The secured party's sworn affidavit in recordable form stating that:

(A) A default has occurred with respect to the obligation secured by the mortgage; and

(B) The secured party is entitled to enforce the mortgage nonjudicially.

(c) A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) Undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) Is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576; May 1, 2013, D.C. Law 19-302, § 2(r), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-601, § 28:9-602, and § 28:9-623.

Effect of amendments. — The 2013 amendment by D.C. Law 19-302 added "with respect to the obligation secured by the mortgage" in (b)(2)(A).

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Legislative history of Law 19-302. — See note to § 28:9-102.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-502; subsections (b), (d), and (e) are new.

2. Collections: In General. Collateral consisting of rights to payment is not only the most liquid asset of a typical debtor's business but also is property that may be collected without any interruption of the debtor's business This situation is far different from that in which collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, problems of valuation and identification, present with collateral that is tangible personal property, frequently are not as serious in the case of rights to payment and other intangible collateral. Consequently, this section, like former Section 9-502, recognizes that financing through assignments of intangibles lacks many of the complexities that arise after default in other types of financing. This section allows the assignee to liquidate collateral by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "nonnotification" financing).

3. Scope. The scope of this section is broader than that of former Section 9-502. It applies not only to collections from account debtors and obligors on instruments but also to enforcement more generally against all persons obligated on collateral. It explicitly provides for the secured party's enforcement of the debtor's rights in respect of the account debtor's (and other third parties') obligations and for the secured party's enforcement of supporting obligations with respect to those obligations. (Supporting obligations are components of the collateral under Section 9-203(f).) The rights of a secured party under subsection (a) include the right to enforce claims that the debtor may enjoy against others. For example, the claims might include a breach-of-warranty claim arising out of a defect in equipment that is collateral or a secured party's action for an injunction against infringement of a patent that is collateral. Those claims typically would be proceeds of original collateral under Section 9-315.

4. Collection and Enforcement Before Default. Like Part 6 generally, this section deals with the rights and duties of secured parties following default. However, as did former Section 9-502 with respect to collection rights, this section also applies to the collection and enforcement rights of secured parties even if a default has not occurred, as long as the debtor has so agreed. It is not unusual for debtors to agree that secured parties are entitled to collect and enforce rights against account debtors prior to default.

5. Collections by Junior Secured Party. A secured party who holds a security interest in a right to payment may exercise the right to collect and enforce under this section, even if the security interest is subordinate to a conflicting security interest in the same right to payment. Whether the junior secured party has priority in the collected proceeds depends on whether the junior secured party qualifies for priority as a purchaser of an instrument (e.g., the account debtor's check) under Section 9-330(d), as a holder in due course of an instrument under Sections 3-305 and 9-331(a), or as a transferee of money under Section 9-332(a). See Sections 9-330, Comment 7; 9-331, Comment 5; and 9-332.

6. Relationship to Rights and Duties of Persons Obligated on Collateral. This section permits a secured party to collect and enforce obligations included in collateral in its capacity as a secured party. It is not necessary for a secured party first to become the owner of the collateral pursuant to a disposition or acceptance. However, the secured party's rights, as between it and the debtor, to collect from and enforce collateral against account debtors and others obligated on collateral under subsection (a) are subject to Section 9-341, Part 4, and other applicable law. Neither this section nor former Section 9-502 should be understood to regulate the duties of an account debtor or other person obligated on collateral. Subsection (e) makes this explicit. For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a non-transferable letter of credit if the debtor is the beneficiary. Unless a secured party has control over a letter-of-credit right and is entitled to receive payment or performance from the issuer or a nominated person under Article 5, its remedies with respect to the

letter-of-credit right may be limited to the recovery of any identifiable proceeds from the debtor. This section establishes only the baseline rights of the secured party vis-a-vis the debtor-the secured party is entitled to enforce and collect after default or earlier if so agreed.

7. Deposit Account Collateral. Subsections (a)(4) and (5) set forth the self-help remedy for a secured party whose collateral is a deposit account. Subsection (a)(4) addresses the rights of a secured party that is the bank with which the deposit account is maintained. That secured party automatically has control of the deposit account under Section 9-104(a)(1). After default, and otherwise if so agreed, the bank/secured party may apply the funds on deposit to the secured obligation.

If a security interest of a third party is perfected by control (Section 9-104(a)(2) or (a)(3)), then after default, and otherwise if so agreed, the secured party may instruct the bank to pay out the funds in the account. If the third party has control under Section 9-104(a)(3), the depositary institution is obliged to obey the instruction because the secured party is its customer. See Section 4-401. If the third party has control under Section 9-104(a)(2), the control agreement determines the depositary institution's obligation to obey.

If a security interest in a deposit account is unperfected, or is perfected by filing by virtue of the proceeds rules of Section 9-315, the depositary institution ordinarily owes no obligation to obey the secured party's instructions. See Section 9-341. To reach the funds without the debtor's cooperation, the secured party must use an available judicial procedure.

8. Rights Against Mortgagor of Real Property. Subsection (b) addresses the situation in which the collateral consists of a mortgage note (or other obligation secured by a mortgage on real property). After the debtor's (mortgagee's) default, the secured party (assignee) may wish to proceed with a nonjudicial foreclosure of the mortgage securing the note but may be unable to do so because it has not become the assignee of record. The assignee/secured party may not have taken a recordable assignment at the commencement of the transaction (perhaps the mortgage note in question was one of hundreds assigned to the secured party as collateral). Having defaulted, the mortgagee may be unwilling to sign a recordable assignment. This section enables the secured party (assignee) to become the assignee of record by recording in the applicable real-property records the security agreement and an affidavit certifying default. Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.

9. Commercial Reasonableness. Subsection (c) provides that the secured party's collection and enforcement rights under subsection (a) must be exercised in a commercially reasonable manner. These rights include the right to settle and compromise claims against the account debtor. The secured party's failure to observe the standard of commercial reasonableness could render it liable to an aggrieved person under Section 9-625, and the secured party's recovery of a deficiency would be subject to Section 9-626. Subsection (c) does not apply if, as is characteristic of most sales of accounts, chattel paper, payment intangibles, and promissory notes, the secured party (buyer) has no right of recourse against the debtor (seller) or a secondary obligor. However, if the secured party does have a right of recourse, the commercial-reasonableness standard applies to collection and enforcement even though the assignment to the secured party was a "true" sale. The obligation to proceed in a commercially reasonable manner arises because the collection process affects the extent of the seller's recourse liability, not because the seller retains an interest in the sold collateral (the seller does not). Concerning classification of a transaction, see Section 9-109, Comment 4.

10. Attorney's Fees and Legal Expenses. The phrase "reasonable attorney's fees and legal expenses," which appears in subsection (d), includes only those fees and expenses incurred in proceeding against account debtors or other third parties. The secured party's right to recover these expenses from the collections arises automatically under this section. The secured party also may incur other attorney's fees and legal expenses in proceeding against the debtor or obligor. Whether the secured party has a right to recover those fees and expenses depends on whether the debtor or obligor has agreed to pay them, as is the case with respect to attorney's fees and legal expenses under Sections 9-608(a)(1)(A) and 9-615(a)(1). The parties also may agree to allocate a portion of the secured party's overhead to collection and enforcement under subsection (d) or Section 9-608(a).

§ 28:9-608. Application of proceeds of collection or enforcement; liability for deficiency and right to surplus.

(a) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under this section in the following order to:

(A) The reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) The satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) The satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under paragraph (1)(C) of this subsection.

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under this section unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Subsection (a) is new; subsection (b) derives from former Section 9-502(2).

2. Modifications of Prior Law. Subsections (a) and (b) modify former Section 9-502(2) by explicitly providing for the application of proceeds recovered by the secured party in substantially the same manner as provided in Section 9-615(a) and (e) for dispositions of collateral.

3. Surplus and Deficiency. Subsections (a)(4) and (b) omit, as unnecessary, the references contained in former Section 9-502(2) to agreements varying the baseline rules on surplus and deficiency. The parties are always free to agree that an obligor will not be liable for a deficiency, even if the collateral secures an obligation, and that an obligor is liable for a

deficiency, even if the transaction is a sale of receivables. For parallel provisions, see Section 9-615(d) and (e).

4. Noncash Proceeds. Subsection (a)(3) addresses the situation in which an enforcing secured party receives noncash proceeds.

Example: An enforcing secured party receives a promissory note from an account debtor who is unable to pay an account when it is due. The secured party accepts the note in exchange for extending the date on which the account debtor's obligation is due. The secured party may wish to credit its debtor (the assignor) with the principal amount of the note upon receipt of the note, but probably will prefer to credit the debtor only as and when the note is paid.

Under subsection (a)(3), the secured party is under no duty to apply the note or its value to the outstanding obligation unless its failure to do so would be commercially unreasonable. If the secured party does apply the note to the outstanding obligation, however, it must do so in a commercially reasonable manner. The parties may provide for the method of application of noncash proceeds by agreement, if the method is not manifestly unreasonable. See Section 9-603. This section does not explain when the failure to apply noncash proceeds would be commercially unreasonable; it leaves that determination to case-by-case adjudication. In the example, the secured party appears to have accepted the account debtor's note in order to increase the likelihood of payment and decrease the likelihood that the account debtor would dispute its obligation. Under these circumstances, it may well be commercially reasonable for the secured party to credit its debtor's obligations only as and when cash proceeds are collected from the account debtor, especially given the uncertainty that attends the account debtor's eventual payment. For an example of a secured party's receipt of noncash proceeds in which it may well be commercially unreasonable for the secured party to delay crediting its debtor's obligations with the value of noncash proceeds, see Section 9-615, Comment 3.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this Article. If the secured party were to dispose of them, for example, appropriate notification would be required (see Section 9-611), and the disposition would be subject to the standards provided in this Part (see Section 9-610). Moreover, a secured party in possession of the noncash proceeds would have the duties specified in Section 9-207.

5. No Effect on Priority of Senior Security Interest. The application of proceeds required by subsection (a) does not affect the priority of a security interest in collateral which is senior to the interest of the secured party who is collecting or enforcing collateral under Section 9-607. Although subsection (a) imposes a duty to apply proceeds to the enforcing secured party's expenses and to the satisfaction of the secured obligations owed to it and to subordinate secured parties, that duty applies only among the enforcing secured party and those persons. Concerning the priority of a junior secured party who collects and enforces collateral, see Section 9-607, Comment 5.

CASE NOTES

Strict foreclosure.

Because settlement agreement between secured creditor and debtor served as vehicle for creditor's foreclosure, rather than as alternative to foreclosure, agreement did not extinguish creditor's security interest in collateral. D.C. Code 1981, § 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Even if proceeds from sale of collateral by creditor to third party failed to satisfy in full debtor's outstanding obligation to secured creditor, settlement agreement between debtor and creditor, providing for strict foreclosure by creditor in full satisfaction of debtor's obligation, precluded creditor from suing debtor for deficiency. Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Settlement agreement between debtor and creditor holding security interest in debtor's equipment was functional equivalent of strict foreclosure pursuant to statute allowing retention of collateral in satisfaction of obligation, thereby giving creditor possessory interest in collateral, and was not alternative to foreclosure, where agreement described process by which creditor was to take possession of collateral, provided notice to debtor of intent to foreclose, described requirements of commercial code that other secured creditors received notice of proposed foreclosure, stated that debtor renounced its rights to collateral and consented to foreclosure, and clearly stated that foreclosure was in full satisfaction of debtor's obligation. D.C. Code 1981, §§ 28:9-501, 28:9-503, 28:9-504, 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Fact that secured party immediately sold collateral to third party following its recovery of collateral pursuant to settlement agreement with debtor, rather than retaining collateral was irrelevant to whether settlement agreement was equivalent of strict foreclosure pursuant to commercial code provision allowing

retention of collateral after default in satisfaction of obligation. D.C. Code 1981, § 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

§ 28:9-609. Secured party's right to take possession after default.

(a) After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under § 28:9-610.

(b) A secured party may proceed under subsection (a):

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:6-103, § 28:9-102, § 28:9-602, and § 28:9-603.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-503.

2. Secured Party's Right to Possession. This section follows former Section 9-503 and earlier uniform legislation. It provides that the secured party is entitled to take possession of collateral after default.

3. Judicial Process; Breach of Peace. Subsection (b) permits a secured party to proceed under this section without judicial process if it does so "without breach of the peace." Although former Section 9-503 placed the same condition on a secured party's right to take possession of collateral, subsection (b) extends the condition to the right provided in subsection (a)(2) as well. Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party's use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503.

4. Damages for Breach of Peace. Concerning damages that may be recovered based on a secured party's breach of the peace in connection with taking possession of collateral, see Section 9-625, Comment 3.

5. Multiple Secured Parties. More than one secured party may be entitled to take possession of collateral under this section. Conflicting rights to possession among secured parties are resolved by the priority rules of this Article. Thus, a senior secured party is entitled to possession as against a junior claimant. Non-UCC law governs whether a junior secured party in possession of collateral is liable to the senior in conversion. Normally, a junior who refuses to relinquish possession of collateral upon the demand of a secured party having a superior possessory right to the collateral would be liable in conversion.

6. Secured Party's Right to Disable and Dispose of Equipment on Debtor's Premises. In the case of some collateral, such as heavy equipment, the physical removal from the debtor's plant and the storage of the collateral pending disposition may be impractical or unduly expensive. This section follows former Section 9-503 by providing that, in lieu of removal, the

secured party may render equipment unusable or may dispose of collateral on the debtor's premises. Unlike former Section 9-503, however, this section explicitly conditions these rights on the debtor's default. Of course, this section does not validate unreasonable action by a secured party. Under Section 9-610, all aspects of a disposition must be commercially reasonable.

7. Debtor's Agreement to Assemble Collateral. This section follows former Section 9-503 also by validating a debtor's agreement to assemble collateral and make it available to a secured party at a place that the secured party designates. Similar to the treatment of agreements to permit collection prior to default under Section 9-607 and former 9-502, however, this section validates these agreements whether or not they are conditioned on the debtor's default. For example, a debtor might agree to make available to a secured party, from time to time, any instruments or negotiable documents that the debtor receives on account of collateral. A court should not infer from this section's validation that a debtor's agreement to assemble and make available collateral would not be enforceable under other applicable law.

8. Agreed Standards. Subject to the limitation imposed by Section 9-603(b), this section's provisions concerning agreements to assemble and make available collateral and a secured party's right to disable equipment and dispose of collateral on a debtor's premises are likely topics for agreement on standards as contemplated by Section 9-603.

CASE NOTES

ANALYSIS

Breach of the peace.

Allegation that automobile was repossessed from debtor's driveway, rather than from alleyway, was insufficient to raise material issue of fact sufficient to preclude summary judgment for creditor in debtor's action for wrongful trespass, in absence of allegation that repossession was accomplished by breaching the peace. D.C. Code 1981, § 28:9-503. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

If the debtor is present when collateral is repossessed and makes an objection, the breach of the peace analysis comes to the fore and the creditor's agent must then desist. D.C. Code 1981, § 28:9-503. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

Since retail installment contract provided that repossession of the automobile would occur upon default, and debtor admitted that he was unable to pay the monthly installments as agreed, creditor was entitled to self-help repossession so long as it was done without breaching the peace. D.C. Code 1981, § 28:9-503. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

The only limitation to a creditor's statutory remedy to repossess the collateral, other than any provided for by contract, is that the secured party proceed only if repossession can be done without a breach of the peace. D.C. Code 1981, § 28:9-503. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

The entry onto a debtor's land, without confrontation or resistance, is not a "breach of the peace" within the meaning of the statute allowing repossession upon default. D.C. Code 1981, § 28:9-503. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

Construction and application.

Under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by a judgment creditor against collateral. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Secured party with prior, perfected interest in impounded automobile was entitled to possession of automobile and was not required to pay registered owner's unpaid parking tickets.

D.C. Code §§ 28:9-503, 40-603(k)(3), 40-702. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

Possession is essential to the enforcement of a garage keeper's lien created in the District of Columbia, but not to the retention of the right, and peaceful repossession is recognized as lawful course of action in pursuance of the possessory interest. D.C. Code §§ 28:9-503, 38-205. O'Donnell v. S & R, Inc., 369 A.2d 168, 1977 D.C. App. LEXIS 419 (1977).

Issues in suit by buyer of automobile against chattel mortgagee, which held mortgage created by seller and which repossessed automobile, were governed by provisions of Uniform Commercial Code, so that determination of issues in accordance with theory of estoppel constituted error; however, where judgment of trial judge was correct, such error did not require reversal. Code Md.1957, art. 95B, § 1-101 et seq. Franklin Inv. Co. v. Homburg, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Effect of repossession.

Mere seizure of vehicle by repossessing secured creditor does not suffice to destroy debtor's title, as long as debtor has right to redeem. In re Young, 193 B.R. 620, 1996 Bankr. LEXIS 260 (1996).

If creditor merely foreclosed on his security to protect himself, foreclosure could not be properly nullified. Harris v. Wagshal, 343 A.2d 283, 1975 D.C. App. LEXIS 430 (1975).

Judicial authority.

The self-help contractual remedy of repossession of collateral takes place outside of the judicial process, and, therefore, the court has no inherent power to interfere with it. Headspeth v. Mercedes-Benz Credit Corp., 709 A.2d 717, 1998 D.C. App. LEXIS 59 (1998), writ of certiorari denied by 525 U.S. 1024, 119 S. Ct. 556, 142 L. Ed. 2d 463, 1998 U.S. LEXIS 7704, 67 U.S.L.W. 3362 (1998).

Mitigation of damages.

In a situation where a buyer commits a breach of a contract of sale before completion of the seller's performance under the contract, the seller is obligated to mitigate damages arising from the breach by retaining control of the property, acting in a reasonable manner to protect its value, or engaging in a substitute transaction designed to limit loss resulting from the breach. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

When delivery and acceptance have already occurred, seller ordinarily has no obligation to protect the property or otherwise mitigate damages in event of a breach of the contract of sale by the buyer and, unless the buyer has valid grounds for rescission of the contract, the seller need not retake or resell the property. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

Removal of fixtures or personal property.

Surrender of leasehold interest by tenant does not affect right of removal by one to whom fixtures or personal property has previously been transferred or mortgaged, and mortgagee of fixtures and personal property must be given opportunity and reasonable time to remove mortgaged property from leased premises when lease has been surrendered prior to expiration of lease term. Leroy Adventures, Inc. v. Cafritz Harbour Group, 640 A.2d 193, 1994 D.C. App. LEXIS 56 (1994), modified by, remanded by 660 A.2d 908, 1995 D.C. App. LEXIS 131, 27 U.C.C. Rep. Serv. 2d (CBC) 697 (D.C. 1995).

Setoff.

Although under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by judgment creditor of borrower against collateral, bank could exercise common-law right of setoff against borrower's demand accounts on deposit with bank. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

When judgment creditor obtained judgment against borrower hospital and served attachment on lender bank in connection with debt service reserve fund established in accordance with hospital revenue bond issue and loan agreement, lender bank was without right to appropriate the trust funds to its own use as a setoff on its claim against defaulting borrower given clear contractual trust relationship between lender and District of Columbia establishing bond issue related loan agreement and indenture of trust which designated funds on deposit for benefit of District of Columbia. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

Doctrines of recoupment and set off permit a defendant to show that the plaintiff's recovery should be adjusted to prevent unjust enrichment or to account for plaintiff's unreasonable conduct and the burden is on the defendant to establish that the plaintiff's recovery should be reduced through recoupment or set off. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

§ 28:9-610. Disposition of collateral after default.

(a) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) A secured party may disclaim or modify warranties under subsection (d):

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) A record is sufficient to disclaim warranties under subsection (e) if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:6-103, § 28:9-406, § 28:9-408, § 28:9-602, § 28:9-609, § 28:9-611, § 28:9-615, § 28:9-616, § 28:9-618, § 28:9-620, and § 28:9-623.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-504(1), (3)

2. Commercially Reasonable Dispositions. Subsection (a) follows former Section 9-504 by permitting a secured party to dispose of collateral in a commercially reasonable manner following a default. Although subsection (b) permits both public and private dispositions, "every aspect of a disposition ... must be commercially reasonable." This section encourages private dispositions on the assumption that they frequently will result in higher realization on collateral for the benefit of all concerned. Subsection (a) does not restrict dispositions to sales; collateral may be sold, leased, licensed, or otherwise disposed. Section 9-627 provides guidance for determining the circumstances under which a disposition is "commercially reasonable."

3. Time of Disposition. This Article does not specify a period within which a secured party must dispose of collateral. This is consistent with this Article's policy to encourage private dispositions through regular commercial channels. It may, for example, be prudent not to dispose of goods when the market has collapsed. Or, it might be more appropriate to sell

a large inventory in parcels over a period of time instead of in bulk. Of course, under subsection (b) every aspect of a disposition of collateral must be commercially reasonable. This requirement explicitly includes the "method, manner, time, place and other terms." For example, if a secured party does not proceed under Section 9-620 and holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a "commercially reasonable" manner. See also Section 1-203 (general obligation of good faith).

4. Pre-Disposition Preparation and Processing. Former Section 9-504(1) appeared to give the secured party the choice of disposing of collateral either "in its then condition or following any commercially reasonable preparation or processing." Some courts held that the "commercially reasonable" standard of former Section 9-504(3) nevertheless could impose an affirmative duty on the secured party to process or prepare the collateral prior to disposition. Subsection (a) retains the substance of the quoted language. Although courts should not be quick to impose a duty of preparation or processing on the secured party, subsection (a) does not grant the secured party the right to dispose of the collateral "in its then condition" under all circumstances. A secured party may not dispose of collateral "in its then condition" when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in that condition.

5. Disposition by Junior Secured Party. Disposition rights under subsection (a) are not limited to first-priority security interests. Rather, any secured party as to whom there has been a default enjoys the right to dispose of collateral under this subsection. The exercise of this right by a secured party whose security interest is subordinate to that of another secured party does not of itself constitute a conversion or otherwise give rise to liability in favor of the holder of the senior security interest. Section 9-615 addresses application of the proceeds of a disposition by a junior secured party. Under Section 9-615(a), a junior secured party owes no obligation to apply the proceeds of disposition to the satisfaction of obligations secured by a senior security interest. Section 9-615(g) builds on this general rule by protecting certain juniors from claims of a senior concerning cash proceeds of the disposition. Even if a senior were to have a non-Article 9 claim to proceeds of a junior's disposition, Section 9-615(g) would protect a junior that acts in good faith and without knowledge that its actions violate the rights of a senior party. Because the disposition by a junior would not cut off a senior's security interest or other lien (see Section 9-617), in many (probably most) cases the junior's receipt of the cash proceeds would not violate the rights of the senior.

The holder of a senior security interest is entitled, by virtue of its priority, to take possession of collateral from the junior secured party and conduct its own disposition, provided that the senior enjoys the right to take possession of the collateral from the debtor. See Section 9-609. The holder of a junior security interest normally must notify the senior secured party of an impending disposition. See Section 9-611. Regardless of whether the senior receives a notification from the junior, the junior's disposition does not of itself discharge the senior's security interest. See Section 9-617. Unless the senior secured party has authorized the disposition free and clear of its security interest, the senior's security interest ordinarily will survive the disposition by the junior and continue under Section 9-315(a). If the senior enjoys the right to repossess the collateral from the debtor, the senior likewise may recover the collateral from the transferee.

When a secured party's collateral is encumbered by another security interest or other lien, one of the claimants may seek to invoke the equitable doctrine of marshaling. As explained by the Supreme Court, that doctrine "rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." Meyer v. United States, 375 U.S. 233, 236 (1963), quoting Sowell v. Federal Reserve Bank, 268 U.S. 449, 456-57 (1925). The purpose of the doctrine is "to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." Id. at 237. Because it is an equitable doctrine, marshaling "is applied only when it can be equitably fashioned as to all of the parties" having an interest in the property. Id. This Article leaves courts free to determine whether marshaling is appropriate in any given case. See Section 1-103.

6. Security Interests of Equal Rank. Sometimes two security interests enjoy the same priority. This situation may arise by contract, e.g., pursuant to "equal and ratable" provisions in indentures, or by operation of law. See Section 9-328(6). This Article treats a security interest having equal priority like a senior security interest in many respects. Assume, for example, that SP-X and SP-Y enjoy equal priority, SP-W is senior to them, and SP-Z is junior. If SP-X disposes of the collateral under this section, then (i) SP-W's and SP-Y's security interests survive the disposition but SP-Z's does not, see Section 9-617, and (ii) neither SP-W nor SP-Y is entitled to receive a distribu-

tion of proceeds, but SP-Z is. See Section 9-615(a)(3).

When one considers the ability to obtain possession of the collateral, a secured party with equal priority is unlike a senior secured party. As the senior secured party, SP-W should enjoy the right to possession as against SP-X. See Section 9-609, Comment 5. If SP-W takes possession and disposes of the collateral under this section, it is entitled to apply the proceeds to satisfy its secured claim. SP-Y, however, should not have such a right to take possession from SP-X; otherwise, once SP-Y took possession from SP-X, SP-X would have the right to get possession from SP-Y, which would be obligated to redeliver possession to SP-X, and so on. Resolution of this problem is left to the parties and, if necessary, the courts.

7. Public vs. Private Dispositions. This Part maintains two distinctions between "public" and other dispositions: (i) the secured party may buy at the former, but normally not at the latter (Section 9-610(c)), and (ii) the debtor is entitled to notification of "the time and place of a public disposition" and notification of "the time after which" a private disposition or other intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under former Section 9-504(4), under which transferees in a noncomplying public disposition could lose protection more easily than transferees in other noncomplying dispositions. Instead, Section 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a "public disposition" is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

8. Investment Property. Dispositions of investment property may be regulated by the federal securities laws. Although a "public" disposition of securities under this Article may implicate the registration requirements of the Securities Act of 1933, it need not do so. A disposition that qualifies for a "private placement" exemption under the Securities Act of 1933 nevertheless may constitute a "public" disposition within the meaning of this section. Moreover, the "commercially reasonable" requirements of subsection (b) need not prevent a secured party from conducting a foreclosure sale without the issuer's compliance with federal registration requirements.

9. "Recognized Market." A "recognized market," as used in subsection (c) and Section 9-611(d), is one in which the items sold are fungible and prices are not subject to individual negotiation. For example, the New York Stock Exchange is a recognized market. A market in which prices are individually negotiated or the items are not fungible is not a recognized market, even if the items are the subject of widely disseminated price guides or are disposed of through dealer auctions.

10. Relevance of Price. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable. Note also that even if the disposition is commercially reasonable, Section 9-615(f) provides a special method for calculating a deficiency or surplus if (i) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor, and (ii) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

11. Warranties. Subsection (d) affords the transferee in a disposition under this section the benefit of any title, possession, quiet enjoyment, and similar warranties that would have accompanied the disposition by operation of non-Article 9 law had the disposition been conducted under other circumstances. For example, the Article 2 warranty of title would apply to a sale of goods, the analogous warranties of Article 2A would apply to a lease of goods, and any common-law warranties of title would apply to dispositions of other types of collateral. See, e.g., Restatement (2d), Contracts s 333 (warranties of assignor).

Subsection (e) explicitly provides that these warranties can be disclaimed either under other applicable law or by communicating a record containing an express disclaimer. The record need not be written, but an oral communication would not be sufficient. See Section 9-102 (definition of "record"). Subsection (f) provides a sample of wording that will effectively exclude the warranties in a disposition under this section, whether or not the exclusion would be effective under non-Article 9 law.

The warranties incorporated by subsection (d) are those relating to "title, possession, quiet enjoyment, and the like." Depending on the circumstances, a disposition under this section also may give rise to other statutory or implied warranties, e.g., warranties of quality or fitness for purpose. Law other than this Article determines whether such other warranties apply to a disposition under this section. Other law also determines issues relating to disclaimer of such warranties. For example, a foreclosure sale of a car by a car dealer could give rise to an implied warranty of merchantability (Section 2-314) unless effectively disclaimed or modified (Section 2-316).

This section's approach to these warranties conflicts with the former Comment to Section 2-312. This Article rejects the baseline assumption that commercially reasonable dispositions under this section are out of the ordinary commercial course or peculiar. The Comment to Section 2-312 has been revised accordingly.

CASE NOTES

ANALYSIS

Actions and proceedings, generally.

Following entry of judgment finding that bank held valid security interest in debtor's agency accounts, bank's action in liquidating agency accounts while automatic stay of judgment was in effect, did not violate stay or place bank in contempt of court; bank already had physical possession of accounts when judgment was entered and never took any action to execute its judgment against debtor, and automatic stay, imposed by court rule, did not address availability of self-help remedy under Uniform Commercial Code (UCC). D.C. Code 1981, § 28:9-504(1, 3); Civil Rule 62(a). Pallie v. Riggs Nat'l Bank, 697 A.2d 1239, 1997 D.C. App. LEXIS 164 (1997).

If person against whom default judgment had been obtained by seller in replevin action had not signed conditional sales agreement, allegations of conversion and violation of Uniform Commercial Code with respect to the property which was subject of the agreement and with respect to its disposal after repossession did not state cause of action against seller unless such person could show some other cognizable interest in furniture which was replevied. Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

If default judgment against defendant in replevin action by store was null and void, store could not rely upon judgment to defend against second person's allegations in action seeking damages for conversion of goods replevied. Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Complaint which sought to vacate prior default judgment was properly treated as a motion to vacate judgment under District of Columbia Superior Court rule. D.C. Code SCR, Civil Rule 60(b)(4). Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

If person against whom default judgment had been entered in replevin action did cosign conditional sales contract, then trial court, in action to vacate default judgment entered against person, could not properly dismiss without determining whether under the facts and circumstances delay of three years in challenging default judgment was unreasonable, and, if so, whether there was sufficient privity between person and second cosigner for prior judgment against person to bind cosigner under principle of collateral estoppel. Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

While alleged misconduct or fraud on part of party who obtained default judgment may not be relied on by one seeking to vacate default judgment after lapse of one year, court may consider conduct of party who obtained default judgment in determining whether or not to grant request of person seeking to vacate judgment for any other reason justifying relief. D.C. Code SCR, Civil Rule 60(b), (b)(6). Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Forfeitures.

Under the "absolute preclusion rule" concerning deficiency judgments, a secured creditor that fails to notify the debtor of a proposed sale of repossessed property forfeits the right to recover a deficiency judgment. HEW Federal Credit Union v. Battle, 772 A.2d 252, 2001 D.C. App. LEXIS 109 (2001).

When property in custody of police department is motor vehicle with liens of record, unclaimed by lienholder, sale proceeds are available for payment of liens as well as payments of sale and custody which, in effect, allows buyer to take free and clear of all liens of record. D.C. Code § 4-160(b). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

"Owner or duly authorized person" contemplated by statute authorizing such person to repossess or secure release of vehicle impounded for traffic violations or unpaid parking tickets does not include a chattel mortgagee, even one whose right to possession has accrued on default by a conditional vendee; rather, statute applies to registered owner, his legal representative, or person authorized by owner to operate the vehicle. D.C. Code § 40-603(k). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

In general.

Because bank's security interest in Chapter 11 debtor's inventory continued in ethanol sold to debtor as proceeds, on default by debtor, bank was entitled to enforce its Article 9 remedies against ethanol, without proceeding

against debtor's contract rights with supplier; nothing in Article 9 required bank first to foreclose on contract before exercising its rights against ethanol. U.C.C. §§ 9-101 et seq., 9-504; N.Y. C.L.S. Uniform Commercial Code §§ 9-101 et seq., 9-504; D.C. Code 1981, §§ 28:9-101 et seq., 28:9-504. In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

Rather than creating statutory liens, statute authorizing owner or other duly authorized person to repossess or secure release of impounded vehicle allows substitution of collateral security for scofflaw's appearance in court. D.C. Code § 40-603(k)(3). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

Secured party with prior, perfected interest in impounded automobile was entitled to possession of automobile and was not required to pay registered owner's unpaid parking tickets. D.C. Code §§ 28:9-503, 40-603(k)(3), 40-702. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

A chattel mortgagee with a security interest in impounded vehicle has right to claim vehicle, and such right flows not from impoundment provisions, but from UCC provisions governing secured transactions. D.C. Code §§ 28:9-503, 40-603(k). District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

Conditional vendee's ownership right in collateral are not cut off as a result of failure to make payment and entry of default judgment, but rather such default merely satisfies a condition precedent to the conditional vendor's right to invoke certain remedies. D.C. Code § 28:9-501(1). Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

It is only where secured creditor ignores rights against the collateral and elects to proceed on the underlying debt that subsequent disposal of collateral is not governed by requirements of Uniform Commercial Code. D.C. Code § 28:9-101 et seq. Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

Procedure for disposition of collateral.

Under Commercial Code provision allowing secured party in possession to propose to retain collateral in satisfaction of obligation after default, secured creditor: must take possession of collateral after default; must send written notice to debtor of its intention to retain collateral in satisfaction of obligation, unless debtor has signed, after default, statement renouncing or modifying his rights under this section; must send notice of his intent to foreclose to any other creditor of debtor who has previously sent secured creditor written notice of claim of interest in collateral; and may retain collateral in satisfaction of debtor's obligation if, within 21 days after sending notice, secured creditor does not receive objection in writing from some party entitled to notice. D.C. Code 1981, § 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

§ 28:9-611. Notification before disposition of collateral.

(a) In this section, "notification date" means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification.

(b) Except as otherwise provided in subsection (d), a secured party that disposes of collateral under § 28:9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.

(c) To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:

(1) The debtor;

(2) Any secondary obligor; and

(3) If the collateral is other than consumer goods:

(A) Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) Any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) Identified the collateral;

(ii) Was indexed under the debtor's name as of that date; and

(iii) Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in § 28:9-311(a).

(d) Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) A secured party complies with the requirement for notification prescribed by subsection (c)(3)(B) if:

(1) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (c)(3)(B); and

(2) Before the notification date, the secured party:

(A) Did not receive a response to the request for information; or

(B) Received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-624.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-504(3).

2. Reasonable Notification. This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

3. Notification to Debtors and Secondary Obligors. This section imposes a duty to send notification of a disposition not only to the debtor but also to any secondary obligor. Subsections (b) and (c) resolve an uncertainty under former Article 9 by providing that secondary obligors (sureties) are entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral. If the surety created the security interest, it would be the debtor. If it did not, it would be a secondary obligor. (This Article also resolves the question of the secondary obligor's ability to waive, pre-default, the right to notification-waiver generally is not permitted. See Section 9-602.) Section 9-605 relieves a secured party from any duty to send notification to a debtor or secondary obligor unknown to the secured party.

Under subsection (b), the principal obligor (borrower) is not always entitled to notification of disposition.

Example: Behnfeldt borrows on an unsecured basis, and Bruno grants a security interest in her car to secure the debt. Behnfeldt is a primary obligor, not a secondary obligor. As such, she is not entitled to notification of disposition under this section.

4. Notification to Other Secured Parties. Prior to the 1972 amendments to Article 9, former Section 9-504(3) required the enforcing secured party to send reasonable notification of the disposition:

except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing

statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral.

The 1972 amendments eliminated the duty to give notice to secured parties other than those from whom the foreclosing secured party had received written notice of a claim of an interest in the collateral.

Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (c)(3)(B) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties. The subsection imposes a search burden that in some cases may be greater than the pre-1972 burden on foreclosing secured parties but certainly is more modest than that faced by a new secured lender.

To determine who is entitled to notification, the foreclosing secured party must determine the proper office for filing a financing statement as of a particular date, measured by reference to the "notification date," as defined in subsection (a). This determination requires reference to the choice-of-law provisions of Part 3. The secured party must ascertain whether any financing statements covering the collateral and indexed under the debtor's name, as the name existed as of that date, in fact were filed in that office. The foreclosing secured party generally need not notify secured parties whose effective financing statements have become more difficult to locate because of changes in the location of the debtor, proceeds rules, or changes in the debtor's name.

Under subsection (c)(3)(C), the secured party also must notify a secured party who has perfected a security interest by complying with a statute or treaty described in Section 9-311(a), such as a certificate-of-title statute.

Subsection (e) provides a "safe harbor" that takes into account the delays that may be attendant to receiving information from the public filing offices. It provides, generally, that the secured party will be deemed to have satisfied its notification duty under subsection (c)(3)(B) if it requests a search from the proper office at least 20 but not more than 30 days before sending notification to the debtor and if it also sends a notification to all secured parties (and other lienholders) reflected on the search report. The secured party's duty under subsection (c)(3)(B) also will be satisfied if the secured party requests but does not receive a search report before the notification is sent to the debtor. Thus, if subsection (e) applies, a secured party who is entitled to notification under subsection (c)(3)(B) has no remedy against a foreclosing secured party who does not send the notification. The foreclosing secured party has complied with the notification requirement. Subsection (e) has no effect on the requirements of the other paragraphs of subsection (c). For example, if the foreclosing secured party received a notification from the holder of a conflicting security interest in accordance with subsection (c)(3)(A) but failed to send to the holder a notification of the disposition, the holder of the conflicting security interest would have the right to recover any loss under Section 9-625(b).

5. Authentication Requirement. Subsections (b) and (c) explicitly provide that a notification of disposition must be "authenticated." Some cases read former Section 9-504(3) as validating oral notification.

6. Second Try. This Article leaves to judicial resolution, based upon the facts of each case, the question whether the requirement of "reasonable notification" requires a "second try," i.e., whether a secured party who sends notification and learns that the debtor did not receive it must attempt to locate the debtor and send another notification.

7. Recognized Market; Perishable Collateral. New subsection (d) makes it clear that there is no obligation to give notification of a disposition in the case of perishable collateral or collateral customarily sold on a recognized market (e.g., marketable securities). Former Section 9-504(3) might be read (incorrectly) to relieve the secured party from its duty to notify a debtor but not from its duty to notify other secured parties in connection with dispositions of such collateral.

8. Failure to Conduct Notified Disposition. Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change. This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable.

9. Waiver. A debtor or secondary obligor may waive the right to notification under this section only by a post-default authenticated agreement. See Section 9-624(a).

CASE NOTES

ANALYSIS

Notice requirement.
—Deficiency judgment, notice requirement.
—In general.
Possession by secured party.

Notice requirement.

— Deficiency judgment, notice requirement.

Under the "absolute preclusion rule" concerning deficiency judgments, a secured creditor that fails to notify the debtor of a proposed sale of repossessed property forfeits the right to recover a deficiency judgment. HEW Federal Credit Union v. Battle, 772 A.2d 252, 2001 D.C. App. LEXIS 109 (2001).

Bar to deficiency judgment for secured creditor which failed to give debtor prior notice of proposed sale of repossessed collateral did not preclude the enforcement of creditor's security interest in collateral remaining in debtor's possession. D.C. Code 1981, § 28:9-101 et seq. Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Bar to deficiency judgment for secured creditor which failed to give debtor prior notice of proposed sale of repossessed collateral did not preclude the enforcement of creditor's security interest in collateral remaining in debtor's possession. D.C. Code 1981, § 28:9-101 et seq. Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

"Absolute preclusion" rule, denying deficiency judgment to secured party who has failed to give notice of proposed sale of repossessed property to debtor, applied in business context. Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Creditor, by failing to give automobile purchasers the required notice of private sale, was not entitled to a deficiency judgment, and its recovery was limited to proceeds of private sale; the required notice of a private sale was not cured, and legally could not be cured, by trial court's determination of a reasonable value of the automobile, for which the buyers had been given credit, at the time of the sale. D.C. Code §§ 28:1-101 et seq., 28:9-101 et seq., 28:9-203(2), 28:9-504(2, 3), 28:9-504(3), 28:9-507(1), 28-3301 et seq., 28-3801 et seq., 28-3812(e)(3), 40-901 et seq., 40-902(e)(1); D.C. Code SCR, Civil Rule 55-II(b). Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Debtor's voluntary surrender of collateral, a used automobile, did not automatically extinguish his right under Uniform Commercial Code to notice of resale, and thus creditor's failure to give requisite notice of resale of collateral under UCC barred deficiency judgment altogether, unless principles of waiver or estoppel precluded debtor from asserting lack of notice. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, neither principles of waiver nor estoppel precluded debtor from asserting lack of notice, since, if trial court considered and rejected waiver and estoppel issues, its conclusions were supported by evidence, and since, if, to contrary, such issues were not raised and considered at trial, there was no perceived injustice in refusing, on appeal, to honor creditor's arguments concerning such issues. D.C. Code §§ 17-305(a), 28:9-501(3), 28:9-504(3), 40-901 et seq., 40-902(f); D.C. Code SCR, Civil Rule 52. Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, error occurred in placing burden on debtor to prove fair market value of automobile at time of resale, since even those jurisdictions interpreting UCC to permit a deficiency judgment to a secured creditor who fails to give notice of resale place burden on creditor to prove that fair and reasonable value of security is being credited to debtor's account. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, trial court, to justify a legal conclusion of estoppel, would have had to find that debtor had intended to convey impression that he did not wish to receive notice of sale, had expected creditor would rely on that impression, and that creditor did so rely, to point of changing its position

prejudicially. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

— In general.

Despite secured creditor's improper failure to give debtor prior notice of sale of repossessed collateral, creditor's security interest in remaining unrepossessed collateral continued until debt was paid, absent express or implied relinquishment of security interest. Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Fact that secured creditor did not repossess all collateral in debtor's possession, and did not sell all collateral it repossessed, did not thereby entitle creditor to deficiency judgment it was otherwise precluded from obtaining due to its failure to give debtor notice of proposed sale of repossessed collateral. D.C. Code 1981, § 28:9-501(1). Fleming v. Carroll Pub. Co., 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

"Presumption of receipt" was applicable to repossession letter sent by certified mail to debtor's last known address where statutory notice requirement [Md.Code, Commercial Law, § 12-624(d)] did not require actual receipt. Anderson v. Peoples Sec. Bank, 503 A.2d 670, 1986 D.C. App. LEXIS 268 (1986).

Evidence was sufficient, in bank's action for deficiency judgment, to authenticate bank's notification letter of impending repossession sale where custodian of bank's records testified that records reflected that letter had been prepared then addressed and mailed to debtor. Anderson v. Peoples Sec. Bank, 503 A.2d 670, 1986 D.C. App. LEXIS 268 (1986).

Bank's repossession letter to debtors fulfilled notice requirement of Maryland's Retail Installment Sales Act when it included rights of debtors as to redemption and resale, notice of balance due on debt, location where automobile was stored, and address where payments were to be made and notices delivered. Md.Code, Commercial Law, § 12-624(d). Anderson v. Peoples Sec. Bank, 503 A.2d 670, 1986 D.C. App. LEXIS 268 (1986).

Lending bank, which acquired security interest in automobile by assignment from seller as part of purchase transaction, was required to comply with notice provisions of Md.Code, Commercial Law, § 12-624(d) upon repossession of the automobile. Anderson v. Peoples Sec. Bank, 503 A.2d 670, 1986 D.C. App. LEXIS 268 (1986).

A debtor's right to notice is not limited to situations in which creditor has repossessed collateral without knowledge or against will of debtor; even when a creditor contemplates a private sale and is accordingly required only to notify debtor of time after which any private sale is to be made, a debtor's voluntary delivery of collateral for purpose of having it sold by creditor is not equivalent of notice to debtor of time after which a private sale will take place; in such a case, debtor is still entitled to notification of specific date after which creditor may proceed to dispose of collateral. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

Possession by secured party.

Settlement agreement between debtor and creditor holding security interest in debtor's equipment was functional equivalent of strict foreclosure pursuant to statute allowing retention of collateral in satisfaction of obligation, thereby giving creditor possessory interest in collateral, and was not alternative to foreclosure, where agreement described process by which creditor was to take possession of collateral, provided notice to debtor of intent to foreclose, described requirements of commercial code that other secured creditors received notice of proposed foreclosure, stated that debtor renounced its rights to collateral and consented to foreclosure, and clearly stated that foreclosure was in full satisfaction of debtor's obligation. D.C. Code 1981, §§ 28:9-501, 28:9-503, 28:9-504, 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Lender would not be entitled to outright ownership of car, if agreement to forfeit title to car upon failure to repay loan was construed to be security agreement. D.C. Code 1981, §§ 28:9-502, 28:9-504(2), 28:9-506. Council v. Hogan, 566 A.2d 1070, 1989 D.C. App. LEXIS 277 (1989).

Upon failure of conditional vendee to make payment, conditional vendor has right to replevy the goods and either keep them as his own or dispose of them by sale provided conditional vendor adheres to notice provisions of the Uniform Commercial Code. D.C. Code § 28:9-501(1). Roebuck v. Walker--Thomas Furniture Co., 310 A.2d 845, 1973 D.C. App. LEXIS 373 (1973).

§ 28:9-612. Timeliness of notification before disposition of collateral.

(a) Except as otherwise provided in subsection (b), whether a notification is sent within a reasonable time is a question of fact.

(b) In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Reasonable Notification. Section 9-611(b) requires the secured party to send a "reasonable authenticated notification." Under that section, as under former Section 9-504(3), one aspect of a reasonable notification is its timeliness. This generally means that the notification must be sent at a reasonable time in advance of the date of a public disposition or the date after which a private disposition is to be made. A notification that is sent so near to the disposition date that a notified person could not be expected to act on or take account of the notification would be unreasonable.

3. Timeliness of Notification: Safe Harbor. The 10-day notice period in subsection (b) is intended to be a "safe harbor" and not a minimum requirement. To qualify for the "safe harbor" the notification must be sent after default. A notification also must be sent in a commercially reasonable manner. See Section 9-611(b) ("reasonable authenticated notification"). These requirements prevent a secured party from taking advantage of the "safe harbor" by, for example, giving the debtor a notification at the time of the original extension of credit or sending the notice by surface mail to a debtor overseas.

§ 28:9-613. Contents and form of notification before disposition of collateral: general.

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) Describes the debtor and the secured party;

(B) Describes the collateral that is the subject of the intended disposition;

(C) States the method of intended disposition;

(D) States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) States the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:

(A) Information not specified by that paragraph; or

(B) Minor errors that are not seriously misleading.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in § 28:9-614(3), when completed, each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

"To: [Name of debtor, obligor, or other person to which the notification is sent]

"From: [Name, address, and telephone number of secured party]

"Name of Debtor(s): [Include only if debtor(s) are not an addressee]

"[For a public disposition:]

"We will sell [or lease or license, as applicable] the [describe collateral] [to the highest qualified bidder] in public as follows:

"Day and Date: ....

"Time: ....

"Place: ....

"Time: ....

"[For a private disposition:]

"We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date].

"You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of $.........]. You may request an accounting by calling us at [telephone number]

"[End of Form]"

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-614.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Contents of Notification. To comply with the "reasonable authenticated notification" requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to "time" of disposition means here, as it did in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor's rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.

CASE NOTES

Priority of liens.

Generally, priority of liens or security interests is determined according to the principle of "first in time, first in right." Malakoff v. Washington, 434 A.2d 432, 1981 D.C. App. LEXIS 348 (1981).

A prior lien gives a prior legal right, except where statute varies common-law rule. District

of Columbia v. Franklin Inv. Co., 404 A.2d 536, 1979 D.C. App. LEXIS 423 (1979).

§ 28:9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) The information specified in § 28:9-613(1);

(B) A description of any liability for a deficiency of the person to which the notification is sent;

(C) A telephone number from which the amount that must be paid to the secured party to redeem the collateral under § 28:9-623 is available; and

(D) A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

"[Name and address of secured party]

"[Date]

"NOTICE OF OUR PLAN TO SELL PROPERTY

"[Name and address of any obligor who is also a debtor]

"Subject: [Identification of Transaction]

"We have your [describe collateral], because you broke promises in our agreement.

"[For a public disposition:]

"We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

"Date: ____________________

"Time: ____________________

"Place: ____________________

"You may attend the sale and bring bidders if you want.

"[For a private disposition:]

"We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

"The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

"You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

"If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [secured party's address] and request a written explanation. [We will charge you $

________ for the explanation if we sent you another written explanation of the amount you owe us within the last 6 months.]

"If you need more information about the sale call us at [telephone number] or write us at [secured party's address].

"We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:

"[Names of all other debtors and obligors, if any]

"[End of Form]"

(4) A notification in the form of paragraph (3) is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of paragraph (3) is sufficient, even if it includes errors in information not required by paragraph (1) of this subsection, unless the error is misleading with respect to rights arising under this article.

(6) If a notification under this section is not in the form of paragraph (3) of this subsection, law other than this article determines the effect of including information not required by paragraph (1) of this subsection.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-613.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Notification in Consumer-Goods Transactions. Paragraph (1) sets forth the information required for a reasonable notification in a consumer-goods transaction. A notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law. Compare Section 9-613(2), under which the trier of fact may find a notification to be sufficient even if it lacks some information listed in paragraph (1) of that section.

3. Safe-Harbor Form of Notification; Errors in Information. Although paragraph (2) provides that a particular phrasing of a notification is not required, paragraph (3) specifies a safe-harbor form that, when properly completed, satisfies paragraph (1). Paragraphs (4), (5), and (6) contain special rules applicable to erroneous and additional information. Under paragraph (4), a notification in the safe-harbor form specified in paragraph (3) is not rendered insufficient if it contains additional information at the end of the form. Paragraph (5) provides that non-misleading errors in information contained in a notification are permitted if the safe-harbor form is used and if the errors are in information not required by paragraph (1). Finally, if a notification is in a form other than the paragraph (3) safe-harbor form, other law determines the effect of including in the notification information other than that required by paragraph (1).

§ 28:9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.

(a) A secured party shall apply or pay over for application the cash proceeds of disposition under § 28:9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(3).

(c) A secured party need not apply or pay over for application noncash proceeds of disposition under § 28:9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) and permitted by subsection (c):

(1) Unless subsection (a)(4) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;

(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602, § 28:9-616, § 28:9-623, and § 28:9-626.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-504(1), (2).

2. Application of Proceeds. This section contains the rules governing application of proceeds and the debtor's liability for a deficiency following a disposition of collateral. Subsection (a) sets forth the basic order of application. The proceeds are applied first to the expenses of disposition, second to the obligation secured by the security interest that is being enforced, and third, in the specified circumstances, to interests that are subordinate to that security interest.

Subsections (a) and (d) also address the right of a consignor to receive proceeds of a disposition by a secured party whose interest is senior to that of the consignor. Subsection (a) requires the enforcing secured party to pay excess proceeds first to subordinate secured parties or lienholders whose interests are senior to that of a consignor and, finally, to a consignor. Inasmuch as a consignor is the owner of the collateral, secured parties and lienholders whose interests are junior to the consignor's interest will not be entitled to any proceeds. In like fashion, under subsection (d)(1) the debtor is not entitled to a surplus when the enforcing secured party is required to pay over proceeds to a consignor.

3. Noncash Proceeds. Subsection (c) addresses the application of noncash proceeds of a disposition, such as a note or lease. The explanation in Section 9-608, Comment 4, generally applies to this subsection.

Example: A secured party in the business of selling or financing automobiles takes possession of collateral (an automobile) following its debtor's default. The secured party decides to sell the automobile in a private disposition under Section 9-610 and sends appropriate notification under Section 9-611. After undertaking its normal credit investigation and in accordance with its normal credit policies, the secured party sells the automobile on credit, on terms typical of the credit terms normally extended by the secured party in the ordinary course of its business. The automobile stands as collateral for the remaining balance of the price. The noncash proceeds received by the secured party are chattel paper. The secured party may wish to credit its debtor (the assignor) with the principal amount of the chattel paper or may wish to credit the debtor only as and when the payments are made on the chattel paper by the buyer.

Under subsection (c), the secured party is under no duty to apply the noncash proceeds (here, the chattel paper) or their value to the secured obligation unless its failure to do so would be commercially unreasonable. If a secured party elects to apply the chattel paper to the outstanding obligation, however, it must do so in a commercially reasonable manner. The facts in the example indicate that it would be commercially unreasonable for the secured party to fail to apply the value of the chattel paper to the original debtor's secured obligation. Unlike the example in Comment 4 to Section 9-608, the noncash proceeds received in this example are of the type that the secured party regularly generates in the ordinary course of its financing business in nonforeclosure transactions. The original debtor should not be exposed to delay or uncertainty in this situation. Of course, there will be many situations that fall between the examples presented in the Comment to Section 9-608 and in this Comment. This Article leaves their resolution to the court based on the facts of each case.

One would expect that where noncash proceeds are or may be material, the secured party and debtor would agree to more specific standards in an agreement entered into before or after default. The parties may agree to the method of application of noncash proceeds if the method is not manifestly unreasonable. See Section 9-603.

When the secured party is not required to "apply or pay over for application noncash proceeds," the proceeds nonetheless remain collateral subject to this Article. See Section 9-608, Comment 4.

4. Surplus and Deficiency. Subsection (d) deals with surplus and deficiency. It revises former Section 9-504(2) by imposing an explicit requirement that the secured party "pay" the

debtor for any surplus, while retaining the secured party's duty to "account." Inasmuch as the debtor may not be an obligor, subsection (d) provides that the obligor (not the debtor) is liable for the deficiency. The special rule governing surplus and deficiency when receivables have been sold likewise takes into account the distinction between a debtor and an obligor. Subsection (d) also addresses the situation in which a consignor has an interest that is subordinate to the security interest being enforced.

5. Collateral Under New Ownership. When the debtor sells collateral subject to a security interest, the original debtor (creator of the security interest) is no longer a debtor inasmuch as it no longer has a property interest in the collateral; the buyer is the debtor. See Section 9-102. As between the debtor (buyer of the collateral) and the original debtor (seller of the collateral), the debtor (buyer) normally would be entitled to the surplus following a disposition. Subsection (d) therefore requires the secured party to pay the surplus to the debtor (buyer), not to the original debtor (seller) with which it has dealt. But, because this situation typically arises as a result of the debtor's wrongful act, this Article does not expose the secured party to the risk of determining ownership of the collateral. If the secured party does not know about the buyer and accordingly pays the surplus to the original debtor, the exculpatory provisions of this Article exonerate the secured party from liability to the buyer. See Sections 9-605, 9-628(a), (b). If a debtor sells collateral free of a security interest, as in a sale to a buyer in ordinary course of business (see Section 9-320(a)), the property is no longer collateral and the buyer is not a debtor.

6. Certain "Low-Price" Dispositions. Subsection (f) provides a special method for calculating a deficiency or surplus when the secured party, a person related to the secured party (defined in Section 9-102), or a secondary obligor acquires the collateral at a foreclosure disposition. It recognizes that when the foreclosing secured party or a related party is the transferee of the collateral, the secured party sometimes lacks the incentive to maximize the proceeds of disposition. As a consequence, the disposition may comply with the procedural requirements of this Article (e.g., it is conducted in a commercially reasonable manner following reasonable notice) but nevertheless fetch a low price.

Subsection (f) adjusts for this lack of incentive. If the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought," then instead of calculating a deficiency (or surplus) based on the actual net proceeds, the calculation is based upon the amount that would have been received in a commercially reasonable disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor. Subsection (f) thus rejects the view that the secured party's receipt of such a price necessarily constitutes noncompliance with Part 6. However, such a price may suggest the need for greater judicial scrutiny. See Section 9-610, Comment 10.

7. "Person Related To." Section 9-102 defines "person related to." That term is a key element of the system provided in subsection (f) for low-price dispositions. One part of the definition applies when the secured party is an individual, and the other applies when the secured party is an organization. The definition is patterned closely on the corresponding definition in Section 1.301(32) of the Uniform Consumer Credit Code.

CASE NOTES

ANALYSIS

In general.

In the case of an executed contract, seller's measure of damages resulting from a breach by the buyer is the contract price and nothing more, and neither mitigation nor market price at time of the breach need be shown. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

Jury verdict of $130,000 in favor of seller of restaurant due to buyers' failure to honor the contract for the purchase of the restaurant business was not unreasonable, even though there was no evidence concerning the market value of the restaurant at time seller regained possession of it, where the contract price was $330,000, and seller, after purchasers' default under the contract, retook control of the restaurant and sold the physical assets for $100,000. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

In a situation where a buyer commits a breach of a contract of sale before completion of seller's performance under the contract, seller must establish at trial both the contract price and market price at time of buyer's breach in order to establish the measure of damages, and seller is allowed to recover the difference between the contract price and the market price

along with any incidental or consequential losses. D.C. Code 1981, § 28:2-708(1). Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

Mitigation of damages.

In a situation where a buyer commits a breach of a contract of sale before completion of the seller's performance under the contract, the seller is obligated to mitigate damages arising from the breach by retaining control of the property, acting in a reasonable manner to protect its value, or engaging in a substitute transaction designed to limit loss resulting from the breach. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

When delivery and acceptance have already occurred, seller ordinarily has no obligation to protect the property or otherwise mitigate damages in event of a breach of the contract of sale by the buyer and, unless the buyer has valid grounds for rescission of the contract, the seller need not retake or resell the property. Fateh v. Rich, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

§ 28:9-616. Explanation of calculation of surplus or deficiency.

(a) In this section:

(1) "Explanation" means a writing that:

(A) States the amount of the surplus or deficiency;

(B) Provides an explanation in accordance with subsection (c) of this section of how the secured party calculated the surplus or deficiency;

(C) States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) Provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

(A) Authenticated by a debtor or consumer obligor;

(B) Requesting that the recipient provide an explanation; and

(C) Sent after disposition of the collateral under § 28:9-610.

(b) In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under § 28:9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(B) Within 14 days after receipt of a request; or

(2) In the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) If the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or

(B) If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;

(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;

(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1) of this subsection; and

(6) The amount of the surplus or deficiency.

(d) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors that are not seriously misleading.

(e) A debtor or consumer obligor is entitled without charge to one response to a request under this section during any 6-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (b)(1). The secured party may require payment of a charge not exceeding $25 for each additional response.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602, § 28:9-625, and § 28:9-628.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Duty to Send Information Concerning Surplus or Deficiency. This section reflects the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the amount of a surplus or deficiency and the basis upon which the surplus or deficiency was calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an "explanation," defined in subsection (a)(1)) no later than the time that it accounts for and pays a surplus or the time of its first written attempt to collect the deficiency. The obligor need not make a request for an accounting in order to receive an explanation. A secured party who does not attempt to collect a deficiency in writing or account for and pay a surplus has no obligation to send an explanation under subsection (b)(1) and, consequently, cannot be liable for noncompliance.

A debtor or secondary obligor need not wait until the secured party commences written collection efforts in order to receive an explanation of how a deficiency or surplus was calculated. Subsection (b)(2) obliges the secured party to send an explanation within 14 days after it receives a "request" (defined in subsection (a)(2)).

3. Explanation of Calculation of Surplus or Deficiency. Subsection (c) contains the requirements for how a calculation of a surplus or deficiency must be explained in order to satisfy subsection (a)(1)(B). It gives a secured party some discretion concerning rebates of interest or credit service charges. The secured party may include these rebates in the aggregate amount of obligations secured, under subsection (c)(1), or may include them with other types of rebates and credits under subsection (c)(5). Rebates of interest or credit service charges are the only types of rebates for which this discretion is provided. If the secured party provides an explanation that includes rebates of pre-computed interest, its explanation must so indicate. The expenses and attorney's fees to be described pursuant to subsection (c)(4) are

those relating to the most recent disposition, not those that may have been incurred in connection with earlier enforcement efforts and which have been resolved by the parties.

4. Liability for Noncompliance. A secured party who fails to comply with subsection (b)(2) is liable for any loss caused plus $500. See Section 9-625(b), (c), (e)(6). A secured party who fails to send an explanation under subsection (b)(1) is liable for any loss caused plus, if the noncompliance was "part of a pattern, or consistent with a practice of noncompliance," $500. See Section 9-625(b), (c), (e)(5). However, a secured party who fails to comply with this section is not liable for statutory minimum damages under Section 9-625(c)(2). See Section 9-628(d).

§ 28:9-617. Rights of transferee of collateral.

(a) A secured party's disposition of collateral after default:

(1) Transfers to a transferee for value all of the debtor's rights in the collateral;

(2) Discharges the security interest under which the disposition is made; and

(3) Discharges any subordinate security interest or other subordinate lien other than liens created under D.C. Official Code § 47-2011 for gross sales taxes, and D.C. Official Code § 47-1812.09 for income and franchise taxes.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this article or the requirements of any judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the collateral subject to:

(1) The debtor's rights in the collateral;

(2) The security interest or agricultural lien under which the disposition is made; and

(3) Any other security interest or other lien.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-504(4).

2. Title Taken by Good-Faith Transferee. Subsection (a) sets forth the rights acquired by persons who qualify under subsection (b)-transferees who act in good faith. Such a person is a "transferee," inasmuch as a buyer at a foreclosure sale does not meet the definition of "purchaser" in Section 1-201 (the transfer is not, vis-a-vis the debtor, "voluntary"). By virtue of the expanded definition of the term "debtor" in Section 9-102, subsection (a) makes clear that the ownership interest of a person who bought the collateral subject to the security interest is terminated by a subsequent disposition under this Part. Such a person is a debtor under this Article. Under former Article 9, the result arguably was the same, but the statute was less clear. Under subsection (a), a disposition normally discharges the security interest being foreclosed and any subordinate security interests and other liens.

A disposition has the effect specified in subsection (a), even if the secured party fails to comply with this Article. An aggrieved person (e.g., the holder of a subordinate security interest to whom a notification required by Section 9-611 was not sent) has a right to recover any loss under Section 9-625(b).

3. Unitary Standard in Public and Private Dispositions. Subsection (b) now contains a unitary standard that applies to transferees in both private and public dispositions—acting in good faith. However, this change from former Section 9-504(4) should not be interpreted to mean that a transferee acts in good faith even though it has knowledge of defects or buys in collusion, standards applicable to public dispositions under the former section. Properly un-

derstood, those standards were specific examples of the absence of good faith.

4. Title Taken by Nonqualifying Transferee. Subsection (c) specifies the consequences for a transferee who does not qualify for protection under subsections (a) and (b) (i.e., a transferee who does not act in good faith). The transferee takes subject to the rights of the debtor, the enforcing secured party, and other security interests or other liens.

§ 28:9-618. Rights and duties of certain secondary obligors.

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

(1) Receives an assignment of a secured obligation from the secured party;

(2) Receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or

(3) Is subrogated to the rights of a secured party with respect to collateral.

(b) An assignment, transfer, or subrogation described in subsection (a):

(1) Is not a disposition of collateral under § 28:9-610; and

(2) Relieves the secured party of further duties under this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-504(5).

2. Scope of This Section. Under this section, assignments of secured obligations and other transactions (regardless of form) that function like assignments of secured obligations are not dispositions to which Part 6 applies. Rather, they constitute assignments of rights and (occasionally) delegations of duties. Application of this section may require an investigation into the agreement of the parties, which may not be reflected in the words of the repurchase agreement (e.g., when the agreement requires a recourse party to "purchase the collateral" but contemplates that the purchaser will then conduct an Article 9 foreclosure disposition).

This section, like former Section 9-504(5), does not constitute a general and comprehensive rule for allocating rights and duties upon assignment of a secured obligation. Rather, it applies only in situations involving a secondary obligor described in subsection (a). In other contexts, the agreement of the parties and applicable law other than Article 9 determine whether the assignment imposes upon the assignee any duty to the debtor and whether the assignor retains its duties to the debtor after the assignment.

Subsection (a)(1) applies when there has been an assignment of an obligation that is secured at the time it is assigned. Thus, if a secondary obligor acquires the collateral at a disposition under Section 9-610 and simultaneously or subsequently discharges the unsecured deficiency claim, subsection (a)(1) is not implicated. Similarly, subsection (a)(3) applies only when the secondary obligor is subrogated to the secured party's rights with respect to collateral. Thus, this subsection will not be implicated if a secondary obligor discharges the debtor's unsecured obligation for a post-disposition deficiency. Similarly, if the secured party disposes of some of the collateral and the secondary obligor thereafter discharges the remaining obligation, subsection (a) applies only with respect to rights and duties concerning the remaining collateral, and, under subsection (b), the subrogation is not a disposition of the remaining collateral.

As discussed more fully in Comment 3, a secondary obligor may receive a transfer of collateral in a disposition under Section 9-610 in exchange for a payment that is applied against the secured obligation. However, a secondary obligor who pays and receives a transfer of collateral does not necessarily become subrogated to the rights of the secured party as contemplated by subsection (a)(3). Only to the extent the secondary obligor makes a payment in satisfaction of its secondary obligation would it become subrogated. To the extent its payment constitutes the price of the collateral in a Section 9-610 disposition by the secured party, the secondary obligor would not be subrogated. Thus, if the amount paid by the secondary

obligor for the collateral in a Section 9-610 disposition is itself insufficient to discharge the secured obligation, but the secondary obligor makes an additional payment that satisfies the remaining balance, the secondary obligor would be subrogated to the secured party's deficiency claim. However, the duties of the secured party as such would have come to an end with respect to that collateral. In some situations the capacity in which the payment is made may be unclear. Accordingly, the parties should in their relationship provide clear evidence of the nature and circumstances of the payment by the secondary obligor.

3. Transfer of Collateral to Secondary Obligor. It is possible for a secured party to transfer collateral to a secondary obligor in a transaction that is a disposition under Section 9-610 and that establishes a surplus or deficiency under Section 9-615. Indeed, this Article includes a special rule, in Section 9-615(f), for establishing a deficiency in the case of some dispositions to, inter alia, secondary obligors. This Article rejects the view, which some may have ascribed to former Section 9-504(5), that a transfer of collateral to a recourse party can never constitute a disposition of collateral which discharges a security interest. Inasmuch as a secured party could itself buy collateral at its own public sale, it makes no sense to prohibit a recourse party ever from buying at the sale.

4. Timing and Scope of Obligations. Under subsection (a), a recourse party acquires rights and incurs obligations only "after" one of the specified circumstances occurs. This makes clear that when a successor assignee, transferee, or subrogee becomes obligated it does not assume any liability for earlier actions or inactions of the secured party whom it has succeeded unless it agrees to do so. Once the successor becomes obligated, however, it is responsible for complying with the secured party's duties thereafter. For example, if the successor is in possession of collateral, then it has the duties specified in Section 9-207.

Under subsection (b), the same event (assignment, transfer, or subrogation) that gives rise to rights to, and imposes obligations on, a successor relieves its predecessor of any further duties under this Article. For example, if the security interest is enforced after the secured obligation is assigned, the assignee-but not the assignor-has the duty to comply with this Part. Similarly, the assignment does not excuse the assignor from liability for failure to comply with duties that arose before the event or impose liability on the assignee for the assignor's failure to comply.

§ 28:9-619. Transfer of record or legal title.

(a) In this section, "transfer statement" means a record authenticated by a secured party stating:

(1) That the debtor has defaulted in connection with an obligation secured by specified collateral;

(2) That the secured party has exercised its post-default remedies with respect to the collateral;

(3) That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and

(4) The name and mailing address of the secured party, debtor, and transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

(1) Accept the transfer statement;

(2) Promptly amend its records to reflect the transfer; and

(3) If applicable, issue a new appropriate certificate of title in the name of transferee.

(c) A transfer of the record or legal title to collateral to a secured party under subsection (b) or otherwise is not of itself a disposition of collateral under this

article and does not of itself relieve the secured party of its duties under this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Transfer of Record or Legal Title. Potential buyers of collateral that is covered by a certificate of title (e.g., an automobile) or is subject to a registration system (e.g., a copyright) typically require as a condition of their purchase that the certificate or registry reflect their ownership. In many cases, this condition can be met only with the consent of the record owner. If the record owner is the debtor and, as may be the case after the default, the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral.

Subsection (b) provides a simple mechanism for obtaining record or legal title, for use primarily when other law does not provide one. Of course, use of this mechanism will not be effective to clear title to the extent that subsection (b) is preempted by federal law. Subsection (b) contemplates a transfer of record or legal title to a third party, following a secured party's exercise of its disposition or acceptance remedies under this Part, as well as a transfer by a debtor to a secured party prior to the secured party's exercise of those remedies. Under subsection (c), a transfer of record or legal title (under subsection (b) or under other law) to a secured party prior to the exercise of those remedies merely puts the secured party in a position to pass legal or record title to a transferee at foreclosure. A secured party who has obtained record or legal title retains its duties with respect to enforcement of its security interest, and the debtor retains its rights as well.

3. Title-Clearing Systems Under Other Law. Applicable non-UCC law (e.g., a certificate-of-title statute, federal registry rules, or the like) may provide a means by which the secured party may obtain or transfer record or legal title for the purpose of a disposition of the property under this Article. The mechanism provided by this section is in addition to any title-clearing provision under law other than this Article.

§ 28:9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.

(a) Except as otherwise provided in subsection (g), a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) The debtor consents to the acceptance under subsection (c);

(2) The secured party does not receive, within the time set forth in subsection (d), a notification of objection to the proposal authenticated by:

(A) A person to which the secured party was required to send a proposal under § 28:9-621; or

(B) Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) Subsection (e) of this section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to § 28:9-624.

(b) A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) of this section are met.

(c) For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

(A) Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) Does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent.

(d) To be effective under subsection (a)(2), a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to § 28:9-621, within 20 days after notification was sent to that person; and

(2) In other cases:

(A) Within 20 days after the last notification was sent pursuant to § 28:9-621; or

(B) If a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this section.

(e) A secured party that has taken possession of collateral shall dispose of the collateral pursuant to § 28:9-610 within the time specified in subsection (f) if:

(1) 60 percent of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) 60 percent of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods.

(f) To comply with subsection (e), the secured party shall dispose of the collateral:

(1) Within 90 days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:6-103, § 28:9-102, § 28:9-406, § 28:9-408, § 28:9-602, and § 28:9-624.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-505.

2. Overview. This section and the two sections following deal with strict foreclosure, a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition under Section 9-610. Although these provisions derive from former Section 9-505, they have been entirely reorganized and substantially rewritten. The more straightforward approach taken in this Article eliminates the fiction that the secured party always will present a "proposal" for the retention of collateral and the debtor will have a fixed period to respond. By eliminating the need (but preserving the possibility) for proceeding in that fashion, this section eliminates much of the awkwardness of former Section 9-505. It reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned.

Subsection (a) sets forth the conditions necessary to an effective acceptance (formerly, retention) of collateral in full or partial satisfaction of the secured obligation. Section 9-621 requires in addition that a secured party who wishes to proceed under this section notify certain other persons who have or claim to have an interest in the collateral. Unlike the failure to meet the conditions in subsection (a), under Section 9-622(b) the failure to comply with the notification requirement of Section 9-621 does not render the acceptance of collateral ineffective. Rather, the acceptance can take effect notwithstanding the secured party's noncompliance. A person to whom the required notice was not sent has the right to recover damages under Section 9-625(b). Section 9-622(a) sets forth the effect of an acceptance of collateral.

3. Conditions to Effective Acceptance. Subsection (a) contains the conditions necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the debtor's consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to satisfy the debtor's-consent condition in subsection (a)(1). It follows the proposal-and-objection model found in former Section 9-505: The debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Under subsection (c)(1), however, that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party who wishes to conduct a "partial strict foreclosure" must obtain the debtor's agreement in a record authenticated after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict foreclosure of a security interest in consumer transactions.)

The time when a debtor consents to a strict foreclosure is significant in several circumstances under this section and the following one. See Sections 9-620(a)(1), (d)(2), 9-621(a)(1), (a)(2), (a)(3). For purposes of determining the time of consent, a debtor's conditional consent constitutes consent.

Subsection (a)(2) contains the second condition to the effectiveness of an acceptance under this section-the absence of a timely objection from a person holding a junior interest in the collateral or from a secondary obligor. Any junior party-secured party or lienholder-is entitled to lodge an objection to a proposal, even if that person was not entitled to notification under Section 9-621. Subsection (d), discussed below, indicates when an objection is timely.

Subsections (a)(3) and (a)(4) contain special rules for transactions in which consumers are involved. See Comment 12.

4. Proposals. Section 9-102 defines the term "proposal." It is necessary to send a "proposal" to the debtor only if the debtor does not agree to an acceptance in an authenticated record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it is necessary to send a proposal to third parties. A proposal need not take any particular form as long as it sets forth the terms under which the secured party is willing to accept collateral in satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions. Note, however, that a conditional proposal generally requires the debtor's agreement in order to take effect. See subsection (c).

5. Secured Party's Agreement; No "Constructive" Strict Foreclosure. The conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary obligor or holder of a junior security interest or lien. To ensure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (b) provides

that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (b), acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record or sends to the debtor a proposal. For this reason, a mere delay in collection or disposition of collateral does not constitute a "constructive" strict foreclosure. Instead, delay is a factor relating to whether the secured party acted in a commercially reasonable manner for purposes of Section 9-607 or 9-610. A debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation under this section.

6. When Acceptance Occurs. This section does not impose any formalities or identify any steps that a secured party must take in order to accept collateral once the conditions of subsections (a) and (b) have been met. Absent facts or circumstances indicating a contrary intention, the fact that the conditions have been met provides a sufficient indication that the secured party has accepted the collateral on the terms to which the secured party has consented or proposed and the debtor has consented or failed to object. Following a proposal, acceptance of the collateral normally is automatic upon the secured party's becoming bound and the time for objection passing. As a matter of good business practice, an enforcing secured party may wish to memorialize its acceptance following a proposal, such as by notifying the debtor that the strict foreclosure is effective or by placing a written record to that effect in its files. The secured party's agreement to accept collateral is self-executing and cannot be breached. The secured party is bound by its agreement to accept collateral and by any proposal to which the debtor consents.

7. No Possession Requirement. This section eliminates the requirement in former Section 9-505 that the secured party be "in possession" of collateral. It clarifies that intangible collateral, which cannot be possessed, may be subject to a strict foreclosure under this section. However, under subsection (a)(3), if the collateral is consumer goods, acceptance does not occur unless the debtor is not in possession.

8. When Objection Timely. Subsection (d) explains when an objection is timely and thus prevents an acceptance of collateral from taking effect. An objection by a person to which notification was sent under Section 9-621 is effective if it is received by the secured party within 20 days from the date the notification was sent to that person. Other objecting parties (i.e., third parties who are not entitled to notification) may object at any time within 20 days after the last notification is sent under Section 9-621. If no such notification is sent, third parties must object before the debtor agrees to the acceptance in writing or is deemed to have consented by silence. The former may occur any time after default, and the latter requires a 20-day waiting period.

See subsection (c).

9. Applicability of Other Law. This section does not purport to regulate all aspects of the transaction by which a secured party may become the owner of collateral previously owned by the debtor. For example, a secured party's acceptance of a motor vehicle in satisfaction of secured obligations may require compliance with the applicable motor vehicle certificate-of-title law. State legislatures should conform those laws so that they mesh well with this section and Section 9-610, and courts should construe those laws and this section harmoniously. A secured party's acceptance of collateral in the possession of the debtor also may implicate statutes dealing with a seller's retention of possession of goods sold.

10. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes. If the collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured party's acceptance of the collateral in satisfaction of secured obligations would constitute a sale to the secured party. That sale normally would give rise to a new security interest (the ownership interest) under Sections 1-201(37) and 9-109. In the case of accounts and chattel paper, the new security interest would remain perfected by a filing that was effective to perfect the secured party's original security interest. In the case of payment intangibles or promissory notes, the security interest would be perfected when it attaches. See Section 9-309. However, the procedures for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement authenticated by the debtor would not be necessary.

11. Role of Good Faith. Section 1-203 imposes an obligation of good faith on a secured party's enforcement under this Article. This obligation may not be disclaimed by agreement. See Section 1-102. Thus, a proposal and acceptance made under this section in bad faith would not be effective. For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith. On the other hand, in the normal case proposals and acceptances should be not second-guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.

12. Special Rules in Consumer Cases. Subsection (e) imposes an obligation on the secured party to dispose of consumer goods under certain circumstances. Subsection (f) explains when a disposition that is required under subsection (e) is timely. An effective acceptance of collateral cannot occur if subsection (e) requires a disposition unless the debtor waives this requirement pursuant to Section 9-624(b). Moreover, a secured party who takes possession of collateral and unreasonably delays disposition violates subsection (e), if applicable, and may also violate Section 9-610 or other provisions of this Part. Subsection (e) eliminates as superfluous the express statutory reference to "conversion" found in former Section 9-505. Remedies available under other law, including conversion, remain available under this Article in appropriate cases. See Sections 1-103, 1-106.

Subsection (g) prohibits the secured party in consumer transactions from accepting collateral in partial satisfaction of the obligation it secures. If a secured party attempts an acceptance in partial satisfaction in a consumer transaction, the attempted acceptance is void.

CASE NOTES

Acceptance of collateral as discharge of obligation.

Under Commercial Code provision allowing secured party in possession to propose to retain collateral in satisfaction of obligation after default, secured creditor: must take possession of collateral after default; must send written notice to debtor of its intention to retain collateral in satisfaction of obligation, unless debtor has signed, after default, statement renouncing or modifying his rights under this section; must send notice of his intent to foreclose to any other creditor of debtor who has previously sent secured creditor written notice of claim of interest in collateral; and may retain collateral in satisfaction of debtor's obligation if, within 21 days after sending notice, secured creditor does not receive objection in writing from some party entitled to notice. D.C. Code 1981, § 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Settlement agreement between debtor and creditor holding security interest in debtor's equipment was functional equivalent of strict foreclosure pursuant to statute allowing retention of collateral in satisfaction of obligation, thereby giving creditor possessory interest in collateral, and was not alternative to foreclosure, where agreement described process by which creditor was to take possession of collateral, provided notice to debtor of intent to foreclose, described requirements of commercial code that other secured creditors received notice of proposed foreclosure, stated that debtor renounced its rights to collateral and consented to foreclosure, and clearly stated that foreclosure was in full satisfaction of debtor's obligation. D.C. Code 1981, §§ 28:9-501, 28:9-503, 28:9-504, 28:9-505(2). Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

Secured party who chooses remedy of strict foreclosure foregoes right to sue debtor for any deficiency between value of collateral and amount of outstanding debt. D.C. Code 1981, § 28:9-505. Leroy Adventures v. Cafritz Harbour Group, 660 A.2d 908, 1995 D.C. App. LEXIS 131 (1995).

§ 28:9-621. Notification of proposal to accept collateral.

(a) A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) Any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) Identified the collateral;

(B) Was indexed under the debtor's name as of that date; and

(C) Was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) Any other secured party that, 10 days before the debtor consented to

the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in § 28:9-311(a).

(b) A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a).

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-102, § 28:9-602, and § 28:9-620.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-505.

2. Notification Requirement. Subsection (a) specifies three classes of competing claimants to whom the secured party must send notification of its proposal: (i) those who notify the secured party that they claim an interest in the collateral, (ii) holders of certain security interests and liens who have filed against the debtor, and (iii) holders of certain security interests who have perfected by compliance with a statute (including a certificate-of-title statute), regulation, or treaty described in Section 9-311(a). With regard to (ii), see Section 9-611, Comment 4. Subsection (b) also requires notification to any secondary obligor if the proposal is for acceptance in partial satisfaction.

Unlike Section 9-611, this section contains no "safe harbor," which excuses an enforcing secured party from notifying certain secured parties and other lienholders. This is because, unlike Section 9-610, which requires that a disposition of collateral be commercially reasonable, Section 9-620 permits the debtor and secured party to set the amount of credit the debtor will receive for the collateral subject only to the requirement of good faith. An effective acceptance discharges subordinate security interests and other subordinate liens. See Section 9-622. If collateral is subject to several liens securing debts much larger than the value of the collateral, the debtor may be disinclined to refrain from consenting to an acceptance by the holder of the senior security interest, even though, had the debtor objected and the senior disposed of the collateral under Section 9-610, the collateral may have yielded more than enough to satisfy the senior security interest (but not enough to satisfy all the liens).

Accordingly, this section imposes upon the enforcing secured party the risk of the filing office's errors and delay. The holder of a security interest who is entitled to notification under this section but does not receive it has the right to recover under Section 9-625(b) any loss resulting from the enforcing secured party's noncompliance with this section.

§ 28:9-622. Effect of acceptance of collateral.

(a) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a), even if the secured party fails to comply with this article.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-102, § 28:9-602, and § 28:9-623.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Effect of Acceptance. Subsection (a) specifies the effect of an acceptance of collateral in full or partial satisfaction of the secured obligation. The acceptance to which it refers is an effective acceptance. If a purported acceptance is ineffective under Section 9-620, e.g., because the secured party receives a timely objection from a person entitled to notification, then neither this subsection nor subsection (b) applies. Paragraph (1) expresses the fundamental consequence of accepting collateral in full or partial satisfaction of the secured obligation-the obligation is discharged to the extent consented to by the debtor. Unless otherwise agreed, the obligor remains liable for any deficiency. Paragraphs (2) through (4) indicate the effects of an acceptance on various property rights and interests. Paragraph (2) follows Section 9-617(a) in providing that the secured party acquires "all of a debtor's rights in the collateral." Under paragraph (3), the effect of strict foreclosure on holders of junior security interests and other liens is the same regardless of whether the collateral is accepted in full or partial satisfaction of the secured obligation: all junior encumbrances are discharged. Paragraph (4) provides for the termination of other subordinate interests.

Subsection (b) makes clear that subordinate interests are discharged under subsection (a) regardless of whether the secured party complies with this Article. Thus, subordinate interests are discharged regardless of whether a proposal was required to be sent or, if required, was sent. However, a secured party's failure to send a proposal or otherwise to comply with this Article may subject the secured party to liability under Section 9-625.

§ 28:9-623. Right to redeem collateral.

(a) A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral; and

(2) The reasonable expenses and attorney's fees described in § 28:9-615(a)(1).

(c) A redemption may occur at any time before a secured party:

(1) Has collected collateral under § 28:9-607;

(2) Has disposed of collateral or entered into a contract for its disposition under § 28:9-610; or

(3) Has accepted collateral in full or partial satisfaction of the obligation it secures under § 28:9-622.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602, § 28:9-614, and § 28:9-624.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-506.

2. Redemption Right. Under this section, as under former Section 9-506, the debtor or another secured party may redeem collateral as long as the secured party has not collected (Section 9-607), disposed of or contracted for the disposition of (Section 9-610), or accepted (Section 9-620) the collateral. Although this section generally follows former Section 9-506, it extends the right of redemption to holders of nonconsensual liens. To redeem the collateral a person must tender fulfillment of all obligations secured, plus certain expenses. If the entire balance of a secured obligation has been accelerated, it would be necessary to tender the entire balance. A tender of fulfillment obviously means more than a new promise to perform an existing promise. It requires payment in full of all monetary obligations then due and performance in full of all other obligations then matured. If unmatured secured obligations remain, the security interest continues to secure them (i.e., as if there had been no default).

3. Redemption of Remaining Collateral Fol-

lowing Partial Enforcement. Under Section 9-610 a secured party may make successive dispositions of portions of its collateral. These dispositions would not affect the debtor's, another secured party's, or a lienholder's right to redeem the remaining collateral.

4. Effect of "Repledging." Section 9-207 generally permits a secured party having possession or control of collateral to create a security interest in the collateral. As explained in the Comments to that section, the debtor's right (as opposed to its practical ability) to redeem collateral is not affected by, and does not affect, the priority of a security interest created by the debtor's secured party.

CASE NOTES

ANALYSIS

In general.

Under New York law, debtor loses right to redeem collateral, following its default, once secured party has disposed of collateral or entered into contract for its disposition. U.C.C. § 9-506. In re Alcom Am. Corp., 154 B.R. 97, 1993 Bankr. LEXIS 575 (1993), vacated in part by 156 B.R. 873, 1993 Bankr. LEXIS 1048, 5 Colo. Bankr. Ct. Rep. 722 (Bankr. D.D.C. 1993).

Notice.

— Deficiency judgment, notice.

Creditor, by failing to give automobile purchasers the required notice of private sale, was not entitled to a deficiency judgment, and its recovery was limited to proceeds of private sale; the required notice of a private sale was not cured, and legally could not be cured, by trial court's determination of a reasonable value of the automobile, for which the buyers had been given credit, at the time of the sale. D.C. Code §§ 28:1-101 et seq., 28:9-101 et seq., 28:9-203(2), 28:9-504(2, 3), 28:9-504(3), 28:9-507(1), 28-3301 et seq., 28-3801 et seq., 28-3812(e)(3), 40-901 et seq., 40-902(e)(1); D.C. Code SCR, Civil Rule 55-II(b). Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, trial court, to justify a legal conclusion of estoppel, would have had to find that debtor had intended to convey impression that he did not wish to receive notice of sale, had expected creditor would rely on that impression, and that creditor did so rely, to point of changing its position prejudicially. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, if creditor and trial court limited their concern to narrower legal argument about a "voluntary" repossession, than creditor's failure to raise "waiver" and "estoppel" at trial precluded their consideration on appeal unless injustice was manifest. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

— Receipt.

"Presumption of receipt" was applicable to repossession letter sent by certified mail to debtor's last known address where statutory notice requirement [Md.Code, Commercial Law, § 12-624(d)] did not require actual receipt. Anderson v. Peoples Sec. Bank, 503 A.2d 670, 1986 D.C. App. LEXIS 268 (1986).

— Right to notice.

A debtor's right to notice is not limited to situations in which creditor has repossessed collateral without knowledge or against will of debtor; even when a creditor contemplates a private sale and is accordingly required only to notify debtor of time after which any private sale is to be made, a debtor's voluntary delivery of collateral for purpose of having it sold by creditor is not equivalent of notice to debtor of time after which a private sale will take place; in such a case, debtor is still entitled to notification of specific date after which creditor may proceed to dispose of collateral. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

§ 28:9-624. Waiver.

(a) A debtor or secondary obligor may waive the right to notification of

disposition of collateral under § 28:9-611 only by an agreement to that effect entered into and authenticated after default.

(b) A debtor may waive the right to require disposition of collateral under § 28:9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under § 28:9-623 only by an agreement to that effect entered into and authenticated after default.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-620.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Sections 9-504(3), 9-505, 9-506.

2. Waiver. This section is a limited exception to Section 9-602, which generally prohibits waiver by debtors and obligors. It makes no provision for waiver of the rule prohibiting a secured party from buying at its own private disposition. Transactions of this kind are equivalent to "strict foreclosures" and are governed by Sections 9-620, 9-621, and 9-622.

CASE NOTES

Waiver of rights.

Under the "absolute preclusion rule" concerning deficiency judgments, a secured creditor that fails to notify the debtor of a proposed sale of repossessed property forfeits the right to recover a deficiency judgment. HEW Federal Credit Union v. Battle, 772 A.2d 252, 2001 D.C. App. LEXIS 109 (2001).

Whether secured creditor voluntarily relinquished its rights in collateral was a mixed question of law and fact insofar as it involved interpretation of secured creditor's intent—essentially factual issue—in light of legal standard for determining secured creditor's waiver of rights in collateral under U.C.C. D.C. Code 1981, § 28:9-504. Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Subpart 2. Noncompliance With Article.

§ 28:9-625. Remedies for secured party's failure to comply with article.

(a) If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in § 28:9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit

service charge plus 10% of the principal amount of the obligation or the time-price differential plus 10% of the cash price.

(d) A debtor whose deficiency is eliminated under § 28:9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under § 28:9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover $500 in each case from a person that:

(1) Fails to comply with § 28:9-208;

(2) Fails to comply with § 28:9-209;

(3) Files a record that the person is not entitled to file under § 28:9-509(a);

(4) Fails to cause the secured party of record to file or send a termination statement as required by § 28:9-513(a) or (c);

(5) Fails to comply with § 28:9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) Fails to comply with § 28:9-616(b)(2).

(f) A debtor or consumer obligor may recover damages under subsection (b) and, in addition, $500 in each case from a person that, without reasonable cause, fails to comply with a request under § 28:9-210. A recipient of a request under § 28:9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under § 28:9-210, the secured party may claim a security interest only as shown in the statement included in the request as against a person that is reasonably misled by the failure.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-628.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-507.

2. Remedies for Noncompliance; Scope. Subsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's failure to comply with this Article. Like all provisions that create liability, they are subject to Section 9-628, which should be read in conjunction with Section 9-605. The principal limitations under this Part on a secured party's right to enforce its security interest against collateral are the requirements that it proceed in good faith (Section 1-203), in a commercially reasonable manner (Sections 9-607 and 9-610), and, in most cases, with reasonable notification (Sections 9-611 through 9-614). Following former Section 9-507, under subsection (a) an aggrieved person may seek injunctive relief, and under subsection (b) the person may recover damages for losses caused by noncompliance. Unlike former Section 9-507, however, subsections (a) and (b) are not limited to noncompliance with provisions of this Part of Article 9. Rather, they apply to noncompliance with any provision of this Article. The change makes this section applicable to noncompliance with Sections 9-207 (duties of secured party in possession of collateral), 9-208 (duties of secured party having control over deposit account),

9-209 (duties of secured party if account debtor has been notified of an assignment), 9-210 (duty to comply with request for accounting, etc.), 9-509(a) (duty to refrain from filing unauthorized financing statement), and 9-513(a) or (c) (duty to provide termination statement). Subsection (a) also modifies the first sentence of former Section 9-507(1) by adding the references to "collection" and "enforcement." Subsection (c)(2), which gives a minimum damage recovery in consumer-goods transactions, applies only to noncompliance with the provisions of this Part.

3. Damages for Noncompliance with This Article. Subsection (b) sets forth the basic remedy for failure to comply with the requirements of this Article: a damage recovery in the amount of loss caused by the noncompliance. Subsection (c) identifies who may recover under subsection (b). It affords a remedy to any aggrieved person who is a debtor or obligor. However, a principal obligor who is not a debtor may recover damages only for noncompliance with Section 9-616, inasmuch as none of the other rights and duties in this Article run in favor of such a principal obligor. Such a principal obligor could not suffer any loss or damage on account of noncompliance with rights or duties of which it is not a beneficiary. Subsection (c) also affords a remedy to an aggrieved person who holds a competing security interest or other lien, regardless of whether the aggrieved person is entitled to notification under Part 6. The remedy is available even to holders of senior security interests and other liens. The exercise of this remedy is subject to the normal rules of pleading and proof. A person who has delegated the duties of a secured party but who remains obligated to perform them is liable under this subsection. The last sentence of subsection (d) eliminates the possibility of double recovery or other over-compensation arising out of a reduction or elimination of a deficiency under Section 9-626, based on noncompliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance. Assuming no double recovery, a debtor whose deficiency is eliminated under Section 9-626 may pursue a claim for a surplus. Because Section 9-626 does not apply to consumer transactions, the statute is silent as to whether a double recovery or other over-compensation is possible in a consumer transaction.

Damages for violation of the requirements of this Article, including Section 9-609, are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred. See Section 1-106. Subsection (b) supports the recovery of actual damages for committing a breach of the peace in violation of Section 9-609, and principles of tort law supplement this subsection. See Section 1-103. However, to the extent that damages in tort compensate the debtor for the same loss dealt with by this Article, the debtor should be entitled to only one recovery.

4. Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and is designed to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Following former Section 9-507(1), this Article does not include a definition or explanation of the terms "credit service charge," "principal amount," "time-price differential," or "cash price," as used in subsection (c)(2). It leaves their construction and application to the court, taking into account the subsection's purpose of providing a minimum recovery in consumer-goods transactions.

5. Supplemental Damages. Subsections (e) and (f) provide damages that supplement the recovery, if any, under subsection (b). Subsection (e) imposes an additional $500 liability upon a person who fails to comply with the provisions specified in that subsection, and subsection (f) imposes like damages on a person who, without reasonable excuse, fails to comply with a request for an accounting or a request regarding a list of collateral or statement of account under Section 9-210. However, under subsection (f), a person has a reasonable excuse for the failure if the person never claimed an interest in the collateral or obligations that were the subject of the request.

6. Estoppel. Subsection (g) limits the extent to which a secured party who fails to comply with a request regarding a list of collateral or statement of account may claim a security interest.

CASE NOTES

ANALYSIS

Attorney fees.
Deficiency judgment.
In general.

Attorney fees.

Secured creditor's succeeding on claim on appeal warranted remand for determination of whether secured creditor was entitled to recover attorney fees. Fleming v. Carroll Pub. Co., 621 A.2d 829, 1993 D.C. App. LEXIS 51 (1993).

Deficiency judgment.

Creditor, by failing to give automobile purchasers the required notice of private sale, was not entitled to a deficiency judgment, and its recovery was limited to proceeds of private sale; the required notice of a private sale was not cured, and legally could not be cured, by trial court's determination of a reasonable value of the automobile, for which the buyers had been given credit, at the time of the sale. D.C. Code §§ 28:1-101 et seq., 28:9-101 et seq., 28:9-203(2), 28:9-504(2, 3), 28:9-504(3), 28:9-507(1), 28-3301 et seq., 28-3801 et seq., 28-3812(e)(3), 40-901 et seq., 40-902(e)(1); D.C. Code SCR, Civil Rule 55-II(b). Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

In action by creditor for a deficiency judgment following private sale of repossessed automobile, court in its discretion improperly denied borrowers leave to file compulsory counterclaim for allegedly illegal payment as well as damages for allegedly wrongful, willful and malicious repossession and resale, while permitting the filing of a late answer, where claim for affirmative relief was based on same facts necessary to establish defenses. D.C. Code SCR, Civil Rules 13, 13(a, f), 15, 15(a, b), 54, 54(c), 55-II(b); D.C. Code §§ 28:9-504(2, 3), 28:9-507(1). Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Debtor's voluntary surrender of collateral, a used automobile, did not automatically extinguish his right under Uniform Commercial Code to notice of resale, and thus creditor's failure to give requisite notice of resale of collateral under UCC barred deficiency judgment altogether, unless principles of waiver or estoppel precluded debtor from asserting lack of notice. D.C. Code § 28:9-504(3). Gavin v. Washington Post Employees Federal Credit Union, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In general.

Under District of Columbia law and Uniform Commercial Code, lender bank's declaration of default, without good-faith execution of affirmative remedies such as acceleration of loan, did not defeat writ of attachment obtained by a judgment creditor against collateral. D.C. Code 1981, §§ 28:9-311, 28:9-501 to 28:9-507; U.C.C. § 9-101 et seq. Martens v. Hadley Memorial Hosp., 729 F. Supp. 1391, 1990 U.S. Dist. LEXIS 1194 (1990).

§ 28:9-626. Action in which deficiency or surplus is in issue.

(a) In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(3) Except as otherwise provided in § 28:9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

(A) The proceeds of the collection, enforcement, disposition, or acceptance; or

(B) The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of paragraph (3)(B) of this subsection, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under § 28:9-615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(b) The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-602 and § 28:9-625.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Scope. The basic damage remedy under Section 9-625(b) is subject to the special rules in this section for transactions other than consumer transactions. This section addresses situations in which the amount of a deficiency or surplus is in issue, i.e., situations in which the secured party has collected, enforced, disposed of, or accepted the collateral. It contains special rules applicable to a determination of the amount of a deficiency or surplus. Because this section affects a person's liability for a deficiency, it is subject to Section 9-628, which should be read in conjunction with Section 9-605. The rules in this section apply only to noncompliance in connection with the "collection, enforcement, disposition, or acceptance" under Part 6. For other types of noncompliance with Part 6, the general liability rule of Section 9-625(b)-recovery of actual damages-applies. Consider, for example, a repossession that does not comply with Section 9-609 for want of a default. The debtor's remedy is under Section 9-625(b). In a proper case, the secured party also may be liable for conversion under non-UCC law. If the secured party thereafter disposed of the collateral, however, it would violate Section 9-610 at that time, and this section would apply.

3. Rebuttable Presumption Rule. Subsection (a) establishes the rebuttable presumption rule for transactions other than consumer transactions. Under paragraph (1), the secured party need not prove compliance with the relevant provisions of this Part as part of its prima facie case. If, however, the debtor or a secondary obligor raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the burden of proving that the collection, enforcement, disposition, or acceptance complied. In the event the secured party is unable to meet this burden, then paragraph (3) explains how to calculate the deficiency. Under this rebuttable presumption rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions. If a deficiency remains, then the secured party is entitled to recover it. The references to "the secured obligation, expenses, and attorney's fees" in paragraphs (3) and (4) embrace the application rules in Sections 9-608(a) and 9-615(a).

Unless the secured party proves that compliance with the relevant provisions would have yielded a smaller amount, under paragraph (4) the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees. Thus, the secured party may

not recover any deficiency unless it meets this burden.

4. Consumer Transactions. Although subsection (a) adopts a version of the rebuttable presumption rule for transactions other than consumer transactions, with certain exceptions Part 6 does not specify the effect of a secured party's noncompliance in consumer transactions. (The exceptions are the provisions for the recovery of damages in Section 9-625.) Subsection (b) provides that the limitation of subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. It also instructs the court not to draw any inference from the limitation as to the proper rules for consumer transactions and leaves the court free to continue to apply established approaches to those transactions.

Courts construing former Section 9-507 disagreed about the consequences of a secured party's failure to comply with the requirements of former Part 5. Three general approaches emerged. Some courts have held that a noncomplying secured party may not recover a deficiency (the "absolute bar" rule). A few courts held that the debtor can offset against a claim to a deficiency all damages recoverable under former Section 9-507 resulting from the secured party's noncompliance (the "offset" rule). A plurality of courts considering the issue held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former Part 5 would have yielded an amount sufficient to satisfy the secured debt. In addition to the nonuniformity resulting from court decisions, some States enacted special rules governing the availability of deficiencies.

5. Burden of Proof When Section 9-615(f) Applies. In a non-consumer transaction, subsection (a)(5) imposes upon a debtor or obligor the burden of proving that the proceeds of a disposition are so low that, under Section 9-615(f), the actual proceeds should not serve as the basis upon which a deficiency or surplus is calculated. Were the burden placed on the secured party, then debtors might be encouraged to challenge the price received in every disposition to the secured party, a person related to the secured party, or a secondary obligor.

6. Delay in Applying This Section. There is an inevitable delay between the time a secured party engages in a noncomplying collection, enforcement, disposition, or acceptance and the time of a subsequent judicial determination that the secured party did not comply with Part 6. During the interim, the secured party, believing that the secured obligation is larger than it ultimately is determined to be, may continue to enforce its security interest in collateral. If some or all of the secured indebtedness ultimately is discharged under this section, a reasonable application of this section would impose liability on the secured party for the amount of any excess, unwarranted recoveries but would not make the enforcement efforts wrongful.

§ 28:9-627. Determination of whether conduct was commercially reasonable.

(a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

(3) By a representative of creditors; or

(4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. Former Section 9-507(2).

2. Relationship of Price to Commercial Reasonableness. Some observers have found the notion contained in subsection (a) (derived from former Section 9-507(2)) (the fact that a better price could have been obtained does not establish lack of commercial reasonableness) to be inconsistent with that found in Section 9-610(b) (derived from former Section 9-504(3) (every aspect of the disposition, including its terms, must be commercially reasonable). There is no such inconsistency. While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.

The law long has grappled with the problem of dispositions of personal and real property which comply with applicable procedural requirements (e.g., advertising, notification to interested persons, etc.) but which yield a price that seems low. This Article addresses that issue in Section 9-615(f). That section applies only when the transferee is the secured party, a person related to the secured party, or a secondary obligor. It contains a special rule for calculating a deficiency or surplus in a complying disposition that yields a price that is "significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought."

3. Determination of Commercial Reasonableness; Advance Approval. It is important to make clear the conduct and procedures that are commercially reasonable and to provide a secured party with the means of obtaining, by court order or negotiation with a creditors' committee or a representative of creditors, advance approval of a proposed method of enforcement as commercially reasonable. This section contains rules that assist in that determination and provides for advance approval in appropriate situations. However, none of the specific methods of disposition specified in subsection (b) is required or exclusive.

4. "Recognized Market." As in Sections 9-610(c) and 9-611(d), the concept of a "recognized market" in subsections (b)(1) and (2) is quite limited; it applies only to markets in which there are standardized price quotations for property that is essentially fungible, such as stock exchanges.

§ 28:9-628. Nonliability and limitation on liability of secured party; liability of secondary obligor.

(a) Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) The secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this article; and

(2) The secured party's failure to comply with this article does not affect the liability of the person for a deficiency.

(b) A secured party is not liable because of its status as secured party:

(1) To a person that is a debtor or obligor, unless the secured party knows:

(A) That the person is a debtor or obligor;

(B) The identity of the person; and

(C) How to communicate with the person; or

(2) To a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) That the person is a debtor; and

(B) The identity of the person.

(c) A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) A debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) An obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) A secured party is not liable to any person under § 28:9-625(c)(2) for its failure to comply with § 28:9-616.

(e) A secured party is not liable under § 28:9-625(c)(2) more than once with respect to any one secured obligation.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-625 and § 28:9-626.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Source. New.

2. Exculpatory Provisions. Subsections (a), (b), and (c) contain exculpatory provisions that should be read in conjunction with Section 9-605. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term "debtor" underscores the need for these provisions.

If a secured party reasonably, but mistakenly, believes that a consumer transaction or consumer-goods transaction is a non-consumer transaction or non-consumer-goods transaction, and if the secured party's belief is based on its reasonable reliance on a representation of the type specified in subsection (c)(1) or (c)(2), then this Article should be applied as if the facts reasonably believed and the representation reasonably relied upon were true. For example, if a secured party reasonably believed that a transaction was a non-consumer transaction and its belief was based on reasonable reliance on the debtor's representation that the collateral secured an obligation incurred for business purposes, the secured party is not liable to any person, and the debtor's liability for a deficiency is not affected, because of any act or omission of the secured party which arises out of the reasonable belief. Of course, if the secured party's belief is not reasonable or, even if reasonable, is not based on reasonable reliance on the debtor's representation, this limitation on liability is inapplicable.

3. Inapplicability of Statutory Damages to Section 9-616. Subsection (d) excludes noncompliance with Section 9-616 entirely from the scope of statutory damage liability under Section 9-625(c)(2).

4. Single Liability for Statutory Minimum Damages. Subsection (e) ensures that a secured party will incur statutory damages only once in connection with any one secured obligation.

Part 7. Transition.

§ 28:9-701. Effective date.

This article takes effect on July 1, 2001.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

A uniform law as complex as Article 9 necessarily gives rise to difficult problems and uncertainties during the transition to the new law. As is customary for uniform laws, this Article is based on the general assumption that all States will have enacted substantially identical versions. While always important, uniformity is essential to the success of this Article. If former Article 9 is in effect in some jurisdictions, and this Article is in effect in others, horrendous complications may arise. For example, the proper place in which to file to perfect a security interest (and thus the status of a particular security interest as perfected or unperfected) would depend on whether the matter was litigated in a State in which former Article 9 was in effect or a State in which this Article was in effect. Accordingly, this section contemplates that States will adopt a uniform effective for this Article. Any one State's failure to adopt the uniform effective date will greatly increase the cost and uncertainty surrounding the transition.

Other problems arise from transactions and relationships that were entered into under former Article 9 or under non-UCC law and which remain outstanding on the effective date of this Article. The difficulties arise primarily because this Article expands the scope of former Article 9 to cover additional types of collateral and transactions and because it provides new methods of perfection for some types of collateral, different priority rules, and different choice-of-law rules governing perfection and priority. This Section and the other sections in this Part address primarily this second set of problems.

§ 28:9-702. Savings clause.

(a) Except as otherwise provided in this part, this article applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001.

(b) Except as otherwise provided in subsection (c) of this section and §§ 28:9-703 through 28:9-709:

(1) Transactions and liens that were not governed by former Article 9, were validly entered into or created before July 1, 2001, and would be subject to this article if they had been entered into or created after July 1, 2001, and the rights, duties, and interests flowing from those transactions and liens, remain valid after July 1, 2001; and

(2) The transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this article or by the law that otherwise would apply if this article had not taken effect.

(c) This article shall not affect an action, case, or proceeding commenced before July 1, 2001.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Pre-Effective-Date Transactions. Subsection (a) contains the general rule that this Article applies to transactions, security interests, and other liens within its scope (see Section 9-109), even if the transaction or lien was entered into or created before the effective date. Thus, secured transactions entered into under former Article 9 must be terminated, completed, consummated, and enforced under this Article. Subsection (b) is an exception to the general rule. It applies to valid, pre-effective-date transactions and liens that were not governed by former Article 9 but would be governed by this Article if they had been entered

into or created after this Article takes effect. Under subsection (b), these valid transactions, such as the creation of agricultural liens and security interests in commercial tort claims, retain their validity under this Article and may be terminated, completed, consummated, and enforced under this Article. However, these transactions also may be terminated, completed, consummated, and enforced by the law that otherwise would apply had this Article not taken effect.

2. Judicial Proceedings Commenced Before Effective Date. As is usual in transition provisions, subsection (c) provides that this Article does not affect litigation pending on the effective date.

§ 28:9-703. Security interest perfected before July 1, 2001.

(a) A security interest that is enforceable immediately before July 1, 2001 and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this article if, on July 1, 2001, the applicable requirements for enforceability and perfection under this article are satisfied without further action.

(b) Except as otherwise provided in § 28:9-705, if, immediately before July 1, 2001, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this article are not satisfied on July 1, 2001, the security interest:

(1) Is a perfected security interest for one year after July 1, 2001;

(2) Remains enforceable thereafter only if the security interest becomes enforceable under § 28:9-203 before the year expires; and

(3) Remains perfected thereafter only if the applicable requirements for perfection under this article applies are satisfied before the year expires.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-702.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Perfected Security Interests Under Former Article 9 and This Article. This section deals with security interests that are perfected (i.e., that are enforceable and have priority over the rights of a lien creditor) under former Article 9 or other applicable law immediately before this Article takes effect. Subsection (a) provides, not surprisingly, that if the security interest would be a perfected security interest under this Article (i.e., if the transaction satisfies this Article's requirements for enforceability (attachment) and perfection), no further action need be taken for the security interest to be a perfected security interest.

2. Security Interests Enforceable and Perfected Under Former Article 9 but Unenforceable or Unperfected Under This Article. Subsection (b) deals with security interests that are enforceable and perfected under former Article 9 or other applicable law immediately before this Article takes effect but do not satisfy the requirements for enforceability (attachment) or perfection under this Article. Except as otherwise provided in Section 9-705, these security interests are perfected security interests for one year after the effective date. If the security interest satisfies the requirements for attachment and perfection within that period, the security interest remains perfected thereafter. If the security interest satisfies only the requirements for attachment within that period, the security interest becomes unperfected at the end of the one-year period.

Example 1: A pre-effective-date security agreement in a consumer transaction covers "all securities accounts." The security interest is properly perfected. The collateral description was adequate under former Article 9 (see former Section 9-115(3)) but is insufficient under this Article (see Section 9-108(e)(2)). Unless the debtor authenticates a new security agreement describing the collateral other than by "type" (or Section 9-203(b)(3) otherwise is satisfied) within the one-year period following the effective date, the security interest becomes unenforceable at the end of that period.

Other examples under former Article 9 or other applicable law that may be effective as attachment or enforceability steps but may be ineffective under this Article include an oral agreement to sell a payment intangible or possession by virtue of a notification to a bailee under former Section 9-305. Neither the oral agreement nor the notification would satisfy the revised Section 9-203 requirements for attachment.

Example 2: A pre-effective-date possessory security interest in instruments is perfected by a bailee's receipt of notification under former 9-305. The bailee has not, however, acknowledged that it holds for the secured party's benefit under revised Section 9-313. Unless the bailee authenticates a record acknowledging that it holds for the secured party (or another appropriate perfection step is taken) within the one-year period following the effective date, the security interest becomes unperfected at the end of that period.

3. Interpretation of Pre-Effective-Date Security Agreements. Section 9-102 defines "security agreement" as "an agreement that creates or provides for a security interest." Under Section 1-201(3), an "agreement" is a "bargain of the parties in fact." If parties to a pre-effective-date security agreement describe the collateral by using a term defined in former Article 9 in one way and defined in this Article in another way, in most cases it should be presumed that the bargain of the parties contemplated the meaning of the term under former Article 9.

Example 3: A pre-effective-date security agreement covers "all accounts" of a debtor. As defined under former Article 9, an "account" did not include a right to payment for lottery winnings. These rights to payment are "accounts" under this Article, however. The agreement of the parties presumptively created a security interest in "accounts" as defined in former Article 9. A different result might be appropriate, for example, if the security agreement explicitly contemplated future changes in the Article 9 definitions of types of collateral-e.g., " 'Accounts' means 'accounts' as defined in the UCC Article 9 of [State X], as that definition may be amended from time to time." Whether a different approach is appropriate in any given case depends on the bargain of the parties, as determined by applying ordinary principles of contract construction.

§ 28:9-704. Security interest unperfected before July 1, 2001.

A security interest that is enforceable immediately before July 1, 2001 but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) Remains an enforceable security interest for one year after July 1, 2001;

(2) Remains enforceable thereafter if the security interest becomes enforceable under § 28:9-203 on July 1, 2001 or within one year thereafter; and

(3) Becomes perfected:

(A) Without further action, on July 1, 2001 if the applicable requirements for perfection under this article are satisfied before or at that time; or

(B) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

This section deals with security interests that are enforceable but unperfected (i.e., subordinate to the rights of a person who becomes a lien creditor) under former Article 9 or other applicable law immediately before this Article takes effect. These security interests remain enforceable for one year after the effective date, and thereafter if the appropriate steps for attachment under this Article are taken before the one-year period expires. (This section's treatment of enforceability is the same as that of Section 9-703.) The security interest becomes

a perfected security interest on the effective date if, at that time, the security interest satisfies the requirements for perfection under this Article. If the security interest does not satisfy the requirements for perfection until sometime thereafter, it becomes a perfected security interest at that later time.

Example: A security interest has attached under former Article 9 but is unperfected because the filed financing statement covers "all of debtor's personal property" and controlling case law in the applicable jurisdiction has determined that this identification of collateral in a financing statement is insufficient. Upon the effective date of this Article, the financing statement becomes sufficient under Section 9-504(2). On that date the security interest becomes perfected. (This assumes, of course, that the financing statement is filed in the proper filing office under this Article.)

§ 28:9-705. Effectiveness of action taken before July 1, 2001.

(a) If action, other than the filing of a financing statement, is taken before July 1, 2001 and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable, the action is effective to perfect a security interest that attaches under this article within one year after July 1, 2001. An attached security interest becomes unperfected 1 year after July 1, 2001 unless the security interest becomes a perfected security interest under this article before the expiration of that period.

(b) The filing of a financing statement before July 1, 2001 is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this article.

(c) This article does not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former § 28:9-103. However, except as otherwise provided in subsections (d) and (e) of this section and § 28:9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) The filing of a continuation statement on or after July 1, 2001 does not continue the effectiveness of the financing statement filed before July 1, 2001. However, upon the timely filing of a continuation statement on or after July 1, 2001 and in accordance with the law of the jurisdiction governing perfection as provided in Part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001 continues for the period provided by the law of that jurisdiction.

(e) Subsection (c)(2) applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former § 28:9-103 only to the extent that Part 3 provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) A financing statement that includes a financing statement filed before July 1, 2001 and a continuation statement filed on or after July 1, 2001 is

effective only to the extent that it satisfies the requirements of Part 5 for an initial financing statement.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-703 and § 28:9-707.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. General. This section addresses primarily the situation in which the perfection step is taken under former Article 9 or other applicable law before the effective date of this Article, but the security interest does not attach until after that date.

2. Perfection Other Than by Filing. Subsection (a) applies when the perfection step is a step other than the filing of a financing statement. If the step that would be a valid perfection step under former Article 9 or other law is taken before this Article takes effect, and if a security interest attaches within one year after this Article takes effect, then the security interest becomes a perfected security interest upon attachment. However, the security interest becomes unperfected one year after the effective date unless the requirements for attachment and perfection under this Article are satisfied within that period.

3. Perfection by Filing: Ineffective Filings Made Effective. Subsection (b) deals with financing statements that were filed under former Article 9 and which would not have perfected a security interest under the former Article (because, e.g., they did not accurately describe the collateral or were filed in the wrong place), but which would perfect a security interest under this Article. Under subsection (b), such a financing statement is effective to perfect a security interest to the extent it complies with this Article. Subsection (b) applies regardless of the reason for the filing. For example, a secured party need not wait until the effective date to respond to the change this Article makes with respect to the jurisdiction whose law governs perfection of certain security interests. Rather, a secured party may wish to prepare for this change by filing a financing statement before the effective date in the jurisdiction whose law governs perfection under this Article. When this Article takes effect, the filing becomes effective to perfect a security interest (assuming the filing satisfies the perfection requirements of this Article). Note, however, that Section 9-706 determines whether a financing statement filed before the effective date operates to continue the effectiveness of a financing statement filed in another office before the effective date.

4. Perfection by Filing: Change in Applicable Law or Filing Office. Subsection (c) provides that a financing statement filed in the proper jurisdiction under former Section 9-103 remains effective for all purposes, despite the fact that this Article would require filing of a financing statement in a different jurisdiction or in a different office in the same jurisdiction. This means that, during the early years of this Article's effectiveness, it may be necessary to search not only in the filing office of the jurisdiction whose law governs perfection under this Article but also (if different) in the jurisdiction(s) and filing office(s) designated by former Article 9. To limit this burden, subsection (c) provides that a financing statement filed in the jurisdiction determined by former Section 9-103 becomes ineffective at the earlier of the time it would become ineffective under the law of that jurisdiction or June 30, 2006. The June 30, 2006, limitation addresses some nonuniform versions of former Article 9 that extended the effectiveness of a financing statement beyond five years. Note that a financing statement filed before the effective date may remain effective beyond June 30, 2006, if subsection (d) (concerning continuation statements) or (e) (concerning transmitting utilities) or Section 9-706 (concerning initial financing statements that operate to continue pre-effective-date financing statements) so provides.

Subsection (c) is an exception to Section 9-703(b). Under the general rule in Section 9-703(b), a security interest that is enforceable and perfected on the effective date of this Article is a perfected security interest for one year after this Article takes effect, even if the security interest is not enforceable under this Article and the applicable requirements for perfection under this Article have not been met. However, in some cases subsection (c) may shorten the one-year period of perfection; in others, if the security interest is enforceable under Section 9-203, it may extend the period of perfection.

Example 1: On July 3, 1996, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On July 6, 1996, SP perfects a security interest in the equipment under former Article 9 by filing in the office of the State Y Secretary of State. See former Section 9-103(1)(b). This Article takes effect in States X and Y on July 1,

2001. Under Section 9-705(c), the financing statement remains effective until it lapses in July 2001. See former Section 9-403. Had SP continued the effectiveness of the financing statement by filing a continuation statement in State Y under former Article 9 before July 1, 2001, the financing statement would have remained effective to perfect the security interest through June 30, 2006. See subsection (c)(2). Alternatively, SP could have filed an initial financing statement in State X under subsection (b) or Section 9-706 before the State Y financing statement lapsed. Had SP done so, the security interest would have remained perfected without interruption until the State X financing statement lapsed.

5. Continuing Effectiveness of Filed Financing Statement. A financing statement filed before the effective date of this Article may be continued only by filing in the State and office designated by this Article. This result is accomplished in the following manner: Subsection (d) indicates that, as a general matter, a continuation statement filed after the effective date of this Article does not continue the effectiveness of a financing statement filed under the law designated by former Section 9-103. Instead, an initial financing statement must be filed under Section 9-706. The second sentence of subsection (d) contains an exception to the general rule. It provides that a continuation statement is effective to continue the effectiveness of a financing statement filed before this Article takes effect if this Article prescribes not only the same jurisdiction but also the same filing office.

Example 2: On November 8, 2000, D, a State X corporation, creates a security interest in certain manufacturing equipment located in State Y. On November 15, 2000, SP perfects a security interest in the equipment under former Article 9 by filing in office of the State Y Secretary of State. See former Section 9-103(1)(b). This Article takes effect in States X and Y on July 1, 2001. Under Section 9-705(c), the financing statement ceases to be effective in November, 2005, when it lapses. See Section 9-515. Under this Article, the law of D's location (State X, see Section 9-307) governs perfection. See Section 9-301. Thus, the filing of a continuation statement in State Y after the effective date would not continue the effectiveness of the financing statement. See subsection (d). However, the effectiveness of the financing statement could be continued under Section 9-706.

Example 3: The facts are as in Example 2, except that D is a State Y corporation. Assume State Y adopted former Section 9-401(1) (second alternative). State Y law governs perfection under Part 3 of this Article. (See Sections 9-301, 9-307.) Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y continues the effectiveness of the financing statement.

Example 4: The facts are as in Example 3, except that the collateral is equipment used in farming operations and, in accordance with former Section 9-401(1) (second alternative) as enacted in State Y, the financing statement was filed in State Y, in the office of the Shelby County Recorder of Deeds. Under this Article, a continuation statement must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). Under the second sentence of subsection (d), the timely filing of a continuation statement in accordance with the law of State Y operates to continue a pre-effective-date financing statement only if the continuation statement is filed in the same office as the financing statement. Accordingly, the continuation statement is not effective in this case, but the financing statement may be continued under Section 9-706.

Example 5: The facts are as in Example 3, except that State Y enacted former Section 9-401(1) (third alternative). As required by former Section 9-401(1), SP filed financing statements in both the office of the State Y Secretary of State and the office of the Shelby County Recorder of Deeds. Under this Article, a continuation statement must be filed in the office of the State Y Secretary of State. See Section 9-501(a)(2). The timely filing of a continuation statement in that office after this Article takes effect would be effective to continue the effectiveness of the financing statement (and thus continue the perfection of the security interest), even if the financing statement filed with the County Recorder lapses.

6. Continuation Statements. In some cases, this Article reclassifies collateral covered by a financing statement filed under former Article 9. For example, collateral consisting of the right to payment for real property sold would be a "general intangible" under the former Article but an "account" under this Article. To continue perfection under those circumstances, a continuation statement must comply with the normal requirements for a continuation statement. See Section 9-515. In addition, the pre-effective-date financing statement and continuation statement, taken together, must satisfy the requirements of this Article concerning the sufficiency of the debtor's name, secured party's name, and indication of collateral. See subsection (f).

Example 6: A pre-effective-date financing statement covers "all general intangibles" of a debtor. As defined under former Article 9, a "general intangible," would include rights to payment for lottery winnings. These rights to payment are "accounts" under this Article, however. A post-effective-date continuation statement will not continue the effectiveness of the pre-effective-date financing statement with re-

spect to lottery winnings unless it amends the indication of collateral covered to include lottery winnings (e.g., by adding "accounts," "rights to payment for lottery winnings," or the like). If the continuation statement does not amend the indication of collateral, the continuation statement will be effective to continue the effectiveness of the financing statement only with respect to "general intangibles" as defined in this Article.

Example 7: The facts are as in Example 6, except that the pre-effective-date financing statement covers "all accounts and general intangibles." Even though rights to payment for lottery winnings are "general intangibles" under former Article 9 and "accounts" under this Article, a post-effective-date continuation statement would continue the effectiveness of the pre-effective-date financing statement with respect to lottery winnings. There would be no need to amend the indication of collateral covered, inasmuch as the indication ("accounts") satisfies the requirements of this Article.

§ 28:9-706. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in § 28:9-501 continues the effectiveness of a financing statement filed before July 1, 2001 if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under this article;

(2) The pre-effective-date financing statement was filed in an office in another State or another office in the District; and

(3) The initial financing statement satisfies subsection (b).

(b) The filing of an initial financing statement under subsection (a) continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before July 1, 2001, for the period provided in former § 28:9-403 with respect to a financing statement; and

(2) If the initial financing statement is filed after July 1, 2001, for the period provided in § 28:9-515 with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a), an initial financing statement must:

(1) Satisfy the requirements of Part 5 for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Section references. — This section is referenced in § 28:9-705 and § 28:9-707.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Continuation of Financing Statements Not Filed in Proper Filing Office Under This Article. This section deals with continuing the effectiveness of financing statements that are filed in the proper State and office under former Article 9, but which would be filed in the wrong State or in the wrong office of the proper State under this Article. Section 9-705(d) provides that,

under these circumstances, filing a continuation statement after the effective date of this Article in the office designated by former Article 9 would not be effective. This section provides the means by which the effectiveness of such a financing statement can be continued if this Article governs perfection under the applicable choice-of-law rule: filing an initial financing statement in the office specified by Section 9-501.

Although it has the effect of continuing the effectiveness of a pre-effective-date financing statement, an initial financing statement described in this section is not a continuation statement. Rather, it is governed by the rules applicable to initial financing statements. (However, the debtor need not authorize the filing. See Section 9-707.) Unlike a continuation statement, the initial financing statement described in this section may be filed any time during the effectiveness of the pre-effective-date financing statement-even before this Article is enacted-and not only within the six months immediately prior to lapse. In contrast to a continuation statement, which extends the lapse date of a filed financing statement for five years, the initial financing statement has its own lapse date, which bears no relation to the lapse date of the pre-effective-date financing statement whose effectiveness the initial financing statement continues. See subsection (b).

As subsection (a) makes clear, the filing of an initial financing statement under this section continues the effectiveness of a pre-effective-date financing statement. If the effectiveness of a pre-effective-date financing statement lapses before the initial financing statement is filed, the effectiveness of the pre-effective-date financing statement cannot be continued. Rather, unless the security interest is perfected otherwise, there will be a period during which the security interest is unperfected before becoming perfected again by the filing of the initial financing statement under this section.

If an initial financing statement is filed under this section before the effective date of this Article, it takes effect when this Article takes effect (assuming that it is ineffective under former Article 9). Note, however, that former Article 9 determines whether the filing office is obligated to accept such an initial financing statement. For the reason given in the preceding paragraph, an initial financing statement filed before the effective date of this Article does not continue the effectiveness of a pre-effective-date financing statement unless the latter remains effective on the effective date of this Article. Thus, for example, if the effectiveness of the pre-effective-date financing statement lapses before this Article takes effect, the initial financing statement would not continue its effectiveness.

2. Requirements of Initial Financing Statement Filed in Lieu of Continuation Statement. Subsection (c) sets forth the requirements for the initial financing statement under subsection (a). These requirements are needed to inform searchers that the initial financing statement operates to continue a financing statement filed elsewhere and to enable searchers to locate and discover the attributes of the other financing statement. A single initial financing statement may continue the effectiveness of more than one financing statement filed before this Article's effective date. See Section 1-102(5)(a) (words in the singular include the plural). If a financing statement has been filed in more than one office in a given jurisdiction, as may be the case if the jurisdiction had adopted former Section 9-401(1), third alternative, then an identification of the filing in the central filing office suffices for purposes of subsection (c)(2). If under this Article the collateral is of a type different from its type under former Article 9-as would be the case, e.g., with a right to payment of lottery winnings (a "general intangible" under former Article 9 and an "account" under this Article), then subsection (c) requires that the initial financing statement indicate the type under this Article.

§ 28:9-707. Amendment of pre-effective-date financing statement.

(a) In this section, "pre-effective-date financing statement" means a financing statement filed before July 1, 2001.

(b) On or after July 1, 2001, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part 3. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d), if the law of the District governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after July 1, 2001 only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in § 28:9-501;

(2) An amendment is filed in the office specified in § 28:9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies § 28:9-706(c); or

(3) An initial financing statement that provides the information as amended and satisfies § 28:9-706(c) is filed in the office specified in § 28:9-501.

(d) If the law of the District governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under § 28:9-705(d) and (f) or 28:9-706.

(e) Whether or not the law of the District governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in the District may be terminated after July 1, 2001 by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies § 28:9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as the office in which to file a financing statement.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Scope of This Section. This section addresses post-effective-date amendments to pre-effective-date financing statements.

2. Applicable Law. Determining how to amend a pre-effective-date financing statement requires one first to determine the jurisdiction whose law applies. Subsection (b) provides that, as a general matter, post-effective-date amendments to pre-effective-date financing statements are effective only if they are accomplished in accordance with the substantive (or local) law of the jurisdiction governing perfection under Part 3 of this Article. However, under certain circumstances, the effectiveness of a financing statement may be terminated in accordance with the substantive law of the jurisdiction in which the financing statement is filed. See Comment 5, below.

Example 1: D is a corporation organized under the law of State Y. It owns equipment located in State X. Under former Article 9, SP properly perfected a security interest in the equipment by filing a financing statement in State X. Under this Article, the law of State Y governs perfection of the security interest. See Sections 9-301, 9-307. After this Article takes effect, SP wishes to amend the financing statement to reflect a change in D's name. Under subsection (b), the financing statement may be amended in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y.

Example 2: The facts are as in Example 1, except that SP wishes to terminate the effectiveness of the State X filing. The first sentence of subsection (b) provides that the financing statement may be terminated after the effective date of this Article in accordance with the law of State Y, i.e., in accordance with subsection (c) as enacted in State Y. However, the second sentence provides that the financing statement also may be terminated in accordance with the law of the jurisdiction in which it is filed, i.e., in accordance with subsection (e) as enacted in State X. If the pre-effective-date financing statement is filed in the jurisdiction whose law governs perfection (here, State Y), then both sentences would designate the law of State Y as applicable to the termination of the financing statement. That is, the financing statement could be terminated in accordance with subsection (c) or (e) as enacted in State Y.

3. Method of Amending. Subsection (c) provides three methods of effectuating a post-effective-date amendment to a pre-effective-date financing statement. Under subsection (c)(1), if the financing statement is filed in the jurisdiction and office determined by this Article, then an effective amendment may be filed in the same office.

Example 3: D is a corporation organized under the law of State Z. It owns equipment located in State Z. Before the effective date of this Article, SP perfected a security interest in the equipment by filing in two offices in State Z, a local filing office and the office of the Secretary of State. See former Section 9-401(1) (third alternative). State Z enacts this Article and specifies in Section 9-501 that a financing statement covering equipment is to be filed in the office of the Secretary of State. SP wishes to assign its power as secured party of record. Under subsection (b), the substantive law of State Z applies. Because the pre-effective-date financing statement is filed in the office specified in subsection (c)(1) as enacted by State Z, SP may effectuate the assignment by filing an amendment under Section 9-514 with the office of the Secretary of State. SP need not amend the local filing, and the priority of the security interest perfected by the filing of the financing statement would not be affected by the failure to amend the local filing.

If a pre-effective-date financing statement is filed in an office other than the one specified by Section 9-501 of the relevant jurisdiction, then ordinarily an amendment filed in that office is ineffective. (Subsection (e) provides an exception for termination statements.) Rather, the amendment must be effectuated by a filing in the jurisdiction and office determined by this Article. That filing may consist of an initial financing statement followed by an amendment, an initial financing statement together with an amendment, or an initial financing statement that indicates the information provided in the financing statement, as amended. Subsection (c)(2) encompasses the first two options; subsection (c)(3) contemplates the last. In each instance, the initial financing statement must satisfy Section 9-706(c).

4. Continuation. Subsection (d) refers to the two methods by which a secured party may continue the effectiveness of a pre-effective-date financing statement under this Part. The Comments to Sections 9-705 and 9-706 explain these methods.

5. Termination. The effectiveness of a pre-effective-date financing statement may be terminated pursuant to subsection (c). This section also provides an alternative method for accomplishing this result: filing a termination statement in the office in which the financing statement is filed. The alternative method becomes unavailable once an initial financing statement that relates to the pre-effective-date financing statement and satisfies Section 9-706(c) is filed in the jurisdiction and office determined by this Article.

Example 4: The facts are as in Example 1, except that SP wishes to terminate a financing statement filed in State X. As explained in Example 1, the financing statement may be amended in accordance with the law of the jurisdiction governing perfection under this Article, i.e., in accordance with the substantive law of State Y. As enacted in State Y, subsection (c)(1) is inapplicable because the financing statement was not filed in the State Y filing office specified in Section 9-501. Under subsection (c)(2), the financing statement may be amended by filing in the State Y filing office an initial financing statement followed by a termination statement. The filing of an initial financing statement together with a termination statement also would be legally sufficient under subsection (c)(2), but Section 9-512(a)(1) may render this method impractical. The financing statement also may be amended under subsection (c)(3), but the resulting initial financing statement is likely to be very confusing. In each instance, the initial financing statement must satisfy Section 9-706(c). Applying the law of State Y, subsection (e) is inapplicable, because the financing statement was not filed in "this State," i.e., State Y.

This section affords another option to SP. Subsection (b) provides that the effectiveness of a financing statement may be terminated either in accordance with the law of the jurisdiction governing perfection (here, State Y) or in accordance with the substantive law of the jurisdiction in which the financing statement is filed (here, State X). Applying the law of State X, the financing statement is filed in "this State," i.e., State X, and subsection (e) applies. Accordingly, the effectiveness of the financing statement can be terminated by filing a termination statement in the State X office in which the financing statement is filed, unless an initial financing statement that relates to the financing statement and satisfies Section 9-706(c) as enacted in State X has been filed in the jurisdiction and office determined by this Article (here, the State Y filing office).

§ 28:9-708. Persons entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this part if:

(1) The secured party of record authorizes the filing; and

(2) The filing is necessary under this part:

(A) To continue the effectiveness of a financing statement filed before July 1, 2001; or

(B) To perfect or continue the perfection of a security interest.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

UNIFORM COMMERCIAL CODE COMMENT

This section permits a secured party to file an initial financing statement or continuation statement necessary under this Part to continue the effectiveness of a financing statement filed before this Article takes effect or to perfect or otherwise continue the perfection of a security interest. Because a filing described in this section typically operates to continue the effectiveness of a financing statement whose filing the debtor already has authorized, this section does not require authorization from the debtor.

§ 28:9-709. Priority.

(a) This article determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former Article 9 determines priority.

(b) For purposes of § 28:9-322(a), the priority of a security interest that becomes enforceable under § 28:9-203 dates from July 1, 2001 if the security interest is perfected under this article by the filing of a financing statement before July 1, 2001 which would not have been effective to perfect the security interest under former Article 9. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

(Oct. 26, 2000, D.C. Law 13-201, § 101, 47 DCR 7576.)

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:9-101.

Part 8. Transition Provisions for 2012 Amendments.

§ 28:9-801. Definitions.

In this part:

(1) "Applicability date" means July 1, 2013.

(2) "2012 Act" means the Uniform Commercial Code Article 9 Amendments Act of 2012 [D.C. Law 19-302].

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — Law 19-302, the "Uniform Commercial Code Article 9 Amendments Act of 2012," was introduced in Council and assigned Bill No. 19-222. The Bill was adopted on first and second readings on December 4, 2012, and December 18, 2012, respectively. Signed by the Mayor on February 5, 2013, it was assigned Act No. 19-669 and transmitted to Congress for its review. D.C. Law 19-302 became effective on May 1, 2013.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

UNIFORM COMMERCIAL CODE COMMENT

These transition provisions largely track the provisions of Part 7, which govern the transition to the 1998 revision of this Article. The Comments to the sections of Part 7 generally are relevant to the corresponding sections of Part 8. The 2010 amendments are less far-reaching than the 1998 revision. Although Part 8 does not carry forward those Part 7 provisions that clearly would have no application to the transition to the amendments, as a matter of prudence Part 8 does carry forward all Part 7 provisions that are even arguably relevant to the transition.

The most significant transition problem raised by the 2010 amendments arises from changes to Section 9-503(a), concerning the name of the debtor that must be provided for a financing statement to be sufficient. Sections 9-805 and 9-806 address this problem.

Example: On November 8, 2012, Debtor, an individual whose "individual name" is "Lon Debtor" and whose principal residence is located in State A, creates a security interest in certain manufacturing equipment. On November 15, 2012, SP perfects a security interest in the equipment under Article 9 (as in effect prior to the 2010 amendments) by filing a financing statement against "Lon Debtor" in the State A filing office. On July 1, 2013, the 2010 amendments, including Alternative A to Section 9-503(a), take effect in State A. Debtor's unexpired State A driver's indicates that Debtor's name is "Polonius Debtor." Assuming that a search under "Polonius Debtor" using the filing office's standard search logic would not disclose the filed financing statement, the financing statement would be insufficient under amended Section 9-503(a)(4) (Alt. A). However, Section 9-805(b) provides that the 2010 amendments do not render the financing statement ineffective. Rather, the financing statement remains effective—even if it has become seriously misleading—until it would have ceased to be effective had the amendments not taken effect. See Section 9-805(b)(1). SP can continue the effectiveness of the financing statement by filing a continuation statement with the State A filing office. To do so, however, SP must amend Debtor's name on the financing statement to provide the name that is sufficient under Section 9-503(a)(4) (Alt. A) at the time the continuation statement is filed. See Section 9-805(c), (e).

The most significant transition problem addressed by the 1998 revision arose from the change in the choice-of-law rules governing where to file a financing statement. The 2010 amendments do not change the choice-of-law rules. Even so, the amendments will change the place to file in a few cases, because certain entities that were not previously classified as "registered organizations" would fall within that category under the amendments.

§ 28:9-802. Savings clause.

(a) Except as otherwise provided in this part, the amendments made by the 2012 Act apply to a transaction or lien within its scope, even if the transaction or lien was entered into or created before the applicability date.

(b) The 2012 Act does not affect an action, case, or proceeding commenced before the applicability date.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-803. Security interest perfected before applicability date.

(a) A security interest that is a perfected security interest immediately before the applicability date is a perfected security interest under Article 9 as amended by the 2012 Act if, on the applicability date, the applicable requirements for attachment and perfection under Article 9 as amended by 2012 Act are satisfied without further action.

(b) Except as otherwise provided in § 28:9-805, if, immediately before the applicability date, a security interest is a perfected security interest, but the applicable requirements for perfection under Article 9 as amended by the 2012 Act are not satisfied on the applicability date, the security interest remains perfected thereafter only if the applicable requirements for perfection under Article 9 as amended by the 2012 Act are satisfied within one year after the applicability date.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-804. Security interest unperfected before applicability date.

A security interest that is an unperfected security interest immediately before the applicability date becomes a perfected security interest:

(1) Without further action, on the applicability date, if the applicable requirements for perfection under Article 9 as amended by the 2012 Act are satisfied before or at that time; or

(2) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-805. Effectiveness of action taken before applicability date.

(a) The filing of a financing statement before the applicability date is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under Article 9 as amended by the 2012 Act.

(b) The 2012 Act does not render ineffective an effective financing statement that, before the applicability date, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in Article 9 as it existed before the applicability date. However, except

as otherwise provided in subsections (c) and (d) of this section and § 28:9-806, the financing statement ceases to be effective:

(1) If the financing statement is filed in the District, at the time the financing statement would have ceased to be effective had the 2012 Act not taken effect; or

(2) If the financing statement is filed in another jurisdiction, at the earlier of:

(A) The time the financing statement would have ceased to be effective under the law of that jurisdiction; or

(B) June 30, 2018.

(c) The filing of a continuation statement after the applicability date does not continue the effectiveness of a financing statement filed before the applicability date. However, upon the timely filing of a continuation statement after the applicability date and in accordance with the law of the jurisdiction governing perfection as provided in Article 9 as amended by the 2012 Act, the effectiveness of a financing statement filed in the same office in that jurisdiction before the applicability date continues for the period provided by the law of that jurisdiction.

(d) Subsection (b)(2)(B) of this section applies to a financing statement that, before the applicability date, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in Article 9 as it existed before the applicability date, only to the extent that Article 9 as amended by the 2012 Act provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(e) A financing statement that includes a financing statement filed before the applicability date and a continuation statement filed after the applicability date only to the extent that it satisfies the requirements of this part as added by the 2012 Act for an initial financing statement. A financing statement that indicates that the debtor is a decedent's estate indicates that the collateral is being administered by a personal representative within the meaning of § 28:9-503(a)(2) as amended by the 2012 Act. A financing statement that indicates that the debtor is a trust or is a trustee acting with respect to property held in trust indicates that the collateral is held in a trust within the meaning of § 28:9-503(a)(3) as amended by the 2012 Act.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-803 and § 28:9-807.

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-806. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in

§ 28:9-501 continues the effectiveness of a financing statement filed before the applicability date if:

(1) The filing of an initial financing statement in that office would be effective to perfect a security interest under Article 9 as amended by the 2012 Act;

(2) The pre-effective-date financing statement was filed in an office in another state; and

(3) The initial financing statement satisfies subsection (c) of this section.

(b) The filing of an initial financing statement under subsection (a) of this section continues the effectiveness of the pre-effective-date financing statement:

(1) If the initial financing statement is filed before the applicability date, for the period provided in § 28:9-515 as it existed before the applicability date with respect to an initial financing statement; and

(2) If the initial financing statement is filed after the applicability date, for the period provided in § 28:9-515 as amended by the 2012 Act with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a) of this section, an initial financing statement must:

(1) Satisfy the requirements of Part 5 as amended by the 2012 Act for an initial financing statement;

(2) Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) Indicate that the pre-effective-date financing statement remains effective.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Section references. — This section is referenced in § 28:9-805 and § 28:9-807.

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-807. Amendment of pre-effective-date financing statement.

(a) For the purposes of this section and § 28:9-806, "pre-effective-date financing statement" means a financing statement filed before the applicability date.

(b) After the applicability date, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Article 9 as amended by the 2012 Act. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d) of this section, if the law of the District governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after the applicability date only if:

(1) The pre-effective-date financing statement and an amendment are filed in the office specified in § 28:9-501;

(2) An amendment is filed in the office specified in § 28:9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies § 28:9- 806(c); or

(3) An initial financing statement that provides the information as amended and satisfies § 28:9-806(c) is filed in the office specified in § 28:9-501.

(d) If the law of the District governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under § 28:9-805(c) and (e) or § 28:9-806.

(e) Whether or not the law of the District governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in the District may be terminated after the applicability date by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies § 28:9-806(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Article 9 as amended by the 2012 Act as the office in which to file a financing statement.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-808. Person entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this part if:

(a) The secured party of record authorizes the filing; and "(b) The filing is necessary under this part:

(1) To continue the effectiveness of a financing statement filed before the applicability date; or

(2) To perfect or continue the perfection of a security interest.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

§ 28:9-809. Priority.

Article 9 as amended by the 2012 Act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were

established before the applicability date, Article 9 as it existed before the applicability date determines priority.

(May 1, 2013, D.C. Law 19-302, § 2(s), 60 DCR 2688.)

Legislative history of Law 19-302. — See note to § 28:9-801.

Editor's notes. — Applicability of D.C. Law 19-302: Section 4 of D.C. Law 19-302 provided that the act shall apply as of July 1, 2013.

ARTICLE 10. CONSTRUCTION WITH OTHER LAWS.

§ 28:10-101. Effective date. [Omitted].

Omitted.

§ 28:10-102. Specific repealer; provision for transition. [Omitted].

Omitted.

§ 28:10-103. Inconsistent laws; what law governs.

(a) Except as provided by section 28:10-104, if any provision of law is inconsistent with this subtitle, this subtitle shall govern, unless this subtitle or the inconsistent provision of the other law specifically provides otherwise.

(b) If any provision of this subtitle is inconsistent with the Commissioner's Order entitled the Regulations Governing the Business of Buying, Selling and Financing of Motor Vehicles in the District of Columbia Department of Licenses and Inspections, issued October 20, 1960 (C.O. 60-2219; 5AA DCRR), the Commissioner's Order shall govern, unless this subtitle or the inconsistent provision of the Commissioner's Order specifically provides otherwise.

(Dec. 30, 1963, 77 Stat. 769, Pub. L. 88-243, § 1; Mar. 31, 1982, D.C. Law 4-90, § 5, 29 DCR 666.)

Prior Codifications. — 1981 Ed., § 28:10-103.

1973 Ed., § 28:10-103.

Legislative history of Law 4-90. — Law 4-90, the "District of Columbia Automobile Financing and Repossession Act of 1981," was introduced in Council and assigned Bill No. 4-17, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on December 8, 1981, and January 12, 1982, respectively. Signed by the Mayor on February 4, 1982, it was assigned Act No. 4-148 and transmitted to both Houses of Congress for its review.

UNIFORM COMMERCIAL CODE COMMENT

This section provides for the repeal of all other legislation inconsistent with this Act.

§ 28:10-104. Laws not repealed.

(1) The article on documents of title (article 7) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (section 28:1-201).

(2) Repealed.

(Dec. 30, 1963, 77 Stat. 769, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-240, § 3(s), 44 DCR 1087.)

Section references. — This section is referenced in § 28:10-103.

Prior Codifications. — 1981 Ed., § 28:10-104.

1973 Ed., § 28:10-104.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

This section subordinates the Article of this Act on Documents of Title (Article 7) to the more specialized regulations of particular classes of bailees under other legislation and international treaties. Particularly, the provisions of that Article are superseded by applicable inconsistent provisions regarding the obligation of carriers and the limitation of their liability found in federal legislation dealing with transportation by water (including the Harter Act, Act of February 13, 1893, 27 Stat. 445, and the Carriage of Goods by Sea Act, Act of April 16, 1936, 49 Stat. 1207); the Warsaw Convention on International Air Transportation, 49 Stat. 3000, and Section 20(11) of the Interstate Commerce Act, Act of February 20, 1887, 24 Stat. 386, as amended. The Documents of Title provisions of this Act supplement such legislation largely in matters other than obligation of the bailee, e.g., form and effects of negotiation, procedure in the case of lost documents, effect of overissue, possibility of rapid transmission.

Doubts have been expressed whether Article 8 provides as complete protection on transfers of securities by fiduciaries as the Uniform Act for the Simplification of Fiduciary Security Transfers. The Editorial Board entirely favors the policy of simplifying fiduciary security transfers and believes that Article 8 soundly implements this policy. However, since the shorter Simplification Act has been so widely enacted and has been working satisfactorily, the Editorial Board recommends that it be retained.

Cross Reference:
Section 7-103.

Article 11. Effective Date and Transition Provisions.

§ 28:11-101. Effective date.

The provisions of this act which amend article 9 and the provisions affecting secured transactions shall become effective at 12:01 A.M. on the 181st day after the effective date of this act.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Section references. — This section is referenced in § 28:11-103, § 28:11-104, § 28:11-105, § 28:11-106, and § 28:11-107.

Prior Codifications. — 1981 Ed., § 28:11-101.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

Editor's notes. — D.C. Law 4-85 became law on March 16, 1982. The 181st day following March 16, 1982 was September 13, 1982.

§ 28:11-102. [Omitted].

§ 28:11-103. Transition to this act — general rule.

Transactions validly entered into after January 1, 1965 and before the effective date of this act (as provided in section 28:11-101), and which were subject to the provisions of articles 1 through 9 of the Uniform Commercial Code, effective January 1, 1965, and which would be subject to this act as amended if they had been entered into after the effective date of this act (as provided in section 28:11-101) and the rights, duties and interests flowing from such transactions remain valid after the latter date and may be terminated, completed, consummated or enforced as required or permitted by this act. Security interests arising out of such transactions which are perfected when this act becomes effective shall remain perfected until they lapse as provided in this act, and may be continued as permitted by this act, except as stated in section 28:11-105.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Prior Codifications. — 1981 Ed., § 28:11-103.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

§ 28:11-104. Transition provision on change of requirement of filing.

A security interest for the perfection of which filing or the taking of possession was required under article 9 of this subtitle, effective January 1, 1965, and which attached prior to the effective date of this act (as provided in section 28:11-101) but was not perfected shall be deemed perfected on such effective date of this act if this act permits perfection without filing or authorizes filing in the office or offices where a prior ineffective filing was made.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Prior Codifications. — 1981 Ed., § 28:11-104.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

§ 28:11-105. Transition provision on change of place of filing.

(1) A financing statement or continuation statement filed prior to the effective date of this act (as provided in section 28:11-101) which shall not have lapsed prior to such effective date of this act shall remain effective for the period provided for in article 9 of this subtitle, effective January 1, 1965, but not less than five years after the filing.

(2) With respect to any collateral acquired by the debtor subsequent to the effective date of this act (as provided in section 28:11-101), any effective financing statement or continuation statement described in this section shall apply only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under this act.

(3) The effectiveness of any financing statement or continuation statement filed prior to the effective date of this act (as provided in section 28:11-101) may be continued by a continuation statement as permitted by this act except that if this act requires a filing in an office where there was no previous financing statement, a new financing statement conforming to section 28:11-106 shall be filed in that office.

(4) If the record of a mortgage of real estate would have been effective as a fixture filing of goods described therein if this act had been in effect on the date of recording the mortgage, the mortgage shall be deemed effective as a fixture filing as to such goods under section 28:9-402 (6) of this act on the effective date of this act (as provided in section 28:11-101).

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Section references. — This section is referenced in § 28:11-103.

Prior Codifications. — 1981 Ed., § 28:11-105.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

§ 28:11-106. Required refilings.

(1) If a security interest is perfected or has priority when this act takes effect (as provided in section 28:11-101) as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under this act, the perfection and priority rights of the security interest continue until three years after such effective date of this act. The perfection will then lapse unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(2) If a security interest is perfected when this act takes effect (as provided in section 28:11-101) under a law other than the Uniform Commercial Code which requires no further filing, refiling or recording to continue its perfection, perfection continues until and will lapse three years after this act takes effect, unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing, or unless under section 28:9-302 (3) the other law continues to govern filing.

(3) If a security interest is perfected by a filing, refiling or recording under a law repealed by this act which required further filing, refiling or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed for such further filing, refiling or recording unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.

(4) A financing statement may be filed within six months before the perfection of a security interest would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice,

however denominated, in another filing office under the Uniform Commercial Code effective January 1, 1965, or under any statute or other law repealed or modified by this act is still effective. Section 28:9-401 and section 28:9-103 determine the proper place to file such a financing statement. Except as specified in this subsection, the provisions of section 28:9-403 (3) for continuation statements apply to such a financing statement.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Section references. — This section is referenced in § 28:11-105.

Prior Codifications. — 1981 Ed., § 28:11-106.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

§ 28:11-107. Transition provisions as to priorities.

Except as otherwise provided in this article, the Uniform Commercial Code effective January 1, 1965, shall apply to any questions of priority if the positions of the parties were fixed prior to the effective date of this act (as provided in section 28:11-101). In other cases questions of priority shall be determined by this act.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Prior Codifications. — 1981 Ed., § 28:11-107.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

§ 28:11-108. Presumption that rule of law continues unchanged.

Unless a change in law has clearly been made, the provisions of this act shall be deemed declaratory of the meaning of the Uniform Commercial Code, effective January 1, 1965.

(Mar. 16, 1982, D.C. Law 4-85, § 40, 29 DCR 309.)

Prior Codifications. — 1981 Ed., § 28:11-108.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:11-101.

References in text. — "This act", referred to in this section, is D.C. Law 4-85.

SUBTITLE II. OTHER COMMERCIAL TRANSACTIONS.

Chapter 21. Assignment for Benefit of Creditors.

§ 28-2101. Form of assignment.

In a voluntary assignment for the benefit of creditors, the debtor shall annex to the assignment (1) an inventory, under oath or affirmation, of his estate, real and personal, according to the best of his knowledge, (2) a list of his creditors, their respective residences and places of business, if known, and (3) the amounts of their respective demands.

(Aug. 30, 1964, 78 Stat. 667, Pub. L. 88-509, § 1.)

Cross references. — Exemptions, see § 15-501 et seq.

Prior Codifications. — 1981 Ed., § 28-2101.

1973 Ed., § 28-2101.

§ 28-2102. Extent of assignment — Assets exempt.

An assignment vests in the assignee the title to all property, except what is legally exempt, belonging to the debtor at the time of making the assignment and comprehended within its general terms. The inventory annexed to an assignment is not conclusive as to the amount of the debtor's estate.

An assignment for the benefit of creditors does not include or cover property exempt from levy or sale on execution unless the exemption is expressly waived. The court may direct the manner in which exempt property may be ascertained and set aside before a sale by a trustee.

(Aug. 30, 1964, 78 Stat. 667, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2102.

1973 Ed., § 28-2102.

§ 28-2103. Assignee.

Only a resident of the District of Columbia may be an assignee in an assignment for the benefit of creditors. His assent shall appear in writing in, or at the end of, or indorsed on, the assignment. An assignment is invalid unless acknowledged and recorded within five days after its execution in the land records of the District. A trust created by an assignment shall be executed under the supervision and control of the court having probate jurisdiction.

(Aug. 30, 1964, 78 Stat. 668, Pub. L. 88-509, § 1; July 29, 1970, 84 Stat. 569, Pub. L. 91-358, title I, § 151(a); Apr. 9, 1997, D.C. Law 11-255, § 27(a), 44 DCR 1271.)

Cross references. — Civil jurisdiction, probate, see §§ 11-501 and 11-921.

Section references. — This section is referenced in § 28-2105.

Prior Codifications. — 1981 Ed., § 28-2103.

1973 Ed., § 28-2103.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

§ 28-2104. Bond of assignee.

Immediately upon the filing for record of an assignment for the benefit of creditors, the assignee shall execute and file in the clerk's office of the court having probate jurisdiction his bond to the United States, in an amount and with security to be approved by a judge thereof, conditioned for the faithful performance of his duties according to law, and the court may from time to time require the assignee, or a trustee appointed in his place, to give additional security when required by the interests of the creditors.

(Aug. 30, 1964, 78 Stat. 668, Pub. L. 88-509, § 1; July 29, 1970, 84 Stat. 569, Pub. L. 91-358, title I, § 151(a).)

Cross references. — Civil jurisdiction, probate, see §§ 11-501 and 11-921.

Section references. — This section is referenced in § 28-2105.

Prior Codifications. — 1981 Ed., § 28-2104.

1973 Ed., § 28-2104.

§ 28-2105. Nonperformance by assignee — Trustee.

If an assignee named in an assignment for the benefit of creditors fails or refuses to comply with any of the requirements of sections 28-2103 and 28-2104, a judge of the court having probate jurisdiction may, on the application of the assignor or a creditor interested in the assignment, remove the assignee and appoint a trustee in his place to execute the trusts created by the assignment, who shall give bond as the court may require. And the court may accept the resignation of an assignee or trustee, and in case of his resignation, death, or removal from the District, appoint a trustee in his place. The court, for cause shown, on the application of an interested person, may remove an assignee or trustee and appoint a trustee in his place, and make and enforce all orders necessary to put the newly appointed trustee in possession of all property covered by the assignment. Upon the death of an assignee or trustee the court may require his executor or administrator to settle his account and to deliver over to his successor all property belonging to the trust, in default of which the successor may bring suit upon the bond of the deceased assignee or trustee or upon the bond of the executor or administrator, accordingly as the assignee or trustee, executor or administrator is the party in default.

(Aug. 30, 1964, 78 Stat. 668, Pub. L. 88-509, § 1; July 29, 1970, 84 Stat. 569, Pub. L. 91-358, title I, § 151(b).)

Cross references. — Civil jurisdiction, probate, see §§ 11-501 and 11-921.
Prior Codifications. — 1981 Ed., § 28-2105.
1973 Ed., § 28-2105.

§ 28-2106. Duties of assignee.

An assignee or trustee, after giving bond, shall collect and take into his possession all the property covered by the assignment, and to that end he may bring suit in his own name to recover debts due or property belonging to the assignor and embraced in the assignment. The court may require the assignor to be examined under oath touching his property, and may make all orders necessary to prevent any fraudulent transfer of or change in the property of the assignor. The assignee or trustee shall return inventories of the assets coming to his hands and, upon the direction of the court, sell and dispose of them; and his conveyance of any property of the assignor, real or personal, transfers the entire title of the assignor therein to the purchaser. When the assets have been converted into money the assignee or trustee shall settle his accounts and make distribution among the creditors, under the direction of the court, according to the usual course of proceeding in creditor's suits.

(Aug. 30, 1964, 78 Stat. 668, Pub. L. 88-509, § 1.)

Cross references. — Civil jurisdiction, probate, see §§ 11-501 and 11-921.
Prior Codifications. — 1981 Ed., § 28-2106.
1973 Ed., § 28-2106.

§ 28-2107. Preferences prohibited.

A provision in a voluntary assignment made for the payment of one debt or liability in preference to another is void, and all debts and liabilities within the provisions of the assignment shall be paid pro rata from the assets. This section does not affect the priority of liens and incumbrances created bona fide and existing before the execution of the assignment.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2107.
1973 Ed., § 28-2107.

CASE NOTES

ANALYSIS

Actions to enforce liability.
In general.

Actions to enforce liability.
Creditor had standing to challenge professional corporation's payments to sole shareholder and president on insider preference the-

ory. Conner v. 1747 Pa. Ave. Assocs., L.P., 669 A.2d 693, 1995 D.C. App. LEXIS 260 (1995).

In general.

President, director and sole shareholder of professional corporation could be held liable, on insider preference theory, for corporation's breach of lease, to extent he authorized payments to himself, while corporation was insolvent and had outstanding debt to landlord, beyond value of his services in wrapping up corporation's affairs. D.C. Code 1981, § 29-342(a)(3). Conner v. 1747 Pa. Ave. Assocs., L.P., 669 A.2d 693, 1995 D.C. App. LEXIS 260 (1995).

An assignment made for the benefit of only some, rather than all, of a debtor's creditors cannot be permitted to defeat the equality of treatment this section demands when a debtor yields control over his property to a trustee. An assignment insulates an insolvent debtor's assets from individual creditor process. Assets should be so insulated only when equality among creditors is provided simultaneously. J. Nichols Produce Co. v. Kingston Mgt. Corp., 110 WLR 2493 (Super. Ct. 1982).

§ 28-2108. Proceedings for benefit of all creditors.

A proceeding instituted under this chapter by one or more creditors is deemed to be for the equal benefit of all creditors, but the court may make such allowance to the creditor or creditors instituting the same, out of the fund to be distributed, or expenses, including counsel fees, as may be just and equitable.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2108.

1973 Ed., § 28-2108.

§ 28-2109. Assignment to hinder or defraud creditors.

This chapter does not prevent a creditor otherwise entitled from attacking an assignment as made to hinder or defraud the creditors of the assignor. When the court finds an assignment to have been made with that intent, it may enjoin any proceeding thereunder, and upon finally decreeing the assignment to be void may appoint a trustee with power to take possession of all the property of the debtor, and may make and enforce all orders necessary to put him in possession of the property. The trustee shall qualify in the same manner and perform the same duties as the trustees provided for by this chapter.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Cross references. — Fraudulent conveyances, see § 28-3101 et seq.

Prior Codifications. — 1981 Ed., § 28-2109.

1973 Ed., § 28-2109.

§ 28-2110. Notice to creditors.

The court shall require a trustee, whether named in the assignment or appointed by the court, in pursuance of this chapter, to give notice as the court may think proper to all the creditors of the assignor to produce and prove their respective claims against the assignor before the auditor of the court, to the end that they may be fairly adjudicated and the creditors may share equally

the assets of the insolvent assignor, subject, however, to any legal priorities created by valid incumbrances antedating the assignment.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2110.
1973 Ed., § 28-2110.

CHAPTER 23. ASSIGNMENT OF CHOSES IN ACTION.

§ 28-2301. Assignment of judgment or money decree.

A judgment or money decree may be assigned in writing, and upon the assignment thereof being filed in the clerk's office the assignee may maintain an action or sue out an execution on the judgment in his own name, as the original plaintiff might have done.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2301.
1973 Ed., § 28-2301.

CASE NOTES

ANALYSIS

Absolute assignment.
Champertous assignments.

Absolute assignment.
Under District of Columbia law, assignment of judgment was "absolute assignment," such that judgment creditor did not retain legally cognizable interest in judgment and assignee had no obligation to act on behalf, or for benefit, of judgment creditor; assignment agreement, providing for assignment of all right, title, and interest in judgment to assignee, used language consistent with absolute assignment, agreement was made for valuable consideration, including payment to judgment creditor of one-half of gross amount recovered by assignee on judgment, and agreement vested in assignee absolute authority to dictate manner in which judgment was enforced, despite assignee's obligation to provide status reports to judgment creditor to keep it informed about any right to additional consideration. Columbia Hosp. for Women Med. Ctr., Inc. v. NCRIC, Inc. (In re Columbia Hosp. for Women Med. Ctr., Inc.), 461 B.R. 648, 2011 Bankr. LEXIS 3643 (2011).

Champertous assignments.
Chapter 11 debtor forfeited right to assert defense of champerty under District of Columbia law in response to right of setoff claimed by assignee of third-party judgment against debtor, in turnover proceeding brought by debtor against assignee, by failing to raise champerty defense to assignee's prepetition, post-assignment enforcement of judgment and its taking of discovery based on judgment, allegedly for improper purpose of obtaining discovery unavailable in debtor's then-pending action against assignee, where, at the time assignee asserted setoff right, it held judgment solely for valid purpose of setoff and collection. Columbia Hosp. for Women Med. Ctr., Inc. v. NCRIC, Inc. (In re Columbia Hosp. for Women Med. Ctr., Inc.), 461 B.R. 648, 2011 Bankr. LEXIS 3643 (2011).

Judgment creditor's conveyance of judgment to assignee was outright conveyance of property, not merely conveyance of naked right to bring action on judgment, and therefore assignment was not champertous on its face under District of Columbia law, even though judgment creditor was to be paid 50 percent of any recovery by assignee on judgment; conveyance assured assignee of right of setoff if it lost in judgment debtor's pending action against assignee, and promised recovery of 50 percent to judgment creditor if setoff occurred, which was recovery that it might not otherwise enjoy, as well as a benefit from any recovery obtained as a result of assignee's discovery efforts. Columbia Hosp. for Women Med. Ctr., Inc. v. NCRIC, Inc. (In re Columbia Hosp. for Women Med. Ctr., Inc.), 461 B.R. 648, 2011 Bankr. LEXIS 3643 (2011).

§ 28-2302. Assignment of bond or obligation.

An obligee named in a bond or obligation under seal for the payment of money may assign it in writing and the assignee may maintain an action thereon in his own name.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2302.
1973 Ed., § 28-2302.

CASE NOTES

ANALYSIS

Consent to assignment.
In general.

Consent to assignment.
Vendor consented to assignment by prospective purchaser of his interest in contract for sale of real estate, even though interim agreement allowing prospective purchaser and assignee to reside in the property contained antiassignment provision, where vendor accepted rental payments from assignee after date of the oral assignment agreement, and vendor did not object when prospective purchaser vacated the premises leaving assignee in sole possession of the house. D.C. Code §§ 28:9-102(1)(b), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

In general.
Generally, all contractual rights may be assigned, including right to sue for enforcement of claim. D.C. Code §§ 28:9-102(1)(b), 28:9-104(f), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

§ 28-2303. Assignment of nonnegotiable contract.

An owner of a nonnegotiable written agreement for the payment of money, including a nonnegotiable bill of exchange and a promissory note, or for the delivery of personal property, an open account, debt, and demand of a liquidated character, except a claim against the United States or the salary of a public officer, may assign it in writing, and the assignee may maintain an action thereon in his own name.

(Aug. 30, 1964, 78 Stat. 669, Pub. L. 88-509, § 1.)

Cross references. — Judicial procedure, counterclaims, effect of assignment, see § 13-502.
Liens on motor vehicles or trailers, assignment, see §§ 50-1208 and 50-1209.
Retirement of public school teachers, nonassignability of annuities, see § 38-2001.17.
Prior Codifications. — 1981 Ed., § 28-2303.
1973 Ed., § 28-2303.

CASE NOTES

ANALYSIS

Consent to assignment.
Construction and application.
Nature of right to assign.
Subrogation.
Sufficiency of assignment.

Consent to assignment.
Vendor consented to assignment by prospective purchaser of his interest in contract for sale of real estate, even though interim agreement allowing prospective purchaser and assignee to reside in the property contained antiassignment provision, where vendor ac-

cepted rental payments from assignee after date of the oral assignment agreement, and vendor did not object when prospective purchaser vacated the premises leaving assignee in sole possession of the house. D.C. Code §§ 28:9-102(1)(b), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Construction and application.

Statute on assignment of choses in action, which provides that owner of nonnegotiable written agreement for payment of money may assign it, embodies policy of free assignability of claims and does not cover only demands of a liquidated character. D.C. Code 1981, § 28-2303. Antal's Restaurant v. Lumbermen's Mut. Cas. Co., 680 A.2d 1386, 1996 D.C. App. LEXIS 161 (1996).

District of Columbia law evinces policy favoring assignability of claims. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994 D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

Nature of right to assign.

Under District of Columbia law, all claims are freely assignable and assignee is permitted to stand in the same position as the assignor. D.C. Code 1981,§ 28-2303. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 5 F.3d 554, 1993 U.S. App. LEXIS 25280 (C.A.D.C. 1993).

Generally, all contractual rights may be assigned, including right to sue for enforcement of claim. D.C. Code §§ 28:9-102(1)(b), 28:9-104(f), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Subrogation.

Under District of Columbia law, the assignment of rights under a contract creates an interest in the assignee, and any party that previously had an obligation to the assignor under the contract thereafter becomes obligated to the assignee and liable to it for failure to fulfill that obligation. Ned Chartering & Trading, Inc. v. Republic of Pak., 294 F.3d 148, 2002 U.S. App. LEXIS 13146 (C.A.D.C. 2002), appeal dismissed by 2002 U.S. App. LEXIS 17742 (D.C. Cir. Aug. 22, 2002).

Under District of Columbia law, assignee of charter party was subject to any defense available to obligor against assignor. Ned Chartering & Trading, Inc. v. Republic of Pak., 294 F.3d 148, 2002 U.S. App. LEXIS 13146 (C.A.D.C. 2002), appeal dismissed by 2002 U.S. App. LEXIS 17742 (D.C. Cir. Aug. 22, 2002).

Under District of Columbia law, defenses that assignor of charter party might have against assignee could not provide defense to obligor against assignee. Ned Chartering & Trading, Inc. v. Republic of Pak., 294 F.3d 148, 2002 U.S. App. LEXIS 13146 (C.A.D.C. 2002), appeal dismissed by 2002 U.S. App. LEXIS 17742 (D.C. Cir. Aug. 22, 2002).

Lender's payment to senior deed of trust beneficiary in connection with refinancing entitled lender to priority of the senior lien over judgment creditors' liens under the doctrine of equitable subrogation, even though the lender's promissory note required higher interest rate and allegedly required more exacting terms; the lender made the payment in its own interest, did not act as a volunteer, was not primarily liable, and satisfied the entire debt, and subrogation would work no injustice to the judgment creditors. E. Sav. Bank, FSB v. Pappas, 829 A.2d 953, 2003 D.C. App. LEXIS 533 (2003).

Equitable subrogation is appropriate where (1) payment was made by the subrogee to protect his own interest, (2) the subrogee has not acted as a volunteer, (3) the debt paid was one for which the subrogee was not primarily liable, (4) the entire debt has been paid, (5) subrogation would not work any injustice to the rights of others. E. Sav. Bank, FSB v. Pappas, 829 A.2d 953, 2003 D.C. App. LEXIS 533 (2003).

Equitable subrogation addresses the priority of liens held by creditors of the owner of property; the doctrine is applied where the subrogee effectively stands in the shoes of the original lienholder, and where the failure to apply it would unjustly enrich prior judgment creditors at the subrogee's expense. E. Sav. Bank, FSB v. Pappas, 829 A.2d 953, 2003 D.C. App. LEXIS 533 (2003).

Under doctrine of equitable subrogation, when one party has paid debt of another, justice requires that payor be able to recover his loss from party who should have paid it, in order to prevent unjust enrichment; rights of party who paid debt are in no way dependent upon showing of contract provision or formal assignment. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994 D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

Conventional subrogation arises from express or implied agreement between payor and debtor or creditor, in contrast to equitable subrogation, which arises from mere fact of payment by third party. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994 D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

Superior equities doctrine, under which equities of parties seeking subrogation must be greater than those of his adversary, applies only to equitable subrogation claims, and has no application in cases of conventional subrogation and assignment. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994

D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

Sufficiency of assignment.
Effectiveness of assignment does not normally depend upon consent of obligor unless rights to be assigned involve performance of unique personal services. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

§ 28-2304. General assignments including choses in action.

In a general assignment which includes choses in action, it is not necessary to execute a separate assignment of each chose in action, but the assignee, by virtue of the general assignment, may sue in his own name on the several choses in action included therein.

(Aug. 30, 1964, 78 Stat. 670, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2304.
1973 Ed., § 28-2304.

CASE NOTES

ANALYSIS

Consent to assignment.
Equitable indemnity claims.
In general.

Consent to assignment.
Vendor consented to assignment by prospective purchaser of his interest in contract for sale of real estate, even though interim agreement allowing prospective purchaser and assignee to reside in the property contained antiassignment provision, where vendor accepted rental payments from assignee after date of the oral assignment agreement, and vendor did not object when prospective purchaser vacated the premises leaving assignee in sole possession of the house. D.C. Code §§ 28:9-102(1)(b), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Equitable indemnity claims.
Wheelchair manufacturer could assign its equitable indemnity claim against medical providers to patient as part of manufacturer's settlement agreement with patient, who was injured when wheelchair malfunctioned and whose injuries were subsequently aggravated by medical providers; assignment of equitable indemnification claim to patient as part of settlement agreement could serve to limit providers' total exposure because patient could not recover more than the settlement amount, and any litigation against providers was the same litigation that manufacturer could or would have pursued if it had not assigned its claim for equitable indemnification to patient. Caglioti v. Dist. Hosp. Partners, LP, 933 A.2d 800, 2007 D.C. App. LEXIS 560 (2007).

Statute providing that, in a general assignment which includes choses in action, it is not necessary to execute a separate assignment of each chose in action, but the assignee, by virtue of the general assignment, may sue in his own name on the several choses in action included therein does not by its terms expressly authorize the assignment of equitable indemnity claims; however, nothing in the language of the statute expressly prohibits the assignment of an equitable indemnity claim. Caglioti v. Dist. Hosp. Partners, LP, 933 A.2d 800, 2007 D.C. App. LEXIS 560 (2007).

In general.
Public policy did not prohibit corporate client's assignment of legal malpractice claim against its former counsel to purchaser of some of client's assets and liabilities, and District of Columbia law did not prevent such assignment. D.C. Code 1981, § 28-2304. Richter v. Analex Corp., 940 F. Supp. 353, 1996 U.S. Dist. LEXIS 15081 (1996).

Insurer, as assignee and conventional subrogee of its insured, need not demonstrate superior equities in order to assert insured's rights against third party. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994 D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

District of Columbia law evinces policy favoring assignability of claims. National Union Fire Ins. Co. v. Riggs Nat'l Bank, 646 A.2d 966, 1994 D.C. App. LEXIS 134 (1994), remanded by 36 F.3d 127, 308 U.S. App. D.C. 313 (1994).

Generally, all contractual rights may be assigned, including right to sue for enforcement of

claim. D.C. Code §§ 28:9-102(1)(b), 28:9-104(f), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

§ 28-2305. Contract to assign future salary or wages.

(a) A contract attempting or purporting to transfer or assign salary or wages to be earned by the debtor, if made in the District of Columbia, is invalid and contrary to public policy and unenforceable, and if made outside the District of Columbia, is unenforceable in any court within the District of Columbia.

(b) Whoever, in the District of Columbia demands or receives from a debtor an assignment of salary or wages to be thereafter earned by the debtor, or notifies an employer that he holds an assignment of such salary or wages, upon conviction shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than sixty days. Prosecutions under this subsection shall be upon information filed in the Criminal Division of the Superior Court of the District of Columbia by the Corporation Counsel of the District of Columbia or one of his assistants.

(Aug. 30, 1964, 78 Stat. 670, Pub. L. 88-509, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); June 11, 2013, D.C. Law 19-317, § 285(a), 60 DCR 2064.)

Prior Codifications. — 1981 Ed., § 28-2305.

1973 Ed., § 28-2305.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "not more than the amount set forth in [§ 22-3571.01]" for "not more than $200" in (b).

Legislative history of Law 19-317. — Law 19-317, the "Criminal Fine Proportionality Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-214. The Bill was adopted on first and second readings on Oct. 16, 2012, and Nov. 1, 2012, respectively. Signed by the Mayor on Jan. 23, 2013, it was assigned Act No. 19-641 and transmitted to Congress for its review. D.C. Law 19-317 became effective on June 11, 2013.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

CHAPTER 25. BONDS AND UNDERTAKINGS.

§ 28-2501. Definitions.

A bond, when required by or referred to in this Code, means an obligation in a certain sum or penalty, subject to a condition, on breach of which it is to become absolute and enforceable by action.

An undertaking means an agreement entered into by a party to a suit or proceeding, with or without sureties, upon which a judgment or decree may be rendered in the same suit or proceeding against the party and his sureties, if any, the party and sureties submitting themselves to the jurisdiction of the court for that purpose.

(Aug. 30, 1964, 78 Stat. 670, Pub. L. 88-509, § 1.)

Cross references. — Attachment and garnishment, affidavits and bonds, see § 16-501.

Sureties, see § 16-4101 et seq.

Undertakings in replevin, see § 16-3704.

Prior Codifications. — 1981 Ed., § 28-2501.

1973 Ed., § 28-2501.

CASE NOTES

Liabilities on bonds.

While rule 73(f) was not available as a means of serving surety on attachment bond on defendant's motion for judgment against plaintiff and surety for damages sustained by the attachment, the ability of defendant to make service upon surety was not thereby necessarily foreclosed. D.C. Code 1961, §§ 16-301, 16-501, 28-2401, 28-2403; Fed.Rules Civ.Proc. rule 73(f), 18 U.S.C. Schmidt v. Smith, 344 F.2d 168, 1965 U.S. App. LEXIS 6663 (C.A.D.C. 1965).

§ 28-2502. Action on bonds in a penal sum containing an avoidance condition.

A bond in a penal sum, containing a condition that it shall be void on the payment of a certain sum of money, or the performance of an act or of certain duties, has the same effect for the purpose of maintaining an action upon it as if it contained a covenant to pay the money or perform the act or the duties specified in the condition. But the damages to be recovered for a breach, or successive breaches, of the condition, as against the sureties therein, may not exceed the penalty of the bond.

(Aug. 30, 1964, 78 Stat. 670, Pub. L. 88-509, § 1.)

Cross references. — Judgments and decrees, damages assessed in actions on bonds or penal sums, see § 15-106.

Section references. — This section is referenced in § 15-106.

Prior Codifications. — 1981 Ed., § 28-2502.

1973 Ed., § 28-2502.

§ 28-2503. Action on bond to United States — Interest by private person.

When a bond is executed to the United States by a fiduciary or public officer, conditioned for the performance of certain duties, in the performance of which private persons are interested, a person aggrieved by a breach of the condition may maintain an action thereon in his own name against the obligor and his sureties to recover damages for the injury suffered by him in consequence of the breach. The custodian of the bond shall furnish a certified copy thereof to the party for that purpose on payment of the legal fees therefor.

(Aug. 30, 1964, 78 Stat. 670, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2503.
1973 Ed., § 28-2503.

§ 28-2504. Fiduciary's bond — Discharge only after accounting.

A person appointed by order or decree of the court to a fiduciary office may not discharge his bond for the due performance of his duties, by receipts, releases, or acquittances from himself, as attorney for parties interested, to himself as fiduciary; but the funds or estate for the application whereof he is responsible shall be considered as remaining in his hands, and the bond shall continue in force as against both principal and sureties until the funds or estate are fully accounted for and paid over or delivered to the parties interested therein, or their attorney, other than himself.

(Aug. 30, 1964, 78 Stat. 671, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2504.
1973 Ed., § 28-2504.

CASE NOTES

Liability of surety.
Indefinite statutory conservator's bonds were continuous, rather than cumulative from year to year, and, thus, surety's liability for conservator's defalcations over several years was capped at face amount of bonds, even though conservator paid annual premiums; the annual premiums were simply installment payments, reflecting the fact that the longer the bond remained in effect, the greater the risk assumed by the surety, and the more the bond should cost. Beck v. Continental Cas. Co. (In re May), 936 A.2d 747, 2007 D.C. App. LEXIS 568 (2007).

CHAPTER 27. BUSINESS HOLIDAYS AND COMPUTATION OF TIME.

Subchapter I. Business Holidays.

§ 28-2701. Holidays designated — Time for performing acts extended.

The following days in each year, namely, New Year's Day, January 1; Dr. Martin Luther King, Jr.'s Birthday, the third Monday in January; Washington's Birthday, the third Monday in February; District of Columbia Emancipation Day, April 16; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veteran's Day, November 11; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25; every Saturday, after twelve o'clock noon; any day appointed by the President of the United States as a day of public feasting or thanksgiving; and the day of the inauguration of the President, in every fourth year, are holidays in the District for all purposes. When a day set apart as a legal holiday, other than the day of the inauguration of the President, falls on a Saturday, the next preceding day is a holiday. When a day set apart as a legal holiday falls on a Sunday, the next succeeding day is a holiday. In such cases, when a Sunday and a holiday or holidays fall on successive days, all commercial papers falling due on any of those days shall, for all purposes of presenting for payment or acceptance, be deemed to mature and be presentable for payment or acceptance on the next secular business day succeeding. Every Saturday is a holiday in the District for (1) every bank or banking institution having an office or banking house located within the District, (2) every Federal savings and loan association whose main office is in the District, and (3) every building association, building and loan association, or savings and loan association, incorporated or unincorporated, organized and operating under the laws of and having an office located within the District. An act which would otherwise be required, authorized, or permitted to be performed on Saturday in the District at the office or banking house of, or by, any such bank or bank institution, Federal savings and loan association, building association, building and loan association, or savings and loan association, if Saturday were not a holiday, shall or may be so performed on the next succeeding business day, and liability or loss of rights of any kind may not result from such delay.

(Aug. 30, 1964, 78 Stat. 671, Pub. L. 88-509, § 1; Aug. 1, 1975, D.C. Law 1-11, § 103, 22 DCR 1804; July 12, 1977, D.C. Law 2-13, § 2, 24 DCR 1443; Mar. 16, 1982, D.C. Law 4-77, § 2, 29 DCR 46; Mar. 14, 1985, D.C. Law 5-155, § 3, 32 DCR 11; Apr. 7, 2006, D.C. Law 16-91, § 109, 52 DCR 10637.)

Cross references. — Holidays, recognition of Dr. King's birthday, see § 1-504.

Merit system, continuation of existing laws, see § 1-632.06.

Section references. — This section is referenced in § 1-632.06 and § 47-1401.

Prior Codifications. — 1981 Ed., § 28-2701.

1973 Ed., § 28-2701.

Effect of amendments. — D.C. Law 16-91, substituted "the third Monday in February; District of Columbia Emancipation Day, April 16;" for "the third Monday in February;".

Legislative history of Law 1-11. — Law 1-11, the "King Birthday Act of 1975," was introduced in Council and assigned Bill No. 1-2, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on April 15, 1975 and April 29, 1975, respectively. Signed by the Mayor on May 28, 1975, it was assigned Act No. 1-16 and transmitted to both Houses of Congress for its review.

Legislative history of Law 2-13. — Law 2-13, the "Dr. King's Birthday Act of 1977," was introduced in Council and assigned Bill No. 2-35, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on March 22, 1977 and April 5, 1977, respectively. Signed by the Mayor on May 2, 1977, it was assigned Act No. 2-35 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-77. — Law 4-77, the "District of Columbia Legal Holiday Clarification Act of 1981," was introduced in Council and assigned Bill No. 4-288, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 10, 1981, and November 24, 1981, respectively. Approved without the signature of the Mayor on December 15, 1981, it was assigned Act No. 4-125 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-155. — Law 5-155, the "Martin Luther King, Jr., Birthday Holiday Conformity Act of 1984," was introduced in Council and assigned Bill No. 5-322, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on November 7, 1984, and December 4, 1984, respectively. Signed by the Mayor on December 10, 1984, it was assigned Act No. 5-220 and transmitted to both Houses of Congress for its review.

Legislative history of Law 16-91. — Law 16-91, the "Technical Amendments Act of 2005", was introduced in Council and assigned Bill No. 16-477 which was referred to the Committee on the Whole. The Bill was adopted on first and second readings on November 1, 2005, and November 15, 2005, respectively. Signed by the Mayor on November 30, 2005, it was assigned Act No. 16-212 and transmitted to both Houses of Congress for its review. D.C. Law 16-91 became effective on April 7, 2006.

Effective date. — Section 4(b) of D.C. Law 5-155 provided that §§ 2 and 3 of the act shall take effect January 1, 1986.

CASE NOTES

Construction and application.

While the Federal Energy Regulatory Commission contended that cities' January 16, 1980 petition for review of the Commission's Opinion No. 63-A, which concluded agency proceedings on nonprice squeeze issues, was filed one day late, thus precluding Court of Appeals' jurisdiction to decide the nonprice squeeze issues, cities' petition was in fact timely filed, since January 15, 1980 was the birthday of Dr. Martin Luther King and was a legal holiday in the District of Columbia. Federal Power Act, § 313(b), 16 U.S.C. § 825l (b); D.C. Code 1973, § 28-2701; D.C. Code 1981, § 1-503. Batavia, Naperville, etc. v. Federal Energy Regulatory Com., 672 F.2d 64, 1982 U.S. App. LEXIS 21954 (C.A.D.C. 1982).

Subchapter II. Computation of Time.

§ 28-2711. Daylight savings time.

The standard time applicable in the District of Columbia shall be advanced by one hour from 2:00 a.m. on the second Sunday in March of each year until 2:00 a.m. on the first Sunday in November of each year and this time, known as daylight savings time, shall, during the period of the year for which it is applicable, be the standard time for the District of Columbia.

(Aug. 30, 1964, 78 Stat. 672, Pub. L. 88-509, § 1; Mar. 13, 1985, D.C. Law

5-133, § 2, 31 DCR 5720; Apr. 9, 1997, D.C. Law 11-255, § 27(b), 44 DCR 1271; Dec. 2, 2011, D.C. Law 19-45, § 3, 58 DCR 8937.)

Section references. — This section is referenced in § 25-723.

Prior Codifications. — 1981 Ed., § 28-2711.

1973 Ed., § 28-2711.

Effect of amendments. — D.C. Law 19-45 substituted "2:00 a.m. on the second Sunday in March of each year until 2:00 a.m. on the first Sunday in November" for "2:00 AM on the last Sunday in April of each year until 2:00 AM on the last Sunday in October".

Legislative history of Law 5-133. — Law 5-133, the "District of Columbia Daylight Saving Time Act of 1984," was introduced in Council and assigned Bill No. 5-427, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on September 25, 1984, and October 9, 1984, respectively. Signed by the Mayor on October 25, 1984, it was assigned Act No. 5-191 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 19-45. — Law 19-45, the "Daylight Savings Time Extension of Hours Act of 2011", was introduced in Council and assigned Bill No. 19-119, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on July 12, 2011, and September 21, 2011, respectively. Signed by the Mayor on October 11, 2011, it was assigned Act No. 19-175 and transmitted to both Houses of Congress for its review. D.C. Law 19-45 became effective on December 2, 2011.

CHAPTER 29. FIDUCIARY SECURITY TRANSFERS.

§ 28-2901. Definitions.

In this chapter, unless the context otherwise requires:

(1) "assignment" includes a written stock power, bond power, bill of sale, deed, declaration of trust or other instrument of transfer;

(2) "claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee, or a minor owner of a security registered in the name of a custodian, or a claim of a similar interest, whether the claim is asserted by the claimant, or by a fiduciary, or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties;

(3) "corporation" means a private or public corporation, association, or trust issuing a security;

(4) "fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian, or nominee;

(5) "person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or other legal or commercial entity;

(6) "security" includes a share of stock, bond, debenture, note, or other security issued by a corporation which is registered as to ownership on the books of the corporation;

(7) "transfer" means a change on the books of a corporation in the registered ownership of a security;

(8) "transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation.

(Aug. 30, 1964, 78 Stat. 672, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2901.

1973 Ed., § 28-2901.

Editor's notes. — Uniform Law: This section is based upon § 1 of the Uniform Act for Simplification of Fiduciary Security Transfers.

CASE NOTES

Fiduciary.

Under District of Columbia law, an entity, whether or not recognized as a fiduciary, must be recognized as one with capacity to sue to bring action, and therefore committee that was established pursuant to Chapter 11 plan to oversee proceedings on behalf of unsecured creditors did not have capacity to bring common-law causes of action against debtors' prepetition auditing firm in committee's common name under District of Columbia law even if it acted as a fiduciary under District of Columbia law. Plan Comm. v. PricewaterhouseCoopers, LLP, 335 B.R. 234,

2005 U.S. Dist. LEXIS 18889 (2005), dismissed by 2007 U.S. Dist. LEXIS 29240 (D.D.C. Apr. 20, 2007).

§ 28-2902. Registration in name of a fiduciary.

A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security.

(Aug. 30, 1964, 78 Stat. 672, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2902.
1973 Ed., § 28-2902.

Editor's notes. — Uniform Law: This section is based upon § 2 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2903. Assignment by fiduciary.

Except as otherwise provided by this chapter, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

(1) may assume without inquiry that the assignment, even though to the fiduciary himself or his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;

(2) may assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(3) is not charged with notice of and is not bound to obtain or examine any court record or recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession.

(Aug. 30, 1964, 78 Stat. 673, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2903.
1973 Ed., § 28-2903.

Editor's notes. — Uniform Law: This section is based upon § 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2904. Evidence of appointment of incumbency.

A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall require the following evidence of appointment or incumbency:

(1) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof, and dated within sixty days before the transfer; or

(2) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the

corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt reasonable standards with respect to evidence of appointment or incumbency under this subsection. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subsection except to the extent that the contents relate directly to the appointment or incumbency.

(Aug. 30, 1964, 78 Stat. 673, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2904.
1973 Ed., § 28-2904.

Editor's notes. — Uniform Law: This section is based upon § 4 of the Uniform Act for Simplification of Fiduciary Security Transfers.

CASE NOTES

ANALYSIS

Parties.
Venue.

Parties.
Supplemental briefing was required to address whether liability insurer's request for transfer of venue would destroy diversity of suit claiming that insurer violated District of Columbia's Consumer Protection Procedures Act (CPPA) in processing third-party claims under motor vehicle policy and first-party claim under homeowner's policy. Cooper v. Farmers New Century Ins. Co., 593 F.Supp.2d 14, 2008 U.S. Dist. LEXIS 104593 (2008).

Venue.
Venue for suit claiming that liability insurer violated District of Columbia's Consumer Protection Procedures Act (CPPA) in processing third-party claims under motor vehicle policy and first-party claim under homeowner's policy was proper in district where insurer resided as corporation subject to personal jurisdiction at time suit was commenced, rather than in district where substantial part of underlying events giving rise to claims or any related activity occurred. Cooper v. Farmers New Century Ins. Co., 593 F.Supp.2d 14, 2008 U.S. Dist. LEXIS 104593 (2008).

§ 28-2905. Adverse claims.

(a) A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may notify in writing the corporation or transfer agent of the claim. The corporation or transfer agent is not put on notice unless the written notice (1) identifies the claimant, the registered owner, and the issue of which the security is a part, (2) provides an address for communications directed to the claimant, and (3) is received before the transfer. This chapter does not relieve the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice, unless it proceeds in the manner authorized by subsection (b).

(b) As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order.

(Aug. 30, 1964, 78 Stat. 673, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2905.
1973 Ed., § 28-2905.

Editor's notes. — Uniform Law: This section is based upon § 5 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2906. Nonliability of corporation and transfer agent.

A corporation or transfer agent does not incur liability to any person by making a transfer or otherwise acting in a manner authorized by this chapter.

(Aug. 30, 1964, 78 Stat. 674, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2906.
1973 Ed., § 28-2906.

Editor's notes. — Uniform Law: This section is based upon § 6 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2907. Nonliability of third persons.

(a) A person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary including a person who guarantees the signature of the fiduciary is not liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

(b) When a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this chapter incurs no liability.

(c) This section does not impose any liability upon the corporation or its transfer agent.

(Aug. 30, 1964, 78 Stat. 674, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2907.
1973 Ed., § 28-2907.

Editor's notes. — Uniform Law: This section is based upon § 7 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2908. Territorial application.

(a) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

(b) This chapter applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in the District of Columbia in connection with the acquisition, disposition, assignment or transfer of a security by or to a fiduciary and of a person who guarantees in the District of Columbia the signature of a fiduciary in connection with such a transaction.

(Aug. 30, 1964, 78 Stat. 674, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2908.
1973 Ed., § 28-2908.

Editor's notes. — Uniform Law: This section is based upon § 8 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 28-2909. Tax obligations.

This chapter does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession, or other taxes imposed by the laws of the District of Columbia.

(Aug. 30, 1964, 78 Stat. 674, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-2909.
1973 Ed., § 28-2909.

Editor's notes. — Uniform Law: This section is based upon § 9 of the Uniform Act for Simplification of Fiduciary Security Transfers.

CHAPTER 31. FRAUDULENT CONVEYANCES.

§ 28-3101. Definitions.

For the purposes of this chapter, the term:

(1) "Affiliate" means:

(A) A person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) As a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) Solely to secure a debt, if the person has not exercised the power to vote;

(B) A corporation having 20% or more of its outstanding voting securities that are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) As a fiduciary or agent without sole power to vote the securities; or

(ii) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(C) A person whose business is operated by the debtor under a lease or other agreement, or a person whose assets are substantially all controlled by the debtor; or

(D) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

(A) Property to the extent it is encumbered by a valid lien;

(B) Property to the extent it is generally exempt under nonbankruptcy law; or

(C) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(A) If the debtor is an individual:

(i) A relative of the debtor or of a general partner of the debtor;

(ii) A partnership in which the debtor is a general partner;

(iii) A general partner in a partnership described in sub-subparagraph (ii) of this subparagraph;

(iv) A corporation of which the debtor is a director, officer, or person in control;

(v) An unincorporated business organization in which the debtor has capital participation as a member or partner with limitation of liability for that participation, if that capital participation includes the right to conduct the business of the organization; or

(vi) A member or partner in an unincorporated business organization described in sub-subparagraph (v) of this subparagraph who has the right to conduct the business of the organization or who controls the organization;

(B) If the debtor is a corporation:

(i) A director of the debtor;

(ii) An officer of the debtor;

(iii) A person in control of the debtor;

(iv) A partnership in which the debtor is a general partner;

(v) A general partner in a partnership described in sub-subparagraph (iv) of this subparagraph; or

(vi) A relative of a general partner, director, officer, or person in control of the debtor;

(C) If the debtor is a partnership:

(i) A general partner in the debtor;

(ii) A relative of a general partner in, or a general partner of, the partnership, or a person in control of the debtor;

(iii) Another partnership in which the debtor is a general partner;

(iv) A general partner in a partnership described in sub-subparagraph (iii) of this subparagraph; or

(v) A person in control of the debtor;

(D) If the debtor is an unincorporated business organization in which members or partners receive limitation of liability for their capital participation in the organization:

(i) A member or partner of the organization who has the right to conduct the business of the organization;

(ii) A person who controls the organization; or

(iii) A relative of a person described in sub-subparagraph (i) or (ii) of this subparagraph;

(E) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(F) A managing agent of the debtor.

(8) "Lien" means a charge against, or an interest in, property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of, or parting with, an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

(Aug. 30, 1964, 78 Stat. 674, Pub. L. 88-509, § 1; Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Prior Codifications. — 1981 Ed., § 28-3101.

1973 Ed., § 28-3101.

Legislative history of Law 11-83. — Law 11-83, the "Uniform Fraudulent Transfer Act of 1995," was introduced in Council and assigned Bill No. 11-228, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 10, 1995, and November 7, 1995, respectively. Signed by the Mayor on November 27, 1995, it was assigned Act No. 11-160 and transmitted to both Houses of Congress for its review. D.C. Law 11-83 became effective on February 9, 1996.

Editor's notes. — Uniform Law: This section is based upon § 1 of the Uniform Fraudulent Transfer Act.

CASE NOTES

ANALYSIS

Choice of law.
Construction and application.
Fraudulent conveyances, generally.
Presumptions and burden of proof.
Summary judgment.

Choice of law.

Fraudulent conveyance action arising out of judgment debtor's contribution of $500,000 to political fund-raising committee for seat at presidential table during fund-raising event would be governed by California, and not District of Columbia, fraudulent transfer law, though committee to which funds were contributed was resident of District of Columbia; committee solicited funds nationally, including in California where funds in question originated, judgment debtor was resident of California, and California was situs of relationship between judgment creditors and debtor. Deering's Cal. Civ. Code § 3439.05; D.C. Code 1981, § 28-3101. 1992 Republican Senate-House Dinner Comm. v. Carolina's Pride Seafood, 858 F. Supp. 243, 1994 U.S. Dist. LEXIS 10470 (1994), vacated by, dismissed by 158 F.R.D. 223, 1994 U.S. Dist. LEXIS 16080 (D.D.C. 1994).

Construction and application.

District of Columbia statute addressing creditor's ability to avoid fraudulent transfers is to be liberally construed to suppress fraud. D.C. Code 1981, § 28-3101. Federal Kemper Life Assurance Co. v. Wolensky's L.P. (In re Wolensky's Ltd. Partnership), 163 B.R. 615, 1993 Bankr. LEXIS 2053 (1993).

Transfer of brokerage accounts did not violate former Fraudulent Conveyance Act where, because of presumption that married couple owning property jointly hold it as tenancy by the entireties, spouses held brokerage accounts as tenancy by the entireties even before the challenged transfer and, thus, there was no "conveyance or assignment" for judgment creditor to challenge. D.C. Code 1981, § 28-3101 (1994). Roberts & Lloyd, Inc. v. Zyblut, 691 A.2d 635, 1997 D.C. App. LEXIS 44 (1997).

Fraudulent conveyances, generally.

Trustee for Chapter 7 debtor limited partner-

ship could bring fraudulent conveyance action with respect to keyman life policy with no cash surrender value insuring life of president of corporate general partner in the event that transfer of policy resulting when president substituted his wife for limited partnership as beneficiary was valid; because limited partnership was original beneficiary under policy, its creditors would have been entitled to proceeds but for transfer. D.C. Code 1981, §§ 28-3101, 28-3103. Federal Kemper Life Assurance Co. v. Wolensky's L.P. (In re Wolensky's Ltd. Partnership), 163 B.R. 615, 1993 Bankr. LEXIS 2053 (1993).

Successor personal representative of decedent's estate in the District of Columbia could not recover from former personal representative's bankruptcy trustee house that was in decedent's estate and conveyed by former representative to herself individually as decedent's heir on fraudulent conveyance theory; District of Columbia statute dealing with fraudulent conveyances provides that title of purchaser for value is not affected unless it appears that he had previous notice of fraudulent intent of immediate grantor, and bankruptcy trustee had authority of hypothetical bona fide purchaser of real property. Bankr.Code, 11 U.S.C. § 544(a)(3); D.C. Code 1981, § 28-3101. In re Dockery, 116 B.R. 1, 1990 Bankr. LEXIS 1406 (1990).

Conduct of judgment debtor, an insurance company, in transferring its building to wholly owned subsidiary in exchange for promissory note after entry of the judgment debt constituted a fraudulent conveyance, although there was a genuine issue of material fact as to evidence surrounding conclusion that wholly owned subsidiary was not a purchaser for value of building; undisputed fact that judgment debtor transferred building to wholly owned subsidiary to protect building from judgment creditor was clear and convincing evidence of fraudulent intent and many people involved in transfer were officers in both judgment debtor and wholly owned subsidiary so that wholly owned subsidiary had notice of fraudulent intent. D.C. Code 1981, § 28-3101. Consumers United Ins. Co. v. Smith, 644 A.2d 1328, 1994 D.C. App. LEXIS 103 (1994).

Badges of fraud which support conclusion that transferor of property had fraudulent intent, for purposes of establishing of fraudulent conveyance, include lack of consideration for conveyance, close relationship between transferor and transferee, pendency or right of litigation, financial difficulties of transferor, and retention of possession, control, or benefit of property by transferor. D.C. Code 1981, § 28-3101. Consumers United Ins. Co. v. Smith, 644 A.2d 1328, 1994 D.C. App. LEXIS 103 (1994).

Presumptions and burden of proof.

To set aside transfer as fraudulent under District of Columbia law, creditor must prove by clear and convincing evidence that debtor made transfer with actual intent to defraud creditors. D.C. Code 1981, § 28-3101. 1992 Republican Senate-House Dinner Comm. v. Carolina's Pride Seafood, 858 F. Supp. 243, 1994 U.S. Dist. LEXIS 10470 (1994), vacated by, dismissed by 158 F.R.D. 223, 1994 U.S. Dist. LEXIS 16080 (D.D.C. 1994).

Party challenging conveyance as fraudulent has burden of proving intent to hinder by clear and convincing evidence. D.C. Code 1981, § 28-3101 (1994). Roberts & Lloyd, Inc. v. Zyblut, 691 A.2d 635, 1997 D.C. App. LEXIS 44 (1997).

Creditors claiming that debtor's conveyance of property was a fraudulent conveyance must prove fraud as a matter of fact by clear and convincing evidence. D.C. Code 1981, § 28-3101. Consumers United Ins. Co. v. Smith, 644 A.2d 1328, 1994 D.C. App. LEXIS 103 (1994).

Creditors with claims at time of conveyance as well as those whose claims arise subsequent thereto must prove fraud in conveyance as matter of fact, and must do so by clear and convincing evidence. D.C. Code 1981, § 28-3101. District-Realty Title Ins. Corp. v. Forman, 518 A.2d 1004, 1986 D.C. App. LEXIS 492 (1986).

Summary judgment.

Genuine issue of material fact as to intent of president of corporate general partner at time president replaced limited partnership as beneficiary of keyman life policy with his wife, without consideration, precluded summary judgment in favor of wife in fraudulent conveyance action brought by trustee for Chapter 7 debtor limited partnership. D.C. Code 1981, §§ 28-3101 to 28-3103. Federal Kemper Life Assurance Co. v. Wolensky's L.P. (In re Wolensky's Ltd. Partnership), 163 B.R. 615, 1993 Bankr. LEXIS 2053 (1993).

§ 28-3102. Insolvency.

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.

(b) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of

all of the partnership's assets, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Prior Codifications. — 1981 Ed., § 28-3102.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 2 of the Uniform Fraudulent Transfer Act.

§ 28-3103. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred, or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of sections 28-3104(a)(2) and 28-3105, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Cross references. — Attachment and garnishment, actions for fraudulent conveyance, see §§ 16-501 and 16-529.

Landlord and tenant, fraudulent attornment, see § 42-3232.

Prior Codifications. — 1981 Ed., § 28-3103.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 3 of the Uniform Fraudulent Transfer Act.

CASE NOTES

In general.

Change of beneficiary on life insurance policy is proper basis of fraudulent conveyance action by creditor who would have had interest in proceeds but for transfer. D.C. Code 1981, §§ 28-3101, 28-3103. Federal Kemper Life Assurance Co. v. Wolensky's L.P. (In re Wolensky's Ltd. Partnership), 163 B.R. 615, 1993 Bankr. LEXIS 2053 (1993).

Trustee for Chapter 7 debtor limited partnership could bring fraudulent conveyance action with respect to keyman life policy with no cash surrender value insuring life of president of corporate general partner in the event that

transfer of policy resulting when president substituted his wife for limited partnership as beneficiary was valid; because limited partnership was original beneficiary under policy, its creditors would have been entitled to proceeds but for transfer. D.C. Code 1981, §§ 28-3101, 28-3103. Federal Kemper Life Assurance Co. v. Wolensky's L.P. (In re Wolensky's Ltd. Partnership), 163 B.R. 615, 1993 Bankr. LEXIS 2053 (1993).

§ 28-3104. Transfers fraudulent as to present and future creditors.

(a) A transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Section references. — This section is referenced in § 28-3103, § 28-3108, and § 28-3109.

Prior Codifications. — 1981 Ed., § 28-3104.

Legislative history of Law 11-83. — For

legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 4 of the Uniform Fraudulent Transfer Act.

§ 28-3105. Transfers fraudulent as to present creditors.

(a) A transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Section references. — This section is referenced in § 28-3103, § 28-3108, and § 28-3109.

Prior Codifications. — 1981 Ed., § 28-3105.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 5 of the Uniform Fraudulent Transfer Act.

§ 28-3106. When transfer is made or obligation is incurred.

For the purposes of this chapter:

(1) A transfer is made:

(A) With respect to an asset that is real property other than a fixture, including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(B) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in paragraph (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in paragraph (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(A) If oral, when it becomes effective between the parties; or

(B) If evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773; Apr. 9, 1997, D.C. Law 11-255, § 27(c), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-3106.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Editor's notes. — Uniform Law: This section is based upon § 6 of the Uniform Fraudulent Transfer Act.

§ 28-3107. Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in section 28-3108, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by sections 16-501 through 16-584;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Section references. — This section is referenced in § 28-3108.

Prior Codifications. — 1981 Ed., § 28-3107.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 7 of the Uniform Fraudulent Transfer Act.

§ 28-3108. Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under section 28-3104(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is

voidable in an action by a creditor under section 28-3107(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on, or a right to retain, any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under section 28-3104(a)(2) or section 28-3105 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with sections 28:9-101 through 28:9-507.

(f) A transfer is not voidable under section 28-3105(b):

(1) To the extent the insider gave new value to, or for the benefit of, the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Section references. — This section is referenced in § 28-3107.

Prior Codifications. — 1981 Ed., § 28-3108.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 8 of the Uniform Fraudulent Transfer Act.

§ 28-3109. Extinguishment of cause of action.

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) Under section 28-3104(a)(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was, or could reasonably have been discovered by the claimant;

(2) Under section 28-3104(a)(2) or section 28-3105(a), within 4 years after the transfer was made or the obligation was incurred; or

(3) Under section 28-3105(b), within 1 year after the transfer was made or the obligation was incurred.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Prior Codifications. — 1981 Ed., § 28-3109.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 9 of the Uniform Fraudulent Transfer Act.

§ 28-3110. Supplementary provisions.

Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the laws relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this chapter.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Prior Codifications. — 1981 Ed., § 28-3110.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 10 of the Uniform Fraudulent Transfer Act.

§ 28-3111. Uniformity of application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

(Feb. 9, 1996, D.C. Law 11-83, § 2, 42 DCR 6773.)

Prior Codifications. — 1981 Ed., § 28-3111.

Legislative history of Law 11-83. — For legislative history of D.C. Law 11-83, see Historical and Statutory Notes following § 28-3101.

Editor's notes. — Uniform Law: This section is based upon § 11 of the Uniform Fraudulent Transfer Act.

CHAPTER 31A. DISHONORED CHECKS.

§ 28-3151. Definitions.

For the purposes of this chapter, the term "merchant" means a person who does or would sell, lease, or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice.

(May 12, 2006, D.C. Law 16-93, § 2, 53 DCR 1645; Mar. 25, 2009, D.C. Law 17-353, § 301, 56 DCR 1117.)

Effect of amendments. — D.C. Law 17-353 added this section to Title 28, an enacted title of the District of Columbia Official Code.

Legislative history of Law 16-93. — Law 16-93, the "Dishonored Check Act of 2005", was introduced in Council and assigned Bill No. 16-55 which was referred to the Committee on Judiciary. The Bill was adopted on first and second readings on January 4, 2006, and February 7, 2006, respectively. Signed by the Mayor on February 27, 2006, it was assigned Act No. 16-288 and transmitted to both Houses of Congress for its review. D.C. Law 16-93 became effective on May 12, 2006.

Legislative history of Law 17-353. — Law 17-353, the "Technical Amendments Act of 2008", was introduced in Council and assigned Bill No. 17-994 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 2, 2008, and December 16, 2008, respectively. Signed by the Mayor on January 15, 2009, it was assigned Act No. 17-687 and transmitted to both Houses of Congress for its review. D.C. Law 17-353 became effective on March 25, 2009.

§ 28-3152. Merchant's civil recovery for dishonored checks.

(a) Any person who, for himself or herself, or for another person, with intent to defraud, makes, draws, utters, or delivers any check, draft, order, or other instrument for the payment of money for goods or services upon any bank or other depository and knows or should have known that payment of the check, draft, order, or other instrument for the payment of money for goods or services will be refused by the drawee bank or other depository, either because the drawer does not have sufficient funds in or credit with the bank or other depository, or the drawer, with intent to defraud, has ordered a stop payment on the check, draft, order, or other instrument for the payment of money for goods or services, shall be civilly liable to the payee who has presented the check, draft, order, or other instrument for the payment of money as provided in this section.

(b) A person shall be liable under subsection (a) of this section only if the check, draft, order, or other instrument for payment of money is dishonored and the drawer fails to pay the face amount of that check, draft, order, or other instrument for payment of money within 30 days following the mailing by the merchant of a written demand for payment as provided in subsection (f) of this section.

(c) Any person liable under subsection (a) of this section shall be liable to the merchant for the face amount of the check, and:

(1) Additional damages in the amount of 2 times the amount of the check, draft, order, or other instrument for the payment of money, or $100, whichever is greater;

(2) Costs; and

(3) Reasonable attorney fees.

(d) The refusal of the drawee bank or other depository to make payment on a check, draft, order, or other instrument because the drawer does not have sufficient funds in or credit with the bank or other depository shall be prima facie evidence of the drawer's intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository.

(e) The additional damages authorized under subsection (c)(1) of this section shall only be available to those merchants that post or otherwise give conspicuous notice at their place of business of the additional damages, including reference to the section of law authorizing the additional damages.

(f) The written demand for payment of the dishonored check, draft, order, or other instrument for the payment of money required by subsection (b) of this section shall be in the form prescribed in subsection (g) of this section and shall be sent to the drawer's last known residence address and the last known place of business, if any, by first-class mail and by certified mail, return receipt requested with delivery restricted to the drawer, on or after the date the merchant received notice that the check, draft, order, or other instrument for the payment of money has been dishonored.

(g) The written demand for payment required by subsection (f) of this section shall be in substantially the following form and shall be printed in at least 10-point type:

"DEMAND FOR PAYMENT OF DISHONORED CHECK, DRAFT, ORDER, OR OTHER INSTRUMENT FOR THE PAYMENT OF MONEY

Notice: You may be sued 30 days after this notice if you don't make payment within 30 days of this notice

DATE:

TO: Name of Drawer
Last known residence address
or place of business

YOUR CHECK, DRAFT, ORDER, OR OTHER INSTRUMENT FOR THE PAYMENT OF MONEY IN THE AMOUNT OF $ ______, DATED ______________, PAYABLE TO THE ORDER OF ____________________ HAS BEEN DISHONORED BY THE BANK/DEPOSITORY UPON WHICH IT WAS DRAWN, BECAUSE:

( ) YOU HAD NO ACCOUNT WITH THAT BANK/DEPOSITORY

( ) YOU HAD INSUFFICIENT FUNDS OR CREDIT WITH THAT BANK/DEPOSITORY

( ) A STOP PAYMENT ORDER WAS ISSUED

( ) OTHER (specify)

IF YOU DO NOT MAKE PAYMENT, YOU COULD BE SUED UNDER SECTION _______ OF THE DISTRICT OF COLUMBIA OFFICIAL CODE TO RECOVER PAYMENT. IF JUDGMENT IS RENDERED AGAINST YOU IN COURT, IT MAY ALSO INCLUDE NOT ONLY THE ORIGINAL FACE AMOUNT OF THE CHECK, BUT ALSO ADDITIONAL DAMAGES, AS FOLLOWS:

(1) TWO TIMES THE FACE AMOUNT OF THE CHECK, OR $100, WHICHEVER IS GREATER;
(2) COSTS; AND
(3) REASONABLE ATTORNEY FEES.

NAME OF PAYEE:

(PHONE NUMBER)

ADDRESS TO WHICH PAYMENT SHOULD BE DELIVERED

IF YOU DISPUTE ANY OF THE FACTS LISTED ABOVE, CONTACT THE PAYEE IMMEDIATELY.".

(h) The remedies provided by this chapter are in addition to civil remedies otherwise provided by law.

(i) The recovery of damages from the alleged offender shall not prohibit criminal prosecution of the alleged offender under § 22-1510.

(j) The recovery of civil damages by a merchant or a finding of liability under this chapter shall not be admissible in a criminal proceeding.

(k) A conviction or plea of guilty of making, drawing, or uttering a check, draft, order, or other instrument for payment of money with the intent to defraud under § 22-1510 is not a prerequisite to the maintenance of a civil action under this chapter.

(May 12, 2006, D.C. Law 16-93, § 3, 53 DCR 1645; Mar. 25, 2009, D.C. Law 17-353, § 301, 56 DCR 1117.)

Effect of amendments. — D.C. Law 17-353 added this section to Title 28, an enacted title of the District of Columbia Official Code.

Legislative history of Law 16-93. — For Law 16-93, see notes following § 28-3151.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 28-3151.

CHAPTER 33. INTEREST AND USURY.

§ 28-3301. Rate of interest expressed in contract.

(a) Except as otherwise provided in this section, section 28-3308, and chapter 36 of this subtitle, the parties to an instrument in writing for the payment of money at a future time may contract therein for the payment of interest on the principal amount thereof at a rate not exceeding 24% per annum.

(b) It shall be lawful to contract for a rate of interest not exceeding 24% per annum on a loan or financial transaction which is secured by: (1) a first purchase mortgage or first purchase deed of trust on residential real property; (2) a first purchase security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization; or (3) the assignment by way of a first security of the borrower's interest in the proprietary lease or first right of tenancy in property covered by such organization. The first sentence of this subsection shall apply only to a loan or financial transaction which is both contracted for and consummated after the effective date of the Interest Rate Ceiling Amendment Act of 1983 and for which no written commitment to make the loan or financial transaction at a lower rate of interest was issued by the lender to the borrower prior to the effective date of the Interest Rate Ceiling Amendment Act of 1983.

(c) It shall be lawful to contract for a rate of interest not exceeding 24% per annum on a loan or financial transaction which is secured directly or indirectly by: (1) a mortgage or deed of trust, other than a first purchase mortgage or first purchase deed of trust, on residential real property; (2) a security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization; or (3) the assignment by way of a security, other than a first security interest, of the borrower's interest in the proprietary lease or first right of tenancy in property covered by such organization. The first sentence of this subsection shall apply only to a loan or financial transaction which is both contracted for and consummated after the effective date of the Interest Rate Ceiling Amendment Act of 1983 and for which no written commitment to make the loan or financial transaction at a lower rate of interest was issued by the lender to the borrower prior to the effective date of the Interest Rate Ceiling Amendment Act of 1983.

(d) Notwithstanding any other provision of this chapter:

(1) any loan, except a loan which is secured directly or indirectly by a mortgage or deed of trust on residential real property, or by a security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization, or by the assignment by the way of a security of the borrower's interest in the proprietary lease or right of tenancy in property covered by a cooperative housing organization and the residential real property or cooperative is the place of residence of the borrower, where the borrower receives the use of an amount in excess of $2,500 shall not be subject to the provisions of this chapter and it shall be lawful to contract for, or receive, any rate of interest thereon if any of the following conditions are satisfied:

(A) the borrower is a not for profit corporation, whether organized under the laws of the United States, the District of Columbia, or any other jurisdiction; or

(B) the borrower is an individual, group of individuals, corporation, unincorporated association, partnership, or other entity, and the loan is made for the purpose of acquiring or carrying on a business, professional, or commercial activity; or

(C) the borrower is an individual, a group of individuals, corporation, unincorporated association, partnership, or any other entity, and the loan is made for the purpose of acquiring any real or personal property as an investment or for carrying on an investment activity; or

(D) the borrower is a religious society, formed under, or subject to, Chapter 4 of Title 29, and the loan is made for the purpose of acquiring or making an improvement on any real or personal property for purposes other than commercial or investment activities.

(2) any loan where the borrower receives the use of an amount in excess of $1,000 which is secured directly or indirectly by a mortgage or deed of trust on residential real property, or by a security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization, or by the assignment by the way of a security of the borrower's interest in the proprietary lease or right of tenancy in property covered by a cooperative housing organization and the residential real property or cooperative is the place of residence of the borrower, shall only be subject to the provisions of D.C. Official Code, sections 28-3301(f), 28-3310, 28-3311, 28-3312, 28-3313, and 28-3314, and it shall be lawful to contract for any rate of interest thereon if any of the conditions set forth in D.C. Official Code, section 28-3301(d)(1)(A), (B), (C), or (D) are satisfied.

(3) a lender shall not require a borrower to make any sworn statement or characterization that the loan meets the requirements of subsections (d)(1)(A), (B), (C), or (D) of this section if such statement or characterization is not true. Nothing contained in this subsection shall be construed to limit a lender's right to request information from the borrower which enables a lender to make a determination that the loan meets the requirements of subsections (d)(1)(A), (B), (C), or (D).

(e)(1) "Point" means a fee, premium, bonus, loan origination fee, service charge, or any other charge equal to 1% or less of the principal amount of a loan

which is charged by the lender at or before the time the loan is made as additional compensation for the loan. The term "point" shall not include any increase in the purchase price of the residential real property or the first purchase security interest in stock, or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization, or the borrower's interest in a proprietary lease or first right of tenancy in the property covered by such organization which is charged by the seller (i) to recover the cost of compensation to a lender for agreeing to make a loan to the borrower which results in a reduction in the effective rate of interest charged to the borrower or (ii) in the case of a first purchase mortgage or first purchase deed of trust, to recover the cost to the seller of his agreement to reduce the effective rate of interest on the first purchase mortgage or first purchase deed of trust or (iii) any monies deposited by a borrower in a savings account to be applied to subsidize scheduled periodic payments on the loan or financial transaction.

(2) A lender may not charge a borrower more than 1 point unless the borrower agrees to pay additional points to a lender for the sole purpose of qualifying for and obtaining a loan or financial transaction at a lower rate of interest than would otherwise have been offered. The first sentence of this paragraph shall not apply to any loan or financial transaction which is described in subsection (d) or to any loan which is described in section 501(a)(1) of the Depository Institutions Deregulation and Monetary Control Act of 1980, approved March 31, 1980 (96 Stat. 161; 12 U.S.C. § 1735f-7, note).

(f) A loan or financial transaction which is secured by a mortgage or deed of trust on residential real property, or a security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization, or the assignment by the way of security of the borrower's interest in the proprietary lease or right of tenancy in property covered by such organization shall meet all of the following requirements:

(1) the loan or financial transaction may be prepaid by the borrower at no penalty at any time following the expiration of 3 years from the execution of the loan or financial transaction. Within 3 years from the execution of the loan or financial transaction, no prepayment charge or penalty shall be contracted for or received which exceeds an amount equal to 2 months advance interest on the aggregate amount of all prepayments in excess of ⅓ of the amount of the original loan or financial transaction made in any 12 month period.

(2) any borrower who, on the date of execution of the loan or financial transaction, has made a downpayment equaling 20% or more of the total purchase price of the property or who has an equity interest in the property equal to or greater than 20% of the fair market value of the property shall not be required by the term of the loan to make advance payments of the real estate taxes or casualty insurance premiums to enable the lender to have funds on hand for disbursement for payment of such taxes or insurance premiums and such borrower shall be furnished with a separate statement, in writing, which clearly and conspicuously sets forth his right to pay such taxes and insurance premiums directly. Nothing contained in this paragraph shall be construed to prohibit the lender from obtaining, during any period during

which the loan is in default and in consideration for the lender not exercising some or all of the remedies to which it is entitled, a written agreement from the borrower to make such advance payments to enable the lender to have funds on hand for disbursement for payment of such taxes or insurance premiums.

(3) prior to the execution of the loan or financial transaction, the lender shall furnish the borrower a separate statement, in writing, which complies with the disclosure provisions of the Truth-In-Lending Act, as heretofore and hereafter amended, effective May 29, 1968 (82 Stat. 146; 15 U.S.C. § 1601 et seq.), and the regulations and interpretations thereunder and, where applicable, a separate statement, in writing, which complies with the disclosure provisions of the Alternative Mortgage Transaction Parity Act of 1982, approved October 15, 1982 (96 Stat. 1545; 12 U.S.C. § 3801 et seq.), and the regulations and interpretations thereunder.

(g) The provisions of this chapter shall not apply to any international banking facility time deposit or international banking facility loan, but shall be governed solely by regulations promulgated by the Board of Governors of the Federal Reserve System. For purposes of this subsection the terms "international banking facility time deposit" and "international banking facility loan" shall have the same meaning as defined in part 204.8(a)(2) and (3), respectively, of Federal Reserve System Regulation D (12 CFR 204.8(a)(2) and (3)) (1983).

(h) Except as otherwise provided in this section, the provisions of this chapter shall apply to consumer credit transactions, including modifications (including refinancing, consolidations, and deferrals), occurring in the District of Columbia. For the purposes of this chapter, a consumer credit transaction occurs in the District of Columbia if:

(1) A written agreement evidencing the obligation or offer of the consumer is received by the creditor in the District of Columbia; or

(2) A consumer who is a resident of the District of Columbia enters into the transaction with a creditor who has solicited or advertised in the District of Columbia by any means, including mail, brochure, telephone, print, radio, television, internet, or any other electronic means.

(i) For the purposes of this chapter, the term "consumer" shall have the same meaning as in § 28-3901(a)(2).

(Aug. 30, 1964, 78 Stat. 675, Pub. L. 88-509, § 1; Dec. 17, 1971, 85 Stat. 665, Pub. L. 92-200, § 1; Nov. 20, 1979, D.C. Law 3-38, § 2, 26 DCR 2183; July 1, 1980, D.C. Law 3-73, § 2, 27 DCR 2270; Sept. 17, 1982, D.C. Law 4-150, § 302, 29 DCR 3377; Mar. 14, 1984, D.C. Law 5-62, § 2, 31 DCR 114; Apr. 23, 1985, D.C. Law 6-2, § 2, 32 DCR 1477; June 4, 1985, D.C. Law 6-5, § 2, 32 DCR 2084; Nov. 24, 2007, D.C. Law 17-42, § 3(a), 54 DCR 9988; July 2, 2011, D.C. Law 18-378, § 3(i)(2), 58 DCR 1720.)

Cross references. — Insurance premium finance companies, application of law, see § 31-1101.

Money lenders, interest and charges, see § 26-901 et seq.

Pawnbrokers, excessive consideration prohibited, see § 47-2884.10.

Real property wet settlement, financial lender duties, see § 42-2403.

Section references. — This section is ref-

erenced in § 28:9-201, § 28-3303, § 28-3311, § 31-1101, § 42-2403, and § 47-2884.10.

Prior Codifications. — 1981 Ed., § 28-3301.

1973 Ed., § 28-3301.

Effect of amendments. — D.C. Law 17-42, in subsec. (d)(1), substituted "an amount in excess of $2,500" for "an amount in excess of $1,000"; and added subsecs. (h) and (i).

D.C. Law 18-378, in subsec. (d)(1)(D), substituted ", formed under, or subject to, Chapter 4 of Title 29 " for ", as referred to in sections 29-901 through 29-916".

Legislative history of Law 3-38. — Law 3-38, the "Interest Rate Modification Act of 1979," was introduced in Council and assigned Bill No. 3-172, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on October 23, 1979 and November 11, 1979, respectively. Signed by the Mayor on November 11, 1979, it was assigned Act No. 3-119 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-73. — Law 3-73, the "Cooperative Loan Interest Rate Modification Act of 1980," was introduced in Council and assigned Bill No. 3-223, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first, amended first and second readings on March 4, 1980, April 1, 1980 and April 22, 1980, respectively. Signed by the Mayor on May 14, 1980, it was assigned Act No. 3-182 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-150. — Law 4-150, the "International Banking Facilities Tax, District of Columbia Redevelopment Act of 1945 Amendment, and Cable Television Communications Act of 1981 Technical Clarification Amendment Act of 1982," was introduced in Council and assigned Bill No. 4-360, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 22, 1982 and July 6, 1982, respectively. Signed by the Mayor on July 21, 1982, it was assigned Act No. 4-221 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-62. — Law 5-62, the "Interest Rate Ceiling Amendment Act of 1983," was introduced in Council and assigned Bill No. 5-193, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on November 15, 1983, and December 6, 1983, respectively. Signed by the Mayor on December 23, 1983, it was assigned Act No. 5-93 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-2. — Law 6-2, the "Interest Rate Ceiling Amendment Act of 1983 Clarification Act of 1985 Temporary Act of 1985," was introduced in Council and assigned Bill No. 6-76. The Bill was adopted on first and second readings on January 16, 1985, and February 12, 1985, respectively. Signed by the Mayor on February 28, 1985, it was assigned Act No. 6-12 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-5. — Law 6-5, the "Interest Rate Ceiling Amendment Clarification Act of 1985," was introduced in Council and assigned Bill No. 6-82, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on March 12, 1985, and March 26, 1985, respectively. Signed by the Mayor on April 10, 1985, it was assigned Act No. 6-17 and transmitted to both Houses of Congress for its review.

Legislative history of Law 17-42. — Law 17-42, the "Payday Loan Consumer Protection Amendment Act of 2007", was introduced in Council and assigned Bill No. 17-132 which was referred to the Committee on Public Service and Consumer Affairs. The Bill was adopted on first and second readings on July 10, 2007, and September 18, 2007, respectively. Signed by the Mayor on October 3, 2007, it was assigned Act No. 17-115 and transmitted to both Houses of Congress for its review. D.C. Law 17-42 became effective on November 24, 2007.

Legislative history of Law 18-378. — Law 18-378, the "District of Columbia Official Code Title 29 (Business Organizations) Enactment Act of 2009", was introduced in Council and assigned Bill No. 18-500, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on December 7, 2010, and December 21, 2010, respectively. Signed by the Mayor on February 27, 2011, it was assigned Act No. 18-724 and transmitted to both Houses of Congress for its review. D.C. Law 18-378 became effective on July 2, 2011.

References in text. — The "Interest Rate Ceiling Amendment Act of 1983", referred to in the last sentences of subsections (b) and (c), is D.C. Law 5-62. The effective date of that Act is March 14, 1984.

Editor's notes. — Section 7092 of D.C. Law 17-219 repealed section 4 of D.C. Law 17-42.

CASE NOTES

ANALYSIS

Customs and usages.
Extension of time of payment.
Forfeiture of interest.
Investment activity or investment property.
Late charges.
Limitation of actions.
Loan origination fees and points.
Loans or advances of money.
Mortgages.
Preemption.
Presumptions and burden of proof.
Principal amount.
Rate and amount of interest, generally.
Sales or exchanges of property.
Usurious contracts and transactions, generally.

Attorney fees.

In absence of any evidence of actual intent of the parties, attorney's fee provision in deed of trust securing note allowed note's guarantor, which had satisfied guarantee following mortgagors' default, to recover attorney's fees incurred with respect to actual foreclosure, incurred in litigating complaint related to alleged violations of law governing terms of mortgages, and incurred in action initiated by mortgagors for guarantor's breach of its duties as trustee under deed of trust; however, guarantor could not recover fees for any work relating to its independent service to mortgagors under real estate brokerage contract, or fees based on any alleged vexatiousness or bad faith on part of mortgagors. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

Reasonable number of hours expended by attorneys for guarantor of note secured by deed of trust, in attempting to foreclose after guarantor was required to satisfy guarantee, would include time spent preparing to foreclose or to otherwise attempt to enforce note and deed of trust, all activity related to mortgagors' attempts to block foreclosure, and all hours related to opposition of mortgagors' first appeal of summary judgment; however, reasonable number of hours would not include time related to guarantor's independent role as mortgagors' real estate broker. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to recover attorney fees incurred in attempting to foreclose in amount of $53,750.90, plus costs in amount of $3,574.74, under deed of trust's fee provision. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to attorney's fees of $12,377.16 and costs of $278.34 incurred in connection with its application for attorney's fees under deed of trust's fee provision. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

Choice of law.

Place of making a promissory note was presumed to be Maryland where promissory note was payable at payee's office in Maryland and where there was no evidence of place of making of promissory note; thus, trial court erred in applying usury law of District of Columbia and in determining that interest rate charged under note, 20.9 percent, was illegal. D.C. Code 1981, § 28-3301(a); Md. Code, Commercial Law, § 12-306(a)(3). Finance America Corp. v. Moyler, 494 A.2d 926, 1985 D.C. App. LEXIS 413 (1985).

Commercial loans.

Regulation which established exemption from usury law for commercial loans in excess of $5000.00 was intended to stand apart from, and override, any other section to the contrary. D.C. Code 1981, § 28-3303; D.C.Mun.Regs. tit. III,§ 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Although secured by trust deed on residential property, loan used for commercial purposes was a commercial loan for purposes of exemption from usury law for commercial loans in excess of $5,000. D.C. Code 1981, § 28-3303; D.C. Mun.Reg. tit. III, § 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Subsequent amendment to regulation allowing exemption from usury laws for commercial purpose loans in access of $5000 which explicitly provided that such loans could be secured by residential property was intended to clarify existing law, not change it. D.C. Code 1981, § 28-3303; D.C. Mun.Reg. tit. III, § 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Computation of interest.

For purpose of demonstrating compliance with the District of Columbia usury laws, banks may compute the interest rate on personal unsecured installment loans according to the United States rule of interest computation, and need not apply the residuary method. D.C. Code §§ 28-3301, 28-3303. Torosian v. National Capital Bank, 411 F. Supp. 167, 1976 U.S. Dist. LEXIS 16487 (1976).

Interest overcharge of 74 cents on a total interest charge of $172.58, resulting from rounding off the monthly payment amounts

from $91.42 to $92 for the first 23 months and from loan officer's failure to follow instruction not to deviate from charts that set forth loan terms calculated to yield 8% interest according to the United States rule, was de minimus and excusable as inadvertent on part of bank. D.C. Code §§ 28-3301, 28-3303. Torosian v. National Capital Bank, 411 F. Supp. 167, 1976 U.S. Dist. LEXIS 16487 (1976).

Assuming loan was subject to usury statute, evidence that demand note required $20,500 repayment on $15,000 loan, thereby providing for built-in interest, did not establish that rate of interest charged by lender exceeded 24 percent statutory limit; there was no evidence regarding repayment date or the terms of any repayment schedule, and such information was critical to determining the actual interest rate. Rivera v. Schlick, 887 A.2d 492, 2005 D.C. App. LEXIS 634 (2005).

Construction and application.

District of Columbia Loan Shark Act is applicable to loans made by life insurance companies in regular course of their business and thus such companies, until 1963, were not exempt from requirement of obtaining license in order to make loans at rate of interest in excess of 6%, notwithstanding contentions that Act does not apply to insurance companies which "invest" their funds by making loans secured by real estate, that, in view of comprehensive regulation of insurance companies under certain title of District of Columbia Code, they cannot be subject to licensing regulation of lending activities under Act, and that Act is not intended to apply to large loans made by "institutional lenders" and secured by real estate. D.C. Code §§ 26-601, 26-610, 26-610(a), 28-3301, 35-105, 35-535, 35-535(14)(f), 47-1574, 47-1806. In re Parkwood, Inc., 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Where insurance company, which made a loan to prior owners of hotel for purpose of providing funds for refinancing hotel property and for refurbishing and renovating the hotel, at all pertinent times was licensed to do business in the District of Columbia under the Life Insurance Act, the company was exempt from the licensing requirements of the Money Lenders Act. D.C. Code §§ 26-601, 26-610(a), 28-3301, 35-301 et seq. National Life Ins. Co. v. Silverman, 454 F.2d 899, 1971 U.S. App. LEXIS 11212 (C.A.D.C. 1971).

District of Columbia statute capping permissible interest rate was not applicable to secured promissory note executed by borrower law firm; interest rate secured by stock could exceed the stated rate, under the statute's terms, unless the loan was secured by interest in stock issued by cooperative housing corporation. Internet Fin. Servs., LLC v. Law Firm of Larson-Jackson, P.C., 310 F.Supp.2d 1, 2004 U.S. Dist. LEXIS 3521 (2004).

District of Columbia consumer protection statute was not applicable in action by District resident against Virginia corporations for allegedly fraudulent and negligent lending practices; statute is not intended to apply to every commercial transaction involving District of Columbia resident, wherever and with whomever that transaction occurs. D.C. Code 1981, §§ 28-3901 to 28-3908. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

Subsequent enactment of legislation more favorable to position of bank engaging in usurious practice of computing interest without regard to declining balance of principal did not have any retroactive effect; any favorable implication was effectively rebutted by plain wording of statute as to unpaid balances. D.C. Code §§ 28-3301, 28-3308, 28-3309. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. Juergens v. Urban Title Servs., Inc., 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

Construction with other laws.

The usury statute, and the loan shark statute which imposes licensing requirements on those in the business of lending money, read together, as the lawmakers intended, constitute a comprehensive code for the business of lending money in the District of Columbia. Rivera v. Schlick, 887 A.2d 492, 2005 D.C. App. LEXIS 634 (2005).

Customs and usages.

Custom and usage cannot contravene requirements of statute and, in case of banking practice, may not legalize a usurious contract. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Custom and practice of District of Columbia banking community of computing interest on installment loans without regard to declining balance of principal did not preclude determination that practice was usurious where it resulted in actual interest rates in excess of eight percent. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Extension of time of payment.

Bonus paid to a creditor for continued use of money is interest, regardless of what it is called; hence, amount maker paid holders of promissory note to extend the instrument for an additional two years constituted interest, although it was added to the principal, and was

to be considered as interest in determining whether extension contract was usurious. D.C. Code § 28-3301. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Amount paid to extend promissory note was to be prorated only over the two-year extension period in determining whether the extension agreement was usurious and was not to be prorated over the entire seven-year loan period: in determining whether extension was usurious the prorated amount, plus the stated interest, was to be divided by the principal balance at time of the extension contract. D.C. Code § 28-3301. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Where holders of note were directly involved in negotiations that culminated in two-year extension agreement and specifically agreed to extend due date of final balloon payment in return for the usurious extension fee, their intent to commit usury would be inferred; in any event, ignorance of the law will not protect a party from the penalties of usury, unless the imposition of the usurious rate was a result of mistake or accident. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Forfeiture of interest.

When a contract is tainted with usury, all of the interest charged by the creditor is forfeited; however, extension of a note is a separate contract and a usurious extension agreement does not require forfeiture of interest charged under an original nonusurious obligation. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Although fee charged in connection with extension of note for two years rendered the extension contract usurious, the usury did not require forfeiture of interest charged under the original obligation but only that charged under the extension agreement; hence, principal sum due was the principal balance at time of the extension agreement, minus amount paid as principal and interest following execution of extension agreement. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

If interest rate on written contract exceeds 8% per annum, creditor shall forfeit whole of interest so contracted to be received including not only usurious excess, but also lawful interest included in contract rate. D.C. Code §§ 28-3301, 28-3303, 28-3309. Caruso v. Hollander, 363 A.2d 297, 1976 D.C. App. LEXIS 354 (1976).

Investment activity or investment property.

Plaintiff borrower's real estate transaction with defendant lenders did not fall under the D.C. Consumer Protections Act, D.C. Code § 28-3904, or D.C. usury laws, D.C. Code § 28-3312, as she purchased the property for investment purposes rather than for personal, household, or family use as required by D.C. Code § 28-3301. Bakeir v. Capital City Mortg. Corp., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 28745 (D.D.C. Mar. 4, 2013).

Late charges.

Late charges imposed on tenant are not interest on a loan and thus the usury laws are inapplicable. Armfield v. Poretsky Mgt., Inc., 112 WLR 2357 (Super. Ct. 1984).

Limitation of actions.

Borrower's usury claim against lenders was not time-barred where lenders' alleged failure to make disclosures required by Truth in Lending Act (TILA) occurred well within three years of when suit was brought. Truth in Lending Act, § 102 et seq., 15 U.S.C. § 1601 et seq.; D.C. Code 1981, § 28-3301(f). Williams v. Central Money Co., 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

Loan origination fees and points.

Lender did not violate District of Columbia's usury statute when it charged more than two points on loan, since the two points were consideration for a lower interest rate. D.C. Code 1981, § 28-3301(e)(2). Young v. 1st Am. Fin. Servs., 992 F. Supp. 440, 1998 U.S. Dist. LEXIS 829 (1998).

Loan placement fee should relate to the whole loan for the entire period it is outstanding and is not attributable to interest in any single year; therefore, the payment of "points" by the borrower, although paid in full the first year, is in consideration of the lender making the full loan for the entire term and the borrower does not pay such a fee for the privilege of having the use of the money for only one year. D.C. Code §§ 28-3301 et seq., 28-3303. Montgomery Federal Sav. & Loan Asso. v. Baer, 308 A.2d 768, 1973 D.C. App. LEXIS 337 (1973).

Loans or advances of money.

Personal, unsecured installment loans are to be considered under same principles as secured loans for all purposes in District of Columbia. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Loan was not business loan, and thus was not exempt from District of Columbia usury law; loan was used to pay off personal debts and mortgaged premises, which were occupied by borrower's mother, were not being held for investment purposes. D.C. Code 1981, § 28-3301(d). Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 1994 Bankr. LEXIS 1497 (1994).

Mortgages.

District of Columbia's usury statute did not

apply to mortgage broker. D.C. Code 1981, § 28-3301(e)(2). Young v. 1st Am. Fin. Servs., 992 F. Supp. 440, 1998 U.S. Dist. LEXIS 829 (1998).

Loan secured by mortgage or deed of trust violates District of Columbia usury statute if lender fails to furnish borrower with separate written statement that complies with disclosure provision of the Truth in Lending Act (TILA). Truth in Lending Act, § 102 et seq., 15 U.S.C. § 1601 et seq.; D.C. Code 1981, § 28-3301(f)(3). Williams v. Central Money Co., 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

Mortgagee's loan to debtors was not exempt from District of Columbia usury law under either investment-activity exception or business-purpose exception. D.C. Code 1981, § 28-3301(d)(2, 3). In re Jackson, 42 B.R. 76, 1984 Bankr. LEXIS 5467 (1984).

Preemption.

D.C. Code 1981, § 28-3301(b)(4), providing that borrower who has made down payment equaling 20% or more of total purchase price cannot be required by lender to make escrow payments of real estate taxes or casualty insurance premiums, was in direct conflict with and, thus, was preempted by regulation of Federal Home Loan Bank Board, permitting federal savings and loan associations to require escrow accounts for estimated annual taxes and insurance premiums for any borrower, including those who make down payment of 20% or more of their purchase price. Home Owners' Loan Act of 1933, § 5(a), 12 U.S.C. § 1464(a); U.S. Const. Art. 6, cl. 2. Goudreau v. Standard Federal Sav. & Loan Ass'n, 511 A.2d 386, 1986 D.C. App. LEXIS 354 (1986).

Presumptions and burden of proof.

Interest Rate Ceiling Amendment Act (IRCA) requires clear and convincing evidence of intentional misrepresentation; it does not lessen the burden of proof for consumers. D.C. Code 1981, § 28-3301 et seq. Osbourne v. Capital City Mortg. Corp., 727 A.2d 322, 1999 D.C. App. LEXIS 76 (1999).

Principal amount.

In context of personal, unsecured installment loans, term "principal amount," within District of Columbia statute providing that parties to an instrument in writing for payment of money may contract for payment of interest on principal amount at any rate not exceeding eight percent per annum, refers to original principal amount of loan, rather than actual principal amount which remains under control of borrower, and operates to prohibit a bank from computing interest without regard to declining balance of loan if interest rates in excess of eight percent result therefrom. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

A loan is usurious under law of District of Columbia, when declining balance of principal is taken into account throughout term thereof, if total interest exacted exceeds that which would have been collected had the maximum lawful rate of interest been charged over entire period of loan. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Whether a loan is secured or unsecured, under prevailing District of Columbia case law, failure to take declining principal balance into account can taint a loan with usury, if it results in actual interest rates in excess of eight percent. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Act of bank in computing interest on personal, unsecured installment loans without regard to declining balance of principal was usurious under law of District of Columbia where amount of interest charged exceeded that which would be assessed by computing interest at maximum permissible rate with regard to unpaid balances of principal. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

A general exception to usury statute in District of Columbia exists, at least for a bank chartered under National Bank Act, in case of a discounted loan, but where discount feature is combined with an installment feature, fact that discount feature is present does not redeem loan from taint of usury insofar as installment feature is concerned. D.C. Code § 28-3301; National Bank Act, 12 U.S.C. §§ 21 et seq., 85. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Rejection of Uniform Small Loan Act by Congress in 1942 was not a basis for concluding that Congress had therefore authorized banks in District of Columbia to employ usurious practice of computing interest for installment loans without regard to declining balance of principal. D.C. Code § 28-3301. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Wherever periodic payments cause a decline in balance of principal to be outstanding, it can be usurious in District of Columbia to take interest on entire principal amount of an installment loan for full term, whether or not loan contains a discount feature. D.C. Code § 28-3301; National Bank Act, 12 U.S.C. §§ 21 et seq., 85. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

A loan is usurious only if the total interest exacted exceeds that which would have been

collected had the maximum lawful rate of interest been charged over the entire period of the loan. D.C. Code §§ 28-3301 et seq., 28-3303. Montgomery Federal Sav. & Loan Asso. v. Baer, 308 A.2d 768, 1973 D.C. App. LEXIS 337 (1973).

Rate and amount of interest, generally.

Within meaning of usury statute providing that the parties to a written instrument for the payment of money at a future time may contract therein for the payment of interest on the principal at a rate not exceeding eight percent per annum, the phrase "8 percent per annum" relates to the rate of interest and rate alone; it has no bearing on the time of payment, as to which the statute is simply silent. D.C. Code § 28-3301. Montgomery Federal Sav. & Loan Asso. v. Baer, 308 A.2d 768, 1973 D.C. App. LEXIS 337 (1973).

Receipt by deed of trust note holder of more than six but less than eight per cent interest violated note provision for six per cent interest but did not constitute "usury" within statute providing that parties to written instrument may contract for any rate not exceeding eight per cent. D.C. Code 1961, § 28-3301. Urciolo v. Nash, 211 A.2d 769, 1965 D.C. App. LEXIS 207 (App. 1965).

Sales or exchanges of property.

Passage of legislation by Congress permitting installment loans for automobile purchases without regard to declining balance of principal created a statutory exception to general usury law but did not create a presumption that Congress intended favorable treatment to extend to any other type of loan. D.C. Code§§ 28-3301, 40-901 to 40-910. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

Sale of automobile on credit was covered by Motor Vehicle Financing Act, permitting a 14% finance charge, and thus transaction was not usurious, notwithstanding borrowers' claim that assignment of their note to finance company had not been an arm's length transaction so that the schedule of permissible charges under the Act did not apply and transaction was accordingly usurious in exceeding 8% annual interest limit in effect at that time. D.C. Code §§ 28:9-505(1), 28-3301. Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Financial institution which issued credit cards honored by independent merchants was entitled to same exemption from usury laws under the "time-price" doctrine as enjoyed by retailers who operated their own revolving charge account plans. D.C. Code § 28-3301 et seq. Kass v. Central Charge Service, Inc., 304 A.2d 632, 1973 D.C. App. LEXIS 285 (1973).

Under usury statute existing prior to enactment of Consumer Credit Protection Act of 1971, a retail merchant could enforce a revolving charge account agreement with a customer, terms of which required payment of one and one-half percent per month on balances remaining unpaid after first billing cycle for goods purchased on credit. D.C. Code §§ 28-3301 to 28-3303, 28-3601 et seq., 28-3701 et seq., 28-3801 et seq.; District of Columbia Consumer Credit Protection Act of 1971, § 9, 85 Stat. 665. Kass v. Garfinckel, Brooks Bros., Miller & Rhoads, Inc., 299 A.2d 542, 1973 D.C. App. LEXIS 214 (1973).

Credit charge of $219 for purchase over two-year period of merchandise which was available to buyer at cash price of $594.85 plus $17.85 sales tax did not constitute "interest" and was not usury. D.C. Code §§ 28-3301, 28-3303. Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775, 1971 D.C. App. LEXIS 189 (1971).

Bona fide sale of property on credit at a price which exceeds cash price by more than legal rate of interest does not constitute usury since seller is privileged to fix one price for cash and another for credit. D.C. Code §§ 28-3301, 28-3303. Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775, 1971 D.C. App. LEXIS 189 (1971).

A cash sale accompanied by a loan bearing a usurious rate of interest is condemned; a purported sale on credit will not be allowed to cloak a usurious loan. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

If contract of sale on deferred payments is but colorable and real transaction a loan providing for illegal profit, it will be held usurious; determination of whether transaction is a loan and forbearance of a sale on time or credit is controlled by intention of the parties, and each case must be decided on its particular facts. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

Where cash sale price of sofa was $320, installment sale contract provided for cash price of $400, $12 sales tax, insurance premium of $7.03 and finance charge and fee for related services in amount of $94.56 and seller, which assigned agreement to finance corporation, merely received its cash prices plus fee of $82.48 for transacting loan and did not contemplate an enlarged credit price sale when contract was executed and did not intend to protect its right of repossession, transaction was not a bona fide sale at a time price but was rather a cloak for a usurious loan. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

Usurious contracts and transactions, generally.

Whether a transaction constitutes a sale at a time price of loan and a cloak for usury gener-

ally is a question for the finder of fact. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

§ 28-3302. Rate of interest not expressed and on judgments.

(a) The rate of interest in the District upon the loan or forbearance of money, goods, or things in action in the absence of expressed contract, is 6% per annum.

(b) Interest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum.

(c) The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly ½ of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment. In the case of the judgments entered prior to the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, that are not satisfied until after the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, the rate of interest thereon shall be the rate of interest prescribed in this subsection from the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, until the date of satisfaction.

(Aug. 30, 1964, 78 Stat. 765, Pub. L. 88-509, § 1; Mar. 10, 1982, D.C. Law 4-70, § 2, 28 DCR 5236; June 4, 1982, D.C. Law 4-112, § 9, 29 DCR 1687; Dec. 16, 1987, D.C. Law 7-61, § 2, 34 DCR 7089; Mar. 9, 1988, D.C. Law 7-82, § 2, 34 DCR 8117.)

Cross references. — Domestic life companies, merger or consolidation, dissenting shareholders, see § 31-4450.

Family and medical leave, complaints, review, see § 32-509.

Government procurement, remedies, interest, see § 2-359.09.

Insurance premium finance companies, application of law, see § 31-1101.

Money lenders, interest and charges, limitations, see § 26-901 et seq.

Parental leave, administrative enforcement procedure, relief, see § 32-1204.

Pawnbrokers, excessive consideration prohibited, see § 47-2884.10.

Section references. — This section is referenced in § 2-359.09, § 31-1101, § 31-4450, § 32-509, and § 32-1204.

Prior Codifications. — 1981 Ed., § 28-3302.

1973 Ed., § 28-3302.

Legislative history of Law 4-70. — Law 4-70, the "Consumer Credit Interest Rate Amendment Act of 1981," was introduced in Council and assigned Bill No. 4-138, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on October 27, 1981, and November 10, 1981, respectively. Signed by the Mayor on December 2, 1981, it was assigned Act No. 4-117 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-112. — Law 4-112, the "Nonprofit Housing Developments' Water and Sanitary Sewer Service Rate Charges Reduction and the Consumer Credit Interest Rate Amendments Clarification Act of 1982," was introduced in Council and assigned Bill No. 4-193, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on March 9, 1982, and March 23, 1982, respectively. Signed by the Mayor on April 12, 1982, it was assigned Act No. 4-175 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-61. — Law 7-61, the "Rate of Interest on Judgments and Decrees Temporary Act of 1987," was introduced in Council and assigned Bill No. 7-313. The Bill was adopted on first and second readings on September 29, 1987, and October 13, 1987, respectively. Signed by the Mayor on October 26, 1987, it was assigned Act No. 7-94 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-82. — Law 7-82, the "Rate of Interest on Judgments and Decrees Act of 1987," was introduced in Council and assigned Bill No. 7-269, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 10, 1987, and November 24, 1987, respectively. Signed by the Mayor on December 10, 1987, it was assigned Act No. 7-117 and transmitted to both Houses of Congress for its review.

References in text. — The "Consumer Credit Interest Rate Amendment Act of 1981", referred to throughout subsection (c), is D.C. Law 4-70.

CASE NOTES

ANALYSIS

Customs and usages.

For purposes of contract interpretation parties are bound by all usages which either party knows or has reason to know. District of Columbia v. C.J. Langenfelder & Son, Inc., 558 A.2d 1155, 1989 D.C. App. LEXIS 94 (1989).

To determine surrounding circumstances in common usage of a particular contract provision, courts must look to administrative and judicial interpretations of contract provision at the time when contract was executed; meaning of a provision is fixed if there has been uniform, continuous, and longstanding judicial and administrative construction of its terms. District of Columbia v. C.J. Langenfelder & Son, Inc., 558 A.2d 1155, 1989 D.C. App. LEXIS 94 (1989).

Evidence.

Evidence did not establish alleged oral agreement between seller's employee and buyer's bid preparer for seller to provide equipment at price lower than that specified in buyer's purchase order, even if buyer was entitled to show oral agreement at variance with terms of written purchase order. U.C.C. § 2-101 et seq.; D.C. Code 1981, § 28:2-202. Graham, Van Leer & Elmore Co. v. Jones & Wood, Inc., 656 F. Supp. 667, 1987 U.S. Dist. LEXIS 2452 (1987).

Evidence that employees were entitled to compound interest on award in their challenge to employer's interpretation of collective bargaining agreement was insufficient for submission to jury, where there was no contractual provision for compound interest, and statutes under which employees sought prejudgment interest did not specify that compound interest could be awarded. D.C. Code 1981, §§ 15-108, 28-3302. Rastall v. CSX Transp., 697 A.2d 46, 1997 D.C. App. LEXIS 140 (1997).

Evidence did not support Superior Court's finding that contractor borrowed money to finance changes unilaterally imposed by District of Columbia under highway construction contract; therefore, contractor did not fall within no-interest rule exception arising when contractor can show that it has paid interest on borrowings necessitated to perform changes. District of Columbia v. C.J. Langenfelder & Son, Inc., 558 A.2d 1155, 1989 D.C. App. LEXIS 94 (1989).

In general.

Nurse who was denied promotion due to sex discrimination was entitled to interest on her back pay award at rate of interest of 4%. Civil Rights Act of 1964, § 706(g), as amended, 42 U.S.C. § 2000e-5(g); D.C. Code 1981, § 28-3302. King v. Palmer, 641 F. Supp. 186, 1986 U.S. Dist. LEXIS 24308 (1986).

Where commercial building management companies bought carpeting intending to use it rather than sell it, revolving credit provisions of Consumer Credit Protection Act of 1971 applied to 1 ½ % monthly finance charge provided under the contract for sale of the carpeting; such provisions necessitated limitation of finance charge to 1% per month on balance exceeding $500 rather than eradication of the

charge. D.C. Code §§ 15-108, 28-3302, 28-3801, 28-3802. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Liabilities subject to statutory rate.

By agreeing to let jury determine interest rate on monies withheld under mechanical subcontract, prime contractor waived its right to invoke District of Columbia's statutory limitation of six percent. D.C. Code 1981, § 28-3302. U. S. Industries, Inc. v. Blake Constr. Co., 671 F.2d 539, 1982 U.S. App. LEXIS 22327 (C.A.D.C. 1982).

Prevailing plaintiffs in IDEA litigation were entitled to recover interest on their attorney fee award at District of Columbia's statutory rate of four percent per year, particularly as, after finding that defendants were liable for plaintiffs' reasonable attorney fees and costs, it became "relatively certain" that defendants would be liable for fees calculated at counsel's $200 per hour rate, despite dispute as to appropriate hourly rate; resolution of issue in favor of $200 per hour rate was based on information produced from defendants' own files. Individuals with Disabilities Education Act, § 615(e)(4)(B), as amended, 20 U.S.C. § 1415(e)(4)(B); D.C. Code 1981, § 28-3302(b). Bailey v. District of Columbia, 839 F. Supp. 888, 1993 U.S. Dist. LEXIS 17810 (1993).

Heir at law was entitled only to the interest actually earned on distribution that was withheld pending outcome of paternity test, not to statutory six percent interest; heir's distribution was not a loan, his wait to receive it did not constitute a forbearance, and difference in interest would have come at the expense of other heirs. Estate of Lew Gin Gee Jung v. Jung, 801 A.2d 59, 2002 D.C. App. LEXIS 315 (2002).

Rental Housing Commission did not abuse its discretion in applying fixed rate of interest from time housing provided stopped overcharging rent until date Commission affirmed hearing officer's refund, in light of nine years of protracted administrative delay and lack of evidence that either party was at fault. D.C. Code 1981, § 28-3302(c); D.C.Mun.Regs. title 14, § 4217.3. Jerome Mgmt. v. District of Columbia Rental Hous. Comm'n, 682 A.2d 178, 1996 D.C. App. LEXIS 170 (1996).

Statutory limit on prejudgment interest applies to liquidated and unliquidated sums, and in absence of express contractual provision, interest at a greater rate cannot be awarded on judgment for liquidated debt. D.C. Code 1981, §§ 15-108, 15-109, 28-3302. District of Columbia v. Pierce Associates, Inc., 527 A.2d 306, 1987 D.C. App. LEXIS 372 (1987).

Where contract for sale of replacement carpeting by retail carpeting distributor to commercial building management companies provided for monthly finance charge of 1 ½ %, and the contract also provided for prejudgment interest, the distributor was entitled to prejudgment interest on award of contract price, less award on counterclaim of the management companies, at rate of 1 ½ % per month on first $500 and 1% per month on remaining balance until paid. D.C. Code §§ 15-108, 28-3302, 28-3801, 28-3802. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Postjudgment interest.

Postjudgment interest on award to District of Columbia government employees based on violation of Fair Labor Standards Act's overtime provisions was properly set at rate established by federal law rather than four percent prejudgment interest rate established by District of Columbia law. Fair Labor Standards Act of 1938, §§ 1-9, 16(b), as amended, 29 U.S.C. §§ 201-209, 216(b); 18 U.S.C. §§ 1961, 1961(a); D.C. Code 1981, § 28-3302. Harrison v. District of Columbia, 704 F. Supp. 244, 1988 U.S. Dist. LEXIS 16537 (1988).

Prejudgment interest.

Proper rate of prejudgment interest due public contractor with respect to equitable adjustment of contract was six percent pursuant to District of Columbia statute limiting rate of interest upon loan or forbearance of money, goods or things in action to six percent per annum in the absence of express contract. D.C. Code 1981, § 28-3302. General Ry. Signal Co. v. Washington Metropolitan Area Transit Authority, 875 F.2d 320, 1989 U.S. App. LEXIS 6535 (C.A.D.C. 1989), writ of certiorari denied by 494 U.S. 1056, 110 S. Ct. 1524, 108 L. Ed. 2d 764, 1990 U.S. LEXIS 1629, 58 U.S.L.W. 3614 (1990).

Under District of Columbia law, award of prejudgment interest at rate of 6% per annum was warranted in borrower's unjust enrichment action against lender, where borrower had been deprived of value of her residence over period of time as result of lender's predatory loan scheme whereby it fraudulently took title to borrower's house and re-sold it without her knowledge. Griffith v. Barnes, 560 F.Supp.2d 29, 2008 U.S. Dist. LEXIS 45058 (2008).

Where Warsaw Convention's statutory award limitation was deemed waived by finding of willful misconduct on part of carrier, shipper could be awarded prejudgment interest on cargo damage claim. Warsaw Convention, Art. 25(1), 49 U.S.C.App. (1988 Ed.) § 1502 note. Saba v. Compagnie Nationale Air France, 866 F. Supp. 588, 1994 U.S. Dist. LEXIS 15762 (1994), reversed by, remanded by 78 F.3d 664, 316 U.S. App. D.C. 303, 1996 U.S. App. LEXIS 4496 (1996).

Operator of legal services training center for region VIII was entitled to prejudgment inter-

est on the difference between monthly installments owed on state support grant and the amount actually paid, since such an award of interest would effectuate the congressional purpose behind appropriations rider which was designed to increase the 1984 funding of Legal Services Corporation grantees by 14.1 percent beginning in January of 1984. Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1985, 98 Stat. 1545; D.C. Code 1981, § 28-3302(c). Massachusetts Law Reform Institute, Inc. v. Legal Services Corp., 601 F. Supp. 415, 1984 U.S. Dist. LEXIS 21092 (1984).

Prejudgment interest may be included as part of the damages in an action for conversion to the extent that it will make the injured party whole. Duggan v. Keto, 554 A.2d 1126, 1989 D.C. App. LEXIS 32 (1989).

Trial court's reliance on D.C. Code 1981 § 28-3302(c), which sets rate of interests on judgments where rate of interest is not fixed by contract, was misplaced where interest rate was fixed by note at 20.9 percent. Finance America Corp. v. Moyler, 494 A.2d 926, 1985 D.C. App. LEXIS 413 (1985).

Procedure.

Where each member of plaintiff class acquired vested right to receive monthly pension payments at time his application was unlawfully denied, there was liquidated debt in sense that, whenever monthly payment was not made, it was an easily ascertainable sum certain, and question of entitlement of interest was thus controlled by statute providing for inclusion of interest where action is to recover liquidated debt on which interest is payable by contract, by law or by usage; and payment of interest should have been ordered; even if statute were not applicable, denial of interest could not be affirmed as exercise of equitable discretion. D.C. Code §§ 15-108, 15-109, 28-2707, 28-3302. Kiser v. Huge, 517 F.2d 1237, 1974 U.S. App. LEXIS 7336 (C.A.D.C. 1974).

Failure of trial judge to specify basis on which she calculated amount of interest due wife for unpaid child support and marital property required remand. Williams v. Williams, 554 A.2d 791, 1989 D.C. App. LEXIS 30 (1989).

Stipulations as to rate.

Under statute governing award of prejudgment interest on liquidated debt on which interest is payable by contract, law or usage, rate of interest agreed upon and fixed by parties in contract controls, rather than statutory rate. D.C. Code §§ 15-108, 28-3302. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Although called "finance charge" rather than interest, 1 ½ % monthly finance charge provided by contract for sale of replacement carpeting was rate fixed by contract within meaning of statute governing award of prejudgment interest on liquidated debt on which interest is payable by contract, law or usage, and thus such contract provision governed rate of interest to be awarded unless contrary to law or public policy. D.C. Code §§ 15-108, 28-3302. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Time for instituting proceedings.

Inasmuch as motion for relief from judgment, to increase amount of postjudgment interest to reflect applicable statutory interest rate was brought over one year after entry of judgment, district court could not properly entertain motion, where judgment erroneously provided for postjudgment interest at a rate of 6 percent instead of 14 percent. D.C. Code 1981, § 28-3302; Fed.R.Civ.Proc. Rule 60(b)(1), 18 U.S.C. Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 1987 U.S. App. LEXIS 1379 (C.A.D.C. 1987).

§ 28-3303. Usury defined.

If a person or corporation contracts in the District,

(1) verbally, to pay a greater rate of interest than 6% per annum, or

(2) in writing, to pay a greater rate than is permitted under section 28-3301, 28-3308, under Chapter 36 of this subtitle, or under § 26-301 et seq., the creditor shall forfeit the whole of the interest so contracted to be received.

This section does not affect sections 26-901 to 26-912.

(Aug. 30, 1964, 78 Stat. 675, Pub. L. 88-509, § 1; Dec. 17, 1971, 85 Stat. 665, Pub. L. 92-200, § 2; May 12, 1998, D.C. Law 12-111, § 25(a), 45 DCR 1782.)

Cross references. — Institutions of higher education, pleading usury as a defense, see § 28-3315.

Pawnbrokers, excessive consideration prohibited, see § 47-2884.10.

Prior Codifications. — 1981 Ed., § 28-3303.

1973 Ed., § 28-3303.

Legislative history of Law 12-111. — Law 12-111, the "Check Cashers Act of 1998," was introduced in Council and assigned Bill No. 12-338, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on January 6, 1998, and February 3, 1998, respectively. Signed by the Mayor on February 24, 1998, it was assigned Act No. 12-300 and transmitted to both Houses of Congress for its review. Law 12-111 became effective on May 12, 1998.

References in text. — Sections 26-901 to 26-912, referred to in the last paragraph of this section, refer to the Act of Feb. 4, 1913, as amended, and as translated to the 2001 edition. D.C. Law 18-378 amended and enacted into law Title 29.

CASE NOTES

ANALYSIS

Commercial loans.
Jury questions.
Nature and validity of transaction.
—Compensation for expenses or losses incurred by lender, nature and validity of transaction.
—Computation of interest, nature and validity of transaction.
—Extension of time of payment, nature and validity of transaction.
—In general.
—Interest after maturity of debt, nature and validity of transaction.
—Sales or exchanges of property, nature and validity of transaction.
Penalties.
Pleadings.
Presumptions and burden of proof.
Weight and sufficiency of evidence.

Commercial loans.

Regulation which established exemption from usury law for commercial loans in excess of $5000.00 was intended to stand apart from, and override, any other section to the contrary. D.C. Code 1981, § 28-3303; D.C.Mun.Regs. tit. III,§ 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Although secured by trust deed on residential property, loan used for commercial purposes was a commercial loan for purposes of exemption from usury law for commercial loans in excess of $5,000. D.C. Code 1981, § 28-3303; D.C. Mun.Reg. tit. III, § 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Subsequent amendment to regulation allowing exemption from usury laws for commercial purpose loans in access of $5000 which explicitly provided that such loans could be secured by residential property was intended to clarify existing law, not change it. D.C. Code 1981, § 28-3303; D.C. Mun.Reg. tit. III, § 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Jury questions.

Whether a transaction constitutes a sale at a time price of loan and a cloak for usury generally is a question for the finder of fact. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

Nature and validity of transaction.

— Compensation for expenses or losses incurred by lender, nature and validity of transaction.

Loan placement fee should relate to the whole loan for the entire period it is outstanding and is not attributable to interest in any single year; therefore, the payment of "points" by the borrower, although paid in full the first year, is in consideration of the lender making the full loan for the entire term and the borrower does not pay such a fee for the privilege of having the use of the money for only one year. D.C. Code §§ 28-3301 et seq., 28-3303. Montgomery Federal Sav. & Loan Asso. v. Baer, 308 A.2d 768, 1973 D.C. App. LEXIS 337 (1973).

Commission paid by a borrower to a loan broker for obtaining a loan from a third person does not constitute usury. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. Oliver v. United Mortg. Co., 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Even if loan broker had advanced his own funds to borrower, but had done so for convenience only and with expectation of reimbursing himself promptly from funds supplied by lender, broker who had retained commission for that service was not liable to borrower for allegedly usurious interest on ground that broker was principal on loan. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. Oliver v. United Mortg. Co., 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

— Computation of interest, nature and validity of transaction.

For purpose of demonstrating compliance with the District of Columbia usury laws, banks may compute the interest rate on personal unsecured installment loans according to the United States rule of interest computation,

and need not apply the residuary method. D.C. Code §§ 28-3301, 28-3303. Torosian v. National Capital Bank, 411 F. Supp. 167, 1976 U.S. Dist. LEXIS 16487 (1976).

Interest overcharge of 74 cents on a total interest charge of $172.58, resulting from rounding off the monthly payment amounts from $91.42 to $92 for the first 23 months and from loan officer's failure to follow instruction not to deviate from charts that set forth loan terms calculated to yield 8% interest according to the United States rule, was de minimus and excusable as inadvertent on part of bank. D.C. Code §§ 28-3301, 28-3303. Torosian v. National Capital Bank, 411 F. Supp. 167, 1976 U.S. Dist. LEXIS 16487 (1976).

— Extension of time of payment, nature and validity of transaction.

Bonus paid to a creditor for continued use of money is interest, regardless of what it is called; hence, amount maker paid holders of promissory note to extend the instrument for an additional two years constituted interest, although it was added to the principal, and was to be considered as interest in determining whether extension contract was usurious. D.C. Code § 28-3301. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Amount paid to extend promissory note was to be prorated only over the two-year extension period in determining whether the extension agreement was usurious and was not to be prorated over the entire seven-year loan period: in determining whether extension was usurious the prorated amount, plus the stated interest, was to be divided by the principal balance at time of the extension contract. D.C. Code § 28-3301. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

— In general.

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. Juergens v. Urban Title Servs., Inc., 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

A loan is usurious only if the total interest exacted exceeds that which would have been collected had the maximum lawful rate of interest been charged over the entire period of the loan. D.C. Code §§ 28-3301 et seq., 28-3303. Montgomery Federal Sav. & Loan Asso. v. Baer, 308 A.2d 768, 1973 D.C. App. LEXIS 337 (1973).

Usurer cannot conceal his handiwork by avoiding use of term "interest". D.C. Code § 28-3303. Fuller v. Universal Acceptance Corp., 264 A.2d 506, 1970 D.C. App. LEXIS 272 (App. 1970).

— Interest after maturity of debt, nature and validity of transaction.

District of Columbia usury statute does not limit interest rate that parties to contract for payment of money may agree to be charged after maturity of obligation. D.C. Code 1981, § 28-3303. Roll ex rel. Ralph D. Kaiser Co. v. Rothenberg (In re Rothenberg), 203 B.R. 827, 1996 Bankr. LEXIS 1692 (1996).

— Sales or exchanges of property, nature and validity of transaction.

Financial institution which issued credit cards honored by independent merchants was entitled to same exemption from usury laws under the "time-price" doctrine as enjoyed by retailers who operated their own revolving charge account plans. D.C. Code § 28-3301 et seq. Kass v. Central Charge Service, Inc., 304 A.2d 632, 1973 D.C. App. LEXIS 285 (1973).

Under usury statute existing prior to enactment of Consumer Credit Protection Act of 1971, a retail merchant could enforce a revolving charge account agreement with a customer, terms of which required payment of one and one-half percent per month on balances remaining unpaid after first billing cycle for goods purchased on credit. D.C. Code §§ 28-3301 to 28-3303, 28-3601 et seq., 28-3701 et seq., 28-3801 et seq.; District of Columbia Consumer Credit Protection Act of 1971, § 9, 85 Stat. 665. Kass v. Garfinckel, Brooks Bros., Miller & Rhoads, Inc., 299 A.2d 542, 1973 D.C. App. LEXIS 214 (1973).

Credit charge of $219 for purchase over two-year period of merchandise which was available to buyer at cash price of $594.85 plus $17.85 sales tax did not constitute "interest" and was not usury. D.C. Code §§ 28-3301, 28-3303. Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775, 1971 D.C. App. LEXIS 189 (1971).

Bona fide sale of property on credit at a price which exceeds cash price by more than legal rate of interest does not constitute usury since seller is privileged to fix one price for cash and another for credit. D.C. Code §§ 28-3301, 28-3303. Morris v. Capitol Furniture & Appliance Co., 280 A.2d 775, 1971 D.C. App. LEXIS 189 (1971).

A cash sale accompanied by a loan bearing a usurious rate of interest is condemned; a purported sale on credit will not be allowed to cloak a usurious loan. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

If contract of sale on deferred payments is but colorable and real transaction a loan providing for illegal profit, it will be held usurious; determination of whether transaction is a loan and forbearance of a sale on time or credit is controlled by intention of the parties, and each case must be decided on its particular facts. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

Where cash sale price of sofa was $320, installment sale contract provided for cash price of $400, $12 sales tax, insurance premium of $7.03 and finance charge and fee for related services in amount of $94.56 and seller, which assigned agreement to finance corporation, merely received its cash prices plus fee of $82.48 for transacting loan and did not contemplate an enlarged credit price sale when contract was executed and did not intend to protect its right of repossession, transaction was not a bona fide sale at a time price but was rather a cloak for a usurious loan. Lee v. Household Finance Corp., 263 A.2d 635, 1970 D.C. App. LEXIS 252 (App. 1970).

Penalties.

When a contract is tainted with usury, all of the interest charged by the creditor is forfeited; however, extension of a note is a separate contract and a usurious extension agreement does not require forfeiture of interest charged under an original nonusurious obligation. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Although fee charged in connection with extension of note for two years rendered the extension contract usurious, the usury did not require forfeiture of interest charged under the original obligation but only that charged under the extension agreement; hence, principal sum due was the principal balance at time of the extension agreement, minus amount paid as principal and interest following execution of extension agreement. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

If interest rate on written contract exceeds 8% per annum, creditor shall forfeit whole of interest so contracted to be received including not only usurious excess, but also lawful interest included in contract rate. D.C. Code §§ 28-3301, 28-3303, 28-3309. Caruso v. Hollander, 363 A.2d 297, 1976 D.C. App. LEXIS 354 (1976).

Pleadings.

Complaint against centralized credit service which sought to recover all interest paid by plaintiff and persons similarly situated and to which there was a statement attached showing that the defendant service charged 18% interest per annum on certain amounts and 12% interest per annum on other sum without any assertion that the statement constituted plaintiff's account asked, in essence, for an advisory opinion that the defendant services' finance charges were usurious and should cease and failed to state a cause of action. D.C. Code §§ 28-3303, 28-3304. Simmons v. Central Charge Service, Inc., 269 A.2d 850, 1970 D.C. App. LEXIS 350 (App. 1970).

Presumptions and burden of proof.

Where holders of note were directly involved in negotiations that culminated in two-year extension agreement and specifically agreed to extend due date of final balloon payment in return for the usurious extension fee, their intent to commit usury would be inferred; in any event, ignorance of the law will not protect a party from the penalties of usury, unless the imposition of the usurious rate was a result of mistake or accident. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Borrower was not entitled to recover portion of commission retained by loan broker for arranging loan on ground that transaction was usurious in absence of showing that broker was acting solely as agent of lender. D.C. Code 1961, §§ 26-611, 28-2703 et seq., 47-1701 et seq. Oliver v. United Mortg. Co., 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Weight and sufficiency of evidence.

Showing that buyer under conditional sale contract was charged $47.88 for use of $300 for 12 months made a prima facie showing of usury, although total sum was labeled "time price", where credit had been prearranged through finance company to which contract was assigned. D.C. Code § 28-3303. Fuller v. Universal Acceptance Corp., 264 A.2d 506, 1970 D.C. App. LEXIS 272 (App. 1970).

Evidence supported finding that loan broker sued by borrower for usurious interest was borrower's agent rather than agent of lender. Oliver v. United Mortg. Co., 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

§ 28-3304. Action to recover usury paid.

If a person or corporation in the District directly or indirectly takes or receives a greater amount of interest than is declared by this chapter to be lawful, whether in advance or not, the person or corporation paying the same may within one year after the date of payment sue for and recover the amount of the unlawful interest so paid.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-3304.
1973 Ed., § 28-3304.

CASE NOTES

ANALYSIS

Limitation of actions.
Pleadings.

Limitation of actions.
Apart from mortgagor's claim under usury statute, all of mortgagor's District of Columbia claims for fraud, violations of the D.C. Consumer Protection Act, D.C. Consumer Protection Procedures Act, conspiracy to defraud, and aiding and abetting the deception of mortgagor, negligence, and negligent supervision, which all stemmed from either direct participation in or failure to properly prevent mortgage broker from allegedly defrauding mortgagor and charging excessive fees, were governed by the District's residual three-year statute of limitations; usury statute claim was governed by its own statute of limitations. Johnson v. Long Beach Mortg. Loan Trust 2001-4, 451 F.Supp.2d 16, 2006 U.S. Dist. LEXIS 54264 (2001).

District of Columbia's three-year fraud statute of limitations, rather than one year statute [D.C. Code 1981, § 28-3304] for actions to recover usurious interest charges, was most analogous, and applied to, Racketeer Influenced and Corrupt Organization Act [18 U.S.C. § 1962(b, c)] action alleging that fraud and misrepresentation precipitated loan transaction. Lawson v. Nationwide Mortg. Corp., 628 F. Supp. 804, 1986 U.S. Dist. LEXIS 29205 (1986).

Pleadings.
Complaint against centralized credit service which sought to recover all interest paid by plaintiff and persons similarly situated and to which there was a statement attached showing that the defendant service charged 18% interest per annum on certain amounts and 12% interest per annum on other sum without any assertion that the statement constituted plaintiff's account asked, in essence, for an advisory opinion that the defendant services' finance charges were usurious and should cease and failed to state a cause of action. D.C. Code §§ 28-3303, 28-3304. Simmons v. Central Charge Service, Inc., 269 A.2d 850, 1970 D.C. App. LEXIS 350 (App. 1970).

§ 28-3305. Unlawful interest credited on principal debt.

In an action upon a contract for the payment of money with interest at a rate forbidden by law, any payment of interest that may have been made on account of the contract is deemed to be payment made on account of the principal debt; and judgment shall be rendered for no more than the balance found due after deducting and properly crediting the interest so paid. A bona fide indorsee of negotiable paper purchased before due is not affected by any usury exacted by a former holder of the paper unless he had notice of the usury before his purchase.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-3305.
1973 Ed., § 28-3305.

CASE NOTES

ANALYSIS

Forfeiture of interest.
Usurious intent.

Forfeiture of interest.
When a contract is tainted with usury, all of the interest charged by the creditor is forfeited; however, extension of a note is a separate contract and a usurious extension agreement does not require forfeiture of interest charged under an original nonusurious obligation. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Although fee charged in connection with ex-

tension of note for two years rendered the extension contract usurious, the usury did not require forfeiture of interest charged under the original obligation but only that charged under the extension agreement; hence, principal sum due was the principal balance at time of the extension agreement, minus amount paid as principal and interest following execution of extension agreement. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

Usurious intent.

Where holders of note were directly involved in negotiations that culminated in two-year extension agreement and specifically agreed to extend due date of final balloon payment in return for the usurious extension fee, their intent to commit usury would be inferred; in any event, ignorance of the law will not protect a party from the penalties of usury, unless the imposition of the usurious rate was a result of mistake or accident. D.C. Code §§ 28-3301, 28-3305. Pazianos v. Schenker, 366 A.2d 440, 1976 D.C. App. LEXIS 429 (1976).

§ 28-3306. Parties compelled to testify.

When in an action to recover a debt the defendant claims that payment of unlawful interest on the debt has been made to the plaintiff or those under whom he claims, which the defendant is entitled to have credited on the principal of the debt, the plaintiff or the party who received the unlawful interest may be examined as a witness to prove the payment, and may not be excused from testifying in relation thereto. A creditor who is made defendant in a proceeding for discovery as to payments of unlawful interest made to him may not be excused from answering.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-3306.

1973 Ed., § 28-3306.

§ 28-3307. Council of the District of Columbia authorized to exempt certain mortgages and loans.

The Council of the District of Columbia is authorized from time to time to provide by regulation for the exemption from the provisions of this chapter of any mortgage or loan insured or guaranteed under the National Housing Act or Chapter 37 of Title 38, United States Code, the interest rate of which is subject to regulation by an officer or agency of the Federal Government. The Council is further authorized to amend or repeal any such regulation at any time, but no such amendment or repeal shall affect any such loan or mortgage lawfully made or committed to be made while such exemption is in effect.

(Aug. 20, 1970, 84 Stat. 828, Pub. L. 91-385, § 2(a); Apr. 9, 1997, D.C. Law 11-255, § 27(d), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-3307.

1973 Ed., § 28-3307.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

References in text. — The National Housing Act, referred to in the first sentence of this section, is codified in 12 U.S.C. § 1701 et seq.

Change in Government. — This section

originated at a time when local government powers were delegated to the District of Columbia Council and to a Commissioner of the District of Columbia. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 28-3308. Finance charge on direct installment loans.

(a) On a loan (other than a loan directly secured on real estate or a direct motor vehicle installment loan covered by Chapter 36 of this subtitle) to be repaid in equal or substantially equal monthly or other periodic installments, including a loan obtained by using a check, credit card, or other device to access a line of credit, any federally insured bank or savings and loan association doing business in the District of Columbia may contract for and receive interest at the rate permitted under this chapter or, in lieu of such interest, a finance charge, which if expressed as an annual percentage rate, does not exceed a rate of 24% per annum on the unpaid balances of the principal. This section does not limit or restrict the manner of contracting for the finance charge, whether by way of discount, add-on, or simple interest, so long as the annual percentage rate of the finance charge does not exceed that permitted by this section.

(b) If such installment loan is precomputed,

(1) the finance charge may be calculated on the assumption that all scheduled payments will be made when due, and

(2) except as provided in subsection (c), upon prepayment in full of the unpaid balance of a precomputed direct installment loan, refinancing, or consolidation, an amount not less than the unearned portion of the finance charge calculated according to this section shall be rebated to the debtor. If the rebate otherwise required is less than $1, no rebate need be made.

(c) Upon prepayment in full of such direct installment loan other than a refinancing or consolidation, whether or not precomputed, the lender may collect or retain a minimum charge within the limits stated in this section if the finance charge earned at the time of prepayment is less than any minimum charge contracted for. The minimum charge may not exceed the smaller of the following: (1) the amount of the finance charge contracted for, or (2) $5 in a transaction which had a principal of $75 or less, or $7.50 in a transaction which had a principal of more than $75.

(d) The unearned portion of the finance charge is a fraction of the finance charge of which the numerator is the sum of the periodic balances scheduled to follow the computational period in which the prepayment occurs, and the denominator is the sum of all periodic balances under either the related loan agreement or, if the balance owing resulted from a refinancing or a consolidation, under the related refinancing agreement or consolidation agreement.

(e) As used in this section, "finance charge", and "annual percentage rate" shall have the respective meanings under the provisions of the Truth-in-Lending Act (82 Stat. 146 et seq.; 15 U.S.C. § 1601 et seq.) and the regulations and interpretations thereunder; and "federally insured bank or savings and

loan association" means an insured bank as defined in section 3 of the Federal Deposit Insurance Act or an "insured institution" as defined in section 401 of the National Housing Act.

(Dec. 17, 1971, 85 Stat. 665, Pub. L. 92-200, § 3; Nov. 20, 1979, D.C. Law 3-38, § 3, 26 DCR 2183; Mar. 10, 1982, D.C. Law 4-70, § 3, 28 DCR 5236; Mar. 14, 1984, D.C. Law 5-62, § 3, 31 DCR 114; Apr. 9, 1997, D.C. Law 11-255, § 27(e), 44 DCR 1271.)

Section references. — This section is referenced in § 28-3301, § 28-3303, and § 28-3802.

Prior Codifications. — 1981 Ed., § 28-3308.

1973 Ed., § 28-3308.

Legislative history of Law 3-38. — Law 3-38, the "Interest Rate Modification Act of 1979," was introduced in Council and assigned Bill No. 3-172, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on October 23, 1979 and November 11, 1979, respectively. Signed by the Mayor on November 11, 1979, it was assigned Act No. 3-119 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-70. — Law 4-70, the "Consumer Credit Interest Rate Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-138, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on October 27, 1981, and November 10, 1981, respectively. Signed by the Mayor on December 2, 1981, it was assigned Act No. 4-117 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Historical and Statutory Notes following § 28-3301.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3307.

References in text. — Section 3 of the Federal Deposit Insurance Act and section 401 of the National Housing Act, both referred to in subsection (e) of this section, are codified in 12 U.S.C. §§ 1813 and 1724, respectively. 12 U.S.C. 1724 was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

CASE NOTES

In general.

Since federal truth in lending claims arose solely out of transaction involving one car, whereas state usury and misrepresentation claims based on the earlier sale of another car did not derive from a nucleus of operative fact common to the federal action, it was not within the district court's power to consider those claims to be pendent to the federal claims; furthermore, while the local law claims arising out of the first transaction were within the district court's power to exercise pendent jurisdiction, the court did not abuse its discretion in electing not to retain those claims, which were completely unrelated to the truth in lending claims and which would have required the resolution of complex choice of law and substantive questions involving the statutory and common law governing usury, loan sharking, and breach of warranty. Price v. Franklin Inv. Co., 574 F.2d 594, 1978 U.S. App. LEXIS 12485 (C.A.D.C. 1978).

Subsequent enactment of legislation more favorable to position of bank engaging in usurious practice of computing interest without regard to declining balance of principal did not have any retroactive effect; any favorable implication was effectively rebutted by plain wording of statute as to unpaid balances. D.C. Code §§ 28-3301, 28-3308, 28-3309. Cohen v. District of Columbia Nat'l Bank, 382 F. Supp. 270, 1974 U.S. Dist. LEXIS 9275 (1974).

§ 28-3309. Council of the District of Columbia authorized to exempt certain loans, and to change rates of interest.

The Council of the District of Columbia is authorized from time to time to provide by regulation for (1) the exemption from the provisions of this chapter of any loan or financial transaction, and (2) the change of any interest rate specified in this chapter. The Council is further authorized to amend or repeal

any such regulation at any time, but no such amendment or repeal relating to any exemption made under authority of this section shall affect any such loan or financial transaction lawfully made or entered into while such exemption is in effect.

(Dec. 29, 1973, 87 Stat. 945, Pub. L. 93-229, § 1(a); Apr. 9, 1997, D.C. Law 11-255, § 27(f), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-3309.

1973 Ed., § 28-3309.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3307.

Change in Government. — This section originated at a time when local government powers were delegated to the District of Columbia Council and to a Commissioner of the District of Columbia. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of the Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

CASE NOTES

Regulations.

Regulation which established exemption from usury law for commercial loans in excess of $5000.00 was intended to stand apart from, and override, any other section to the contrary. D.C. Code 1981, § 28-3303; D.C.Mun.Regs. tit. III,§ 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

Subsequent amendment to regulation allowing exemption from usury laws for commercial purpose loans in access of $5000 which explicitly provided that such loans could be secured by residential property was intended to clarify existing law, not change it. D.C. Code 1981, § 28-3303; D.C. Mun.Reg. tit. III, § 301. Needle v. Hoyte, 644 A.2d 1369, 1994 D.C. App. LEXIS 110 (1994).

§ 28-3310. Consumer protections.

(a)(1) A lender who receives scheduled periodic payments on more than 5 loans or financial transactions in a calendar year shall furnish to the borrower, upon request, but not more than 2 times a year, a statement, in writing stating the amount of:

(A) payments credited to reducing the principal;

(B) payments credited to interest;

(C) the remaining unpaid principal balance;

(2) A lender who receives scheduled periodic payments on more than 5 loans or financial transactions in a calendar year shall furnish to the borrower, at least 6 months and not more than 12 months prior to maturity of the loan or financial transaction, or, if the loan or financial transaction is for a period of less than 1 year, halfway through the loan period, a statement, in writing, stating the following:

(A) in the case of a loan or financial transaction which contains a schedule of payments under which each payment is not equal to, or substantially equal to, the other payments or if the intervals between payments are not substantially equal, the date or event upon which maturity occurs, and the projected principal loan balance that will be due at maturity of the loan or financial transaction; and

(B) in the case of a loan or financial transaction where the interest rate is not fixed for the term of the loan, the projected principal loan balance that will be due at maturity, assuming no change in the interest rate, and the conditions under which the interest rate may change and what limits or restrictions, if any, apply to changes in the interest rate.

(b) No delinquent or late charge shall be contracted for or received which does not meet all of the following requirements:

(1) the delinquency shall have continued for at least 10 calendar days;

(2) a delinquent or late charge shall not have already been charged for the same delinquent or late periodic installment; and

(3) the delinquent or late charge shall not exceed 5% of the total amount of the delinquent or late periodic installment of principal and interest.

(Mar. 14, 1984, D.C. Law 5-62, § 4, 31 DCR 114.)

Section references. — This section is referenced in § 28-3301.

Prior Codifications. — 1981 Ed., § 28-3310.

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Historical and Statutory Notes following § 28-3301.

CASE NOTES

ANALYSIS

Pleadings.
Reformation of loan.
Summary judgment.

Pleadings.

Borrower's declaratory judgment complaint that loan secured by deed of trust violated Interest Rate Ceiling Amendment Act, was not insufficient for failure to specify the alleged unlawful interest rates, since complaint, exactly specifying challenged late charge and attaching supporting deed of trust, sufficiently alleged that terms of loan were in excess of explicit statutory limits and thus sufficiently informed defendant of the parameters of borrower's claim. D.C. Code 1986 Supp., § 28-3301 et seq. Thompson v. Seton Inv., 533 A.2d 1255, 1987 D.C. App. LEXIS 493 (1987).

Reformation of loan.

Violations of District of Columbia's Home Loan Protection Act (HLPA) by mortgage broker and lender warranted reformation of loan on terms consistent with acceptable consumer lending practices, including reinstatement of original interest rate and elimination of provision allowing for increased interest rate of 24 percent in event of default, extension, to seven-year period, of due date upon which balloon payment became payable, reduction of balance due by amount of any penalties or fees traced to rate increases triggered by balloon-payment due date, reduction of note's 10 percent late fee to statutory limit of five percent, and striking of note's provision for reinstatement fee based upon entire loan balance. Dawson v. Thomas (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

Summary judgment.

Borrower raised issue of material fact concerning alleged lender-required attestation to "commercial purpose" for what was actually a residential loan, precluding summary judgment in favor of lender in borrower's declaratory judgment action seeking declaration that loan secured by deed of trust violated Interest Rate Ceiling Amendment Act on loans for residential purposes, where borrower presented sufficient documentation of the alleged residential purpose and lender maintained solely that loan was exempt from Act, and never argued in the alternative that loan satisfied Act. D.C. Code 1986 Supp., § 28-3301 et seq. Thompson v. Seton Inv., 533 A.2d 1255, 1987 D.C. App. LEXIS 493 (1987).

§ 28-3311. Definition of interest.

(a) For the purposes of this chapter, the word "interest" means any compensation directly or indirectly imposed by a lender for the extension of credit for the use or forbearance of money, including any loan fee, origination fee, service

and carrying charge, investigator's fee, and any amount payable as a discount under section 28-3301(e)(1), or point, or otherwise payable for services. The following charges shall not be considered interest:

(1) fees and charges collected at the direction of and actually paid to a government or governmental agency;

(2) a service charge for investigation and continued servicing of collateral for a commercial loan secured by inventory or accounts receivable and any compensating balance accounts required by a lender for a commercial loan;

(3) reasonable charges by the lender's attorney or other agent for service rendered in connection with collateral appraisals and the preparation, closing, or disbursement of the loan, but only if the charges are an actual expense of the lender;

(4) premiums for credit life, accident, health, or loss-of-income insurance, but only if the insurance coverage is in fact not required by the lender and this fact is clearly and conspicuously disclosed; that the borrower signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph; and that the terms of and premiums for the insurance coverage are disclosed;

(5) premiums for insurance against loss of or damage to the property, or against liability arising out of the ownership or use of the property, but only if the lender does not in fact require that the insurance be purchased through a particular broker, agent or insurance company; that the insurance coverage may be obtained from a broker, agent or insurance company of borrower's choice, subject to approval by the lender, and this fact is clearly and conspicuously disclosed; and that if the insurance coverage is obtained from or through the lender, the term of and premiums for the insurance coverage are clearly and conspicuously disclosed;

(6) a service charge made by a broker or dealer dealing in investment securities if money is advanced on the security of pledged investment securities and if services are rendered in the collection, crediting, and disbursement of income on the investment securities and in the furnishing of income tax and other information in connection with that income;

(7) reasonable charges for investigation and reporting in regard to the credit rating or credit history of the borrower, but only if such charges are an actual expense of the lender; and

(8) advance payments of real estate taxes or casualty insurance premiums made in accordance with section 28-3301(f)(2).

(b) The rate of interest on any loan or financial transaction shall be calculated in compliance with the provisions of the Truth-in-Lending Act, as heretofore and hereafter amended, effective May 29, 1968 (82 Stat. 146; 15 U.S.C. 1601 et seq.), and the regulations and interpretations thereunder.

(Mar. 14, 1984, D.C. Law 5-62, § 4, 31 DCR 114.)

Cross references. — Real property wet settlement, financial lender duties, see § 42-2403.

Section references. — This section is referenced in § 28-3301 and § 42-2403.

Prior Codifications. — 1981 Ed., § 28-3311.

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Histor

ical and Statutory Notes following § 28-3301.

CASE NOTES

Points.

Borrowers who alleged that they had paid 3.5 points as a loan origination fee on one loan and 2.25 points on a second loan did not allege that lenders charged more than twice the allowable interest "rate" so as to state a claim for amount of debt under RICO, even though governing law provided that a lender may not charge more than one "point," as points must be prorated over the entire terms of the loan to determine if the rate of interest is usurious and a point is simply one component of the overall interest rate. 18 U.S.C. § 1964; D.C. Code 1981, § 28-3301(e). Reidy v. Meritor Sav., F.S.B., 705 F. Supp. 39, 1989 U.S. Dist. LEXIS 1857 (1989), affirmed without opinion by 888 F.2d 898, 281 U.S. App. D.C. 201, 1989 U.S. App. LEXIS 17060 (1989).

§ 28-3312. Unlawful practices.

It shall be a violation of this chapter for any lender to:

(1) misrepresent as to a material fact;

(2) fail to state a material fact;

(3) disparage the services or business of another by false or misleading representations of material facts;

(4) advertise or offer services without the intent to provide them or without the intent to provide them as advertised or offered;

(5) include in the loan or financial transaction agreement an acceleration clause under which any part or all of the unpaid balance of the loan or financial transaction not yet matured may be declared due and payable for any reason other than due to default by the borrower in the payment or in accordance with another term of the agreement; or

(6) include in the loan or financial transaction agreement any provision by which the borrower waives any right accruing to him under the provisions of this chapter.

(Mar. 14, 1984, D.C. Law 5-62, § 4, 31 DCR 114; Apr. 9, 1997, D.C. Law 11-255, § 27(g), 44 DCR 1271.)

Section references. — This section is referenced in § 28-3301.

Prior Codifications. — 1981 Ed., § 28-3312.

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Historical and Statutory Notes following § 28-3301.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3307.

CASE NOTES

ANALYSIS

Construction and application.
Consumer credit transaction requirement.
Misrepresentations.

Construction and application.

Inclusion of provision waiving right to plead usury as defense in personal guaranty of secured promissory note did not render entire guaranty invalid and unenforceable, even if the usury waiver were invalid under District of Columbia statute, where guaranty also contained severability provision stating that invalidity of any one provision should not affect other lawful provisions. Internet Fin. Servs., LLC v. Law Firm of Larson-Jackson, P.C., 310 F.Supp.2d 1, 2004 U.S. Dist. LEXIS 3521 (2004).

District of Columbia's usury statute is violated when lender misrepresents material facts

about loan or fails to state material facts. D.C. Code 1981,§ 28-3312. Williams v. Central Money Co., 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. Juergens v. Urban Title Servs., Inc., 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

District of Columbia's Truth-in-Lending Act was not retroactively applicable to transactions that took place before its enactment. D.C. Code 1981, § 28-3312. Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 1994 Bankr. LEXIS 1497 (1994).

Consumer credit transaction requirement.

Plaintiff borrower's real estate transaction with defendant lenders did not fall under the D.C. Consumer Protections Act, D.C. Code § 28-3904, or D.C. usury laws, D.C. Code § 28-3312, as she purchased the property for investment purposes rather than for personal, household, or family use as required by D.C. Code § 28-3301. Bakeir v. Capital City Mortg. Corp., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 28745 (D.D.C. Mar. 4, 2013).

Misrepresentations.

Borrowers alleged sufficient injury to maintain misrepresentation claim against lender under Consumer Protection Procedures Act and under Interest Rate Ceiling Amendment Act, based on borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note, thereby causing economic and emotional damages. D.C. Code 1981, §§ 28-3904, 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Although Interest Rate Ceiling Amendment Act was ambiguous on its face as to whether proof of damages was required for misrepresentation claim, use of conjunctive phrase "actual and punitive damages" meant that proof of actual damages was condition of "any other relief," including punitive damages. D.C. Code 1981, § 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

§ 28-3313. Penalties.

Any lender who wilfully violates any provision of this chapter shall, upon conviction thereof, be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned for not more than 1 year, or both.

(Mar. 14, 1984, D.C. Law 5-62, § 4, 31 DCR 114; June 11, 2013, D.C. Law 19-317, § 285(b), 60 DCR 2064.)

Section references. — This section is referenced in § 28-3301.

Prior Codifications. — 1981 Ed., § 28-3313.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "not more than the amount set forth in [§ 22-3571.01]" for "not more than $1,000".

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Historical and Statutory Notes following § 28-3301.

Legislative history of Law 19-317. — Law 19-317, the "Criminal Fine Proportionality Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-214. The Bill was adopted on first and second readings on Oct. 16, 2012, and Nov. 1, 2012, respectively. Signed by the Mayor on Jan. 23, 2013, it was assigned Act No. 19-641 and transmitted to Congress for its review. D.C. Law 19-317 became effective on June 11, 2013.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

§ 28-3314. Right of action.

Any borrower who suffers a violation of any provision of this chapter by any lender may bring an action in the Superior Court of the District of Columbia to recover, or obtain, or enforce any of the following:

(1) reasonable attorney's fees;

(2) actual and punitive damages; or

(3) any other relief which the court deems proper.

(Mar. 14, 1984, D.C. Law 5-62, § 4, 31 DCR 114; Apr. 9, 1997, D.C. Law 11-255, § 27(h), 44 DCR 1271.)

Section references. — This section is referenced in § 28-3301.

Prior Codifications. — 1981 Ed., § 28-3314.

Legislative history of Law 5-62. — For legislative history of D.C. Law 5-62, see Historical and Statutory Notes following § 28-3301.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3307.

CASE NOTES

ANALYSIS

Actual and punitive damages.
Attorney fees.
Emotional damages.

Actual and punitive damages.

Although Interest Rate Ceiling Amendment Act was ambiguous on its face as to whether proof of damages was required for misrepresentation claim, use of conjunctive phrase "actual and punitive damages" meant that proof of actual damages was condition of "any other relief," including punitive damages. D.C. Code 1981, § 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Attorney fees.

Proof of borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note would entitle borrowers to submit proof that those actions caused them to incur legal expenses and fees in connection with lender's subsequent attempted foreclosure. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Emotional damages.

Upon proof of intentional misrepresentation, plaintiff may recover emotional damages that are natural and proximate result of defendant's conduct, even if tort was committed in contractual contract. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Proof of borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note would permit borrowers to recover for any emotional harm that may have occurred as result of lender's actions. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

§ 28-3315. Exemption of institutions of higher learning from usury law.

Any institution of higher education located in the District of Columbia and described in the first sentence of section 101(a) of the Higher Education Amendments, approved October 7, 1998 (112 Stat. 1385; 20 U.S.C. § 1001(a)) (other than District of Columbia Teachers' College, Federal City College, Gallaudet College, and Howard University) may borrow money at such rates of interest as the institution may determine, without regard to the restrictions of any usury law applicable in the District of Columbia, and shall not plead any statutes against usury in any action.

(July 2, 2011, D.C. Law 18-378, § 3(i)(3), 58 DCR 1720.)

Prior Codifications. — 2001 Ed., § 29-631.
1981 Ed., § 29-820.
1973 Ed., § 29-421.

Legislative history of Law 18-378. — For history of Law 18-378, see notes under § 28-3301.

CHAPTER 35. STATUTE OF FRAUDS.

§ 28-3501. Estate created otherwise than by deed.

An estate, attempted to be created for a greater term than one year in real estate, other than by deed, is an estate by sufferance.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Cross references. — Estates in land, written instruments, requirements, see §§ 42-306 and 42-522.

Prior Codifications. — 1981 Ed., § 28-3501.

1973 Ed., § 28-3501.

CASE NOTES

ANALYSIS

Estoppel.
Jury questions.
Modification of contract.
Partial performance.
Persons to whom statute is available.
Recovery of possession.
Review.
Sufficiency of evidence.
Summary judgment.

Estoppel.

Equitable estoppel may be granted to estop vendor from asserting statute of frauds as bar to enforcement of written contract to purchase real property where prospective purchaser relied upon oral modification of contract to his detriment or partially performed under such oral modification. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Oral agreement to purchase land is taken out of statute of frauds only when purchaser has changed his position so materially that unless oral contract is enforced, fraud will result. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Mere refusal to perform oral contract within statute of frauds does not generally constitute such fraud as to raise equitable estoppel against assertion of statute as bar to enforcement of contract. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

In order to effectively assert estoppel against assertion of statute of frauds as bar to enforcement of contract, promisee must be able to show that he has changed his position substantially for the worse and that he has incurred unjust and unconscionable injury. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Jury questions.

Reasonable men might differ as to whether lessor knowingly misled lessee into believing that he wanted to sell restaurant business and lessee made its $3,000 per month payments acting on this belief, thus precluding directed verdict against lessee on its fraud claim, where lessee testified that purchase agreement was not reduced to writing because lessor did not want sale in writing, $3,000 monthly payments were made in cash because lessor requested that they be made in cash, and when lessee attempted to make payments by check, lessor would only accept cash. Civil Rule 50(a)(1). R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Modification of contract.

Detrimental reliance upon oral contract by one of parties may remove modification from reach of statute of frauds. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Prospective purchaser failed to demonstrate sufficient damages incurred in reliance on or in performance of oral modification to contract for purchase of real property to estop vendor from

asserting statute of frauds against such oral modification. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Partial performance.

Exception to statute of frauds' bar on oral contracts that cannot be performed within one year exists where partial performance has occurred. D.C. Code 1981, § 28-3502. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Although statute of frauds provides that any agreement involving interest in real estate which purportedly is for term in excess of one year must be in writing to be enforceable, partial or complete performance under oral contract may remove case from applicability of statute. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Although statute provides that any agreement involving an interest in real estate which purportedly is for a term in excess of one year must be in writing to be enforceable, the effectiveness of such legislation is not absolute and partial or complete performance under an oral contract may remove the case from the applicability of the statute. D.C. Code §§ 28-3501, 28-3502. Amberger & Wohlfarth, Inc. v. District of Columbia, 300 A.2d 460, 1973 D.C. App. LEXIS 226 (1973).

Persons to whom statute is available.

Prospective purchaser, as assignor, alone had standing to challenge assignment of his interest in contract for sale of real estate on ground that statute of frauds barred assignee from proving oral assignment ever occurred. D.C. Code§§ 28-3501 to 28-3505. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Recovery of possession.

Order which granted lessor judgment for possession of restaurant for lessee's failure to pay rent, which was subsequently revoked by protective order that was retroactive past date on which judgment for possession was entered, could not terminate lease between parties as of date of order granting lessor judgment of possession. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Review.

In reviewing directed verdict against lessee on its fraud and breach of contract claims against lessor, reviewing court was required to construe evidence most favorably to lessee, and determine whether upon such evidence reasonable men might differ or whether no reasonable man could reach verdict in favor of lessee. Civil Rule 50(a)(1). R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Any error in trial court's instruction on defense of illegality in lease dispute was not reversible error, where trial court instructed jury that if they found lessee owed back rent, they would then have to determine whether purpose in entering employment agreement with lessee was to defraud Social Security Administration, but jury found that monthly rent was paid and thus did not consider issue of illegality. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Sufficiency of evidence.

Evidence that lessee and lessor agreed to monthly rental of $3400, that lessee tendered checks every month to lessor for $3400, that lessor claimed $3400 per month as rental income on its federal income tax returns, and that lessee understood that this was agreed upon rent was sufficient for jury to conclude that lessee agreed to pay lessor $3400 per month in rent, paid such rent, and thus did not owe lessor back rent. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Evidence supported trial court's finding that arrangement under which gift shop was operated and hotel lobby was licensed, not leased, and that such license therefor terminated on sale of hotel to new owner. Union Travel Associates, Inc. v. International Associates, Inc., 401 A.2d 105, 1979 D.C. App. LEXIS 347 (1979).

Summary judgment.

Lessee's conclusory allegations that lessor received offers to purchase building in which lessee's restaurant was located without affording it right of first refusal that it allegedly received from landlord were insufficient to create genuine issue of material fact necessary to defeat motion for summary judgment on lessee's breach-of-lease claim. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

§ 28-3502. Special promise to answer for debt or default of another.

An action may not be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, or to charge the defendant upon a special promise to answer for the debt, default, or miscarriage of another person, or to charge a person upon an agreement made upon

consideration of marriage, or upon a contract or sale of real estate, of any interest in or concerning it, or upon an agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing, which need not state the consideration and signed by the party to be charged therewith or a person authorized by him.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Prior Codifications. — 1981 Ed., § 28-3502.
1973 Ed., § 28-3502.

CASE NOTES

Analysis

Admissibility of evidence.

Parol evidence is admissible to prove both contents and existence of a writing which satisfied statute of frauds when executed, but was subsequently lost or destroyed, and this parol evidence must be clear and convincing, and it is first necessary to give a satisfactory explanation for failure to produce writing. D.C. Code § 28-3502. Mark Keshishian & Sons, Inc. v. Washington Square, Inc., 414 A.2d 834, 1980 D.C. App. LEXIS 286 (1980).

Parol evidence of employer's policy regarding bonuses was admissible as aid in interpretation of handwritten agreement, which was signed by employer some nine months after oral promise to pay employee certain salary for a year and which provided that "Earning—Salary and Bonus" for year totaled specified amount, to explain that total compensation for year was limited to specified amount and that employee would not receive an additional amount by way of discretionary Christmas bonus. D.C. Code § 28-3502. Educational Enterprises, Inc. v. Greening, 265 A.2d 287, 1970 D.C. App. LEXIS 282 (App. 1970).

Contents of memorandum or contract.

Defendants' letter stating that defendants would give plaintiff opportunity to become major tenant in contemplated shopping center with rental and terms at least equal to that of any other major store in center was sufficient evidence of unilateral contract to satisfy District of Columbia statute of frauds. D.C. Code § 28-3502. Ammerman v. City Stores Co., 394 F.2d 950, 1968 U.S. App. LEXIS 7456 (C.A.D.C. 1968).

Omission to perform a contractual obligation does not ordinarily create a cause of action in tort as between the contracting parties; thus, the mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort. Curry v. Bank of Am. Home Loans Servicing, 802 F.Supp.2d 105, 2011 U.S. Dist. LEXIS 88299 (2011), affirmed by 466 Fed. Appx. 12, 2012 U.S. App. LEXIS 10310 (D.C. Cir. 2012).

Under District of Columbia law, although the statute of frauds does not require that the contract itself be in writing, it does require that the writing set forth the essential terms of the agreement, and adequately identify the parties to the contract. Gharib v. Wolf, 518 F.Supp.2d 50, 2007 U.S. Dist. LEXIS 54988 (2007).

Oral settlement agreements are not enforceable in Florida or the District of Columbia where the terms of the agreement bring it within the prohibitions of the applicable statute of frauds. Samra v. Shaheen Bus. & Inv. Group, Inc., 355 F.Supp.2d 483, 2005 U.S. Dist. LEXIS 1272 (2005).

Contract for employment of husband and wife for two years was unenforceable against

corporation under statute of frauds where letter offering employment identified subsidiary and not corporation as offeror and essential terms of alleged contract were missing in that there was no reference in letter or other writings to employment of offeree's wife. D.C. Code 1981, § 28-3502. Penick v. Frank E. Basil, Inc., 579 F. Supp. 160, 1984 U.S. Dist. LEXIS 19969 (1984), affirmed without opinion by 744 F.2d 878, 240 U.S. App. D.C. 254 (1984).

Form signed by former employee was type of form that new employees typically are required to fill out when accepting position with new company, was silent on issues of promotion and evaluation and, in area of compensation, only indicated former employee's annual salary; therefore, form was insufficient to satisfy District of Columbia's statute of frauds for purposes of former employee's breach of contract claims that he was not treated in accordance with contractual agreement he had with employer in area of compensation, evaluation, and promotion. D.C. Code 1981, § 28-3502. Prouty v. National R. Passenger Corp., 572 F. Supp. 200, 1983 U.S. Dist. LEXIS 12963 (1983).

As general rule, identification of real property by street address, city, and state is sufficient to satisfy statute of frauds; omission of name of city and state will be excused where their identity is clear under circumstances, but only where property description clearly identifies particular tract of land and could not apply equally to any other tract; however, under even most liberal of constructions, extrinsic evidence that leaves no doubt as to parcel of land that is being sold is required. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Street address in alleged land sale contract did not sufficiently describe subject property to satisfy statute of frauds, where vendor owned improved lot at address and adjacent vacant lot; street address was insufficiently definite as to whether one or two distinct lots were to be sold. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Itemized statement for services performed for municipality by landscape architect and city planner pursuant to oral contract with acting director of agency satisfied statute of frauds. D.C. Code § 28-3502. Coffin v. District of Columbia, 320 A.2d 301, 1974 D.C. App. LEXIS 220 (1974).

Under statute of frauds, a contract for sale of realty is valid and enforceable only when it is in writing and there is sufficient description of property to be sold, price to be paid and the names of parties to transaction. D.C. Code 1961, § 28-3502. Apostolides v. Colecchia, 221 A.2d 437, 1966 D.C. App. LEXIS 198 (App. 1966).

Estoppel.

Under District of Columbia law, a defendant waives protection of statute of frauds, and hence is barred from asserting it defensively, by admitting during course of discovery either making of contract or facts sufficient to establish its existence. Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 1983 U.S. App. LEXIS 27893 (C.A.D.C. 1983).

In failing to respond to vendors' requests for admission, purported purchaser thus admitted that he promised to meet vendors to execute contract of sale, that parties had agreed upon conditions for lease of land, and that he promised to fortify transaction with monetary deposit; purported purchaser thereby waived protection of statute of frauds and was barred from asserting it defensively in suit for breach of oral agreement to execute contract for sale and lease. Fed.Rules Civ.Proc. Rule 36, 18 U.S.C. Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 1983 U.S. App. LEXIS 27893 (C.A.D.C. 1983).

Under Virginia and the District of Columbia law, under the doctrine of equitable estoppel, a defendant is prevented from employing the statute of frauds as a defense to an alleged breach of contract if the plaintiff can prove that she reasonably relied on a representation by the defendant to her detriment. Morris v. Buvermo Props., 510 F.Supp.2d 112, 2007 U.S. Dist. LEXIS 70337 (2007).

Defendant waives his right to assert statute of frauds objection to existence of contract by admitting existence of contract or its material terms through oral or written testimony. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Vendor waived his right to assert statute of frauds objection to existence of alleged contract for sale of real estate by admitting that he entered "back-up" contract with purchaser, that expired by its own terms, because of purchaser's failure to respond or tender earnest money. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Vendor's admission in his pleadings that he entered agreement with purchaser was sufficient to satisfy statute of frauds with respect to its requirement that identity of purchaser be established by signed writing. D.C. Code 1981,§ 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Equitable estoppel may be granted to estop vendor from asserting statute of frauds as bar to enforcement of written contract to purchase real property where prospective purchaser relied upon oral modification of contract to his detriment or partially performed under such oral modification. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Oral agreement to purchase land is taken out of statute of frauds only when purchaser has changed his position so materially that unless

oral contract is enforced, fraud will result. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Mere refusal to perform oral contract within statute of frauds does not generally constitute such fraud as to raise equitable estoppel against assertion of statute as bar to enforcement of contract. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

In order to effectively assert estoppel against assertion of statute of frauds as bar to enforcement of contract, promisee must be able to show that he has changed his position substantially for the worse and that he has incurred unjust and unconscionable injury. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Prospective purchaser failed to demonstrate sufficient damages incurred in reliance on or in performance of oral modification to contract for purchase of real property to estop vendor from asserting statute of frauds against such oral modification. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Defendant waives right to assert statute of frauds as a defense if his counsel stipulates the facts showing that an agreement has, in fact, been reached. D.C. Code §§ 28-3502, 28:2-201; D.C. Code SCR, Civil Rule 8(c). Hackney v. Morelite Constr., 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

In action to enforce option contract, stipulated facts, together with letter of intent, sufficiently established elements of valid option contract by establishing that defendant, by its agent, made promise to keep open and offer to sell disputed property for fixed or reasonable period of time and that promise was given for valuable consideration, by establishing identification and location of property and by establishing that price was to be set by appropriate governmental agencies, and, thus, stipulations constituted a waiver of statute of frauds defense and of any parol evidence objections to admission of stipulated facts. D.C. Code §§ 28-3502, 28:2-201; D.C. Code SCR, Civil Rule 8(c). Hackney v. Morelite Constr., 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

In general.

Under District of Columbia law, parties may enter into an arrangement obligating them to prepare and execute a subsequent written contract, but to achieve enforceability it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in final document; thus, if document or contract that parties agree to make is to contain any material term that is not already agreed upon, oral promises cannot serve as foundation for judicial relief. Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 1983 U.S. App. LEXIS 27893 (C.A.D.C. 1983).

Written offer signed by the offeror is sufficient to satisfy the statute of frauds, in a suit against the offeror to enforce the agreement, even though the offeree subsequently accepted the offer only orally. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Memorandum or note required by the statute of frauds need not be made by the parties as an expression of the contract or signed with the intention of assenting to the contract's term in order to satisfy the statute of frauds. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Generally, the purpose for which a memorandum is prepared and the intent within which it was signed are immaterial to determining whether the statute of frauds has been satisfied. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Memorandum satisfying the statute of frauds may be made before the contract is concluded. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Claim that aptitude test preparation service procured test questions created by medical school aptitude test provider through fraud was not subject to statute of frauds requirement that specified contracts be in writing. Ass'n of Am. Med. Colleges v. Princeton Review, Inc., 332 F.Supp.2d 11, 2004 U.S. Dist. LEXIS 17458 (2004).

Alleged promise of corporate employee to personally guarantee employment contract with corporate subsidiary was unenforceable under statute of frauds where there was no writing embodying guarantee by employee signed by him. D.C. Code 1981, § 28-3502. Penick v. Frank E. Basil, Inc., 579 F. Supp. 160, 1984 U.S. Dist. LEXIS 19969 (1984), affirmed without opinion by 744 F.2d 878, 240 U.S. App. D.C. 254 (1984).

Letter wherein shopping center operators indicated appreciation for company's efforts in assisting operators in their application for proper zoning and stated that in event of success operators would give company opportunity to be major tenant with rental and terms at least equal to that of any other major department store in the center, together with full performance by company of the assistance services, was sufficient writing to satisfy District of Columbia statute of frauds. D.C. Code 1961, § 12-302. City Stores Co. v. Ammerman, 266 F.

Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

Assuming oral contract existed between assignee of tax liens and former property owner for the redemption of property that was subject to tax liens in which former property owner could match the highest bid received for the property, such an agreement fell within the statute of frauds, and thus, could not be enforced without some evidence of a written agreement, or partial or complete performance under the alleged oral contract. Scoville St. Corp. v. Dist. TLC Trust, 1996, 857 A.2d 1071, 2004 D.C. App. LEXIS 437 (1996).

Purchaser's letter to vendor could not be relied upon to satisfy statute of frauds, with respect to alleged agreement to sell real estate, where letter was written after earlier memorandum, and was neither signed by vendor nor effectively incorporated by memorandum; purchaser could not, by sending letter, unilaterally deprive vendor of protection provided by statute of frauds. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Even where there is promise to answer for debt of another, promise may be enforceable notwithstanding statute of frauds if "leading object" of promisor was to obtain direct, personal benefit. D.C. Code § 28-3502. Hudson v. Ashley, 411 A.2d 963, 1980 D.C. App. LEXIS 219 (1980).

Generally, essential terms of agreement required to be in writing by virtue of statute of frauds must be expressed in writing without resort to parol evidence. D.C. Code § 28-3502. Educational Enterprises, Inc. v. Greening, 265 A.2d 287, 1970 D.C. App. LEXIS 282 (App. 1970).

Intent.

Intent of statute of frauds is not to invalidate any oral agreement in one of the enumerated classes, but merely to suspend its enforcement until statute is satisfied by reduction of agreement to writing. D.C. Code § 28-3502. Hackney v. Morelite Constr., 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

Jury questions.

Jury questions were presented as to whether developer conferred benefits on transit authority, and whether developer detrimentally relied on authority's promise to sell subject property so as to give rise to promissory estoppel precluding authority from raising defense to developer's breach of contract claim based on District of Columbia statute of frauds. Monument Realty LLC v. Wash. Metro. Area Transit Auth., 535 F.Supp.2d 60, 2008 U.S. Dist. LEXIS 14073 (2008).

Test to determine whether undertaking was original or collateral for purposes of statute of frauds is usually mixed question of law and fact; facts that are determinative usually make issue a question for jury. D.C. Code § 28-3502. Hudson v. Ashley, 411 A.2d 963, 1980 D.C. App. LEXIS 219 (1980).

Landlord and tenant.

Lease must minimally contain description of premises, term of tenancy, rent to be paid, and identity of parties. Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 1983 U.S. App. LEXIS 27893 (C.A.D.C. 1983).

Written lease agreement between retail property owner and tenant was written memorandum of owner's purported agreement with commercial real estate broker, as required to satisfy statute of frauds for broker's breach of contract action under District of Columbia law against owner for failure to pay monthly commissions, where lease stated owner would pay broker a percentage of monthly lease payments as commission for securing tenant, and was signed by owner. Uhar & Co. v. Jacob, 710 F.Supp.2d 45, 2010 U.S. Dist. LEXIS 43025 (2010).

Services performed by company in assisting shopping center operators in securing necessary zoning, particularly the writing of a letter, constituted adequate consideration for valid, binding unilateral contract of operators to give the company an opportunity to become major tenant of shopping center with rental and terms at least equal to that of any other major department store there. City Stores Co. v. Ammerman, 266 F. Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

Letter wherein shopping center operators expressed appreciation for efforts of company in endeavoring to assist in application for proper zoning and assured company that operators, if successful, would give company opportunity to become one of center's major tenants with rental and terms at least equal to that of any other major department store there was a binding unilateral contract, and conditions precedent consisting of securing of necessary zoning and operators' entry into other leases did not render the contract invalid or too indefinite. City Stores Co. v. Ammerman, 266 F. Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

Company which sued timely to prevent shopping center operators from entering into department store lease that would have pre-

cluded operators from performing contract to offer company a lease on terms at least equal to those of other major department stores neither gave up its contractual rights nor unnecessarily delayed assertion thereof by suit for specific performance. City Stores Co. v. Ammerman, 266 F. Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

In view of impossibility of assessing damages when shopping center operators advised company before executing other leases that operators considered themselves no longer contractually obligated to offer company a lease on terms at least equal to those offered to other major department stores, company could not have brought action for anticipatory breach. City Stores Co. v. Ammerman, 266 F. Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

Leading object exception.

Managing members of private equity fund were not personally liable to investment management firm for alleged oral agreement to compensate firm for consulting services under "leading object" exception to the Statute of Frauds, where there was no evidence that either managing member derived a direct, personal benefit firms efforts. New Econ. Capital, LLC v. New Mkts. Capital Group, 881 A.2d 1087, 2005 D.C. App. LEXIS 418 (2005).

"Leading object exception" to the Statute of Frauds provides that the maker of a personal, new and direct promise to pay, though it be merely verbal, is not relieved of the obligation to pay; exception requires that person allegedly making the independent promise derive a direct, personal benefit. New Econ. Capital, LLC v. New Mkts. Capital Group, 881 A.2d 1087, 2005 D.C. App. LEXIS 418 (2005).

Modification of contract.

Oral modifications of alimony formula in nonmerged property settlement were not barred by statute of frauds, as agreement was capable of being performed within one year insofar as alimony obligations could terminate upon wife's death or remarriage or upon husband's death. Clark v. Clark, 535 A.2d 872, 1987 D.C. App. LEXIS 511 (1987).

A written contract may be orally modified or rescinded by subsequent oral agreement, even though contract contains express language prohibiting oral modification. Clark v. Clark, 535 A.2d 872, 1987 D.C. App. LEXIS 511 (1987).

Detrimental reliance upon oral contract by one of parties may remove modification from reach of statute of frauds. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Nature and subject matter.

Oral contract for permanent employment was not unenforceable under District of Columbia statute of frauds, even if employee expected to retire at some indefinite time in future, and employer agreed to pay bonus more than one year after commencement of employment. D.C. Code 1981, § 28-3502. Hodge v. Evans Financial Corp., 823 F.2d 559, 1987 U.S. App. LEXIS 9188 (C.A.D.C. 1987).

Oral contract contemplating long-term employment is void under statute of frauds. D.C. Code § 28-3502. Gebhard v. GAF Corp., 59 F.R.D. 504, 1973 U.S. Dist. LEXIS 13739 (1973).

Even if oral agreement was made whereby defendant was to purchase, each year, football season tickets as agent of plaintiffs, statute of frauds was applicable to bar action, notwithstanding any hardship incurred by claimants in reliance. D.C. Code § 28-3502. Tauber v. Jacobson, 293 A.2d 861, 1972 D.C. App. LEXIS 235 (1972).

Oral statements explaining ambiguous contract.

Parol evidence rule does not bar oral statements prior to and contemporaneous with an ambiguous written agreement if they explain, rather than contradict, the writing. Launay v. Launay, Inc., 497 A.2d 443, 1985 D.C. App. LEXIS 467 (1985).

Where contractual language is inexact, surrounding circumstances should be examined to determine meaning of words used. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Original or collateral promise.

Test to determine whether undertaking was original or collateral, for purposes of statute of frauds, is to ascertain to whom credit was given for services rendered. D.C. Code § 28-3502. Hudson v. Ashley, 411 A.2d 963, 1980 D.C. App. LEXIS 219 (1980).

Fact that law firm billed son, whose father had promised to pay law firm for services rendered to son, did not preclude jury finding of original promise by father since billing was only circumstance to be considered by finder of fact in determining whether credit was extended exclusively to promisor. D.C. Code § 28-3502. Hudson v. Ashley, 411 A.2d 963, 1980 D.C. App. LEXIS 219 (1980).

Partial performance.

Partial or complete performance under an oral contract may remove a case from the applicability of the statute of frauds under District of Columbia law. Bell v. Rotwein, 535

F.Supp.2d 137, 2008 U.S. Dist. LEXIS 16305 (2008).

Under District of Columbia law, court may refuse to allow the defendant to interpose a statute of frauds defense where the equitable doctrine of part performance, also known as promissory estoppel, is applicable. Bell v. Rotwein, 535 F.Supp.2d 137, 2008 U.S. Dist. LEXIS 16305 (2008).

Alleged oral contract between former employee and non-profit organization for fixed term of ten years was subject to statute of frauds under District of Columbia law, and thus employee could not sustain breach of implied contract claim against organization, although employee alleged exception to statute of frauds should apply due to employee's partial performance; employee failed to sufficiently allege that his circumstances warranted removing the alleged oral contract from the statute. Gharib v. Wolf, 518 F.Supp.2d 50, 2007 U.S. Dist. LEXIS 54988 (2007).

The rule that where material terms remain to be decided by the parties, there is no contract at all, applies only where parties fail to reach an enforceable agreement, that is, an agreement for a valuable consideration binding on both parties, and not to a binding option contract or any contract where promised performance has been completed by one of the parties. City Stores Co. v. Ammerman, 266 F. Supp. 766, 1967 U.S. Dist. LEXIS 9198 (D.D.C1967), affirmed by 394 F.2d 950, 129 U.S. App. D.C. 322, 129 U.S. App. D.C. 325, 1968 U.S. App. LEXIS 7456, 38 A.L.R.3d 1042 (1968).

Under District of Columbia law, lessee of child care center did not establish part performance or detrimental reliance removing its purchase option under lease from statute of frauds, even though lessee was in possession of property and paid rent, inasmuch as neither of those acts represented performance evidencing option or detrimental reliance upon it, but instead served equally as evidence of lease as of option to purchase, and lessee provided no independent consideration for option. Nations Capital Child & Family Development, Inc. v. MarlynTree, LCC (In re Nation's Capital Child & Family Development, Inc.), 457 B.R. 142, 2011 Bankr. LEXIS 3782 (2011).

Exception to statute of frauds' bar on oral contracts that cannot be performed within one year exists where partial performance has occurred. D.C. Code 1981, § 28-3502. Fitzgerald v. Hunter Concessions, 710 A.2d 863, 1998 D.C. App. LEXIS 81 (1998).

Exception to statute of frauds' bar on oral contracts that cannot be performed within one year exists where partial performance has occurred. D.C. Code 1981, § 28-3502. R & A, Inc. v. Kozy Korner, 672 A.2d 1062, 1996 D.C. App. LEXIS 23 (1996).

Although statute of frauds provides that any agreement involving interest in real estate which purportedly is for term in excess of one year must be in writing to be enforceable, partial or complete performance under oral contract may remove case from applicability of statute. D.C. Code 1981, §§ 28-3501, 28-3502. Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 1982 D.C. App. LEXIS 501 (1982).

Husband's authorizing filing of pretrial praecipe and withdrawing countersuit in divorce proceeding commenced by wife was sufficient to bring oral agreement, which had been negotiated with consent of husband and wife, and which provided that title to marital estate was to be given to husband in return for cash payment and withdrawal of countersuit, outside statute of frauds, and thus trial court, after verifying consent of wife, was in error in refusing to hold that parties were bound by such agreement. D.C. Code § 28-3502. Brown v. Brown, 343 A.2d 59, 1975 D.C. App. LEXIS 232 (1975).

Although statute provides that any agreement involving an interest in real estate which purportedly is for a term in excess of one year must be in writing to be enforceable, the effectiveness of such legislation is not absolute and partial or complete performance under an oral contract may remove the case from the applicability of the statute. D.C. Code §§ 28-3501, 28-3502. Amberger & Wohlfarth, Inc. v. District of Columbia, 300 A.2d 460, 1973 D.C. App. LEXIS 226 (1973).

Persons to whom statute is available.

Prospective purchaser, as assignor, alone had standing to challenge assignment of his interest in contract for sale of real estate on ground that statute of frauds barred assignee from proving oral assignment ever occurred. D.C. Code§§ 28-3501 to 28-3505. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Pleadings.

Plaintiff, by alleging that he fully performed his obligations under an oral contract for his services in setting up and operating carousel, and that he was paid for his services at contractual rate for first five years of contract, sufficiently alleged partial performance, as required to state breach of contract claim under exception to statute of frauds' bar on oral contracts that cannot be performed within one year. D.C. Code 1981, § 28-3502. Fitzgerald v. Hunter Concessions, 710 A.2d 863, 1998 D.C. App. LEXIS 81 (1998).

Possibility of performance.

Statute of frauds is applicable if, at time contract is formed, any contingent event could complete terms of contract within one year. D.C. Code 1981, § 28-3502. Hodge v. Evans

Financial Corp., 823 F.2d 559, 1987 U.S. App. LEXIS 9188 (C.A.D.C. 1987).

Where stock restriction agreement was by its terms capable, possible, or susceptible of performance within one year, statute of frauds did not apply to the oral agreement. Launay v. Launay, Inc., 497 A.2d 443, 1985 D.C. App. LEXIS 467 (1985).

Oral partnership agreement did not run afoul of statute of frauds where no term of years was ever fixed by agreement and it was therefore capable of performance within one year, nor did asserted agreement by its terms convey any interest in land so as to place it within statute of frauds. Cooper v. Saunders-Hunt, 365 A.2d 626, 1976 D.C. App. LEXIS 402 (1976).

Presumptions and burden of proof.

In the case of a written offer, the offense, suing on the contract and entering into evidence the written offer in satisfaction of the statute of frauds, continues to bear the burden of proving the existence of a contract on the terms contained in the document. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Separate writings.

Memorandum respecting sale of real estate need not, to satisfy statute of frauds, be one piece of paper; memorandum may consist of several writings if one writing is signed and writings in circumstances clearly indicate that they relate to same transaction. D.C. Code 1981, § 28-3502. Clay v. Hanson, 536 A.2d 1097, 1988 D.C. App. LEXIS 10 (1988).

Signature of memorandum.

Statute of frauds does not require that the contract itself be in writing or that the signature of the party to be charged be affixed to the writing as the operative, legally effective act of assent. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

District of Columbia statute of frauds applied to settlement agreement establishing amount to be paid for the acquisition of lessees' interests in property, and therefore agreement was unenforceable as a result of the fact that it was not signed by a representative for the acquiring governmental entity. Rumber v. District of Columbia, 598 F.Supp.2d 97, 2009 U.S. Dist. LEXIS 14918 (2009), affirmed by 595 F.3d 1298, 389 U.S. App. D.C. 242, 2010 U.S. App. LEXIS 4038 (2010).

Statute as affirmative defense.

Statute of frauds has not been devised as a mandatory directive to reduce to writing any oral contract which comes under the statute on pain of forever foregoing right to enforce it, but, rather, as an optional defense which party being charged may invoke to prevent enforcement of unfounded claims against him, and, thus, the defense may be lost if it is not affirmatively pleaded. D.C. Code § 28-3502. Hackney v. Morelite Constr., 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

Sufficiency of evidence.

Partner in California law firm, suing on a contract for the purchase of the Washington, D. C., office of the law firm and offering a written "memorandum agreement" in satisfaction of the statute of frauds, successfully bore the burden of independently proving the existence of the contract upon the terms of the written "memorandum agreement," notwithstanding that the "memorandum agreement" was created and signed prior to the time the contract was concluded. D.C. Code 1973, § 28-3502. Farrow v. Cahill, 663 F.2d 201, 1980 U.S. App. LEXIS 11491 (C.A.D.C. 1980).

Valid contract for modification of loan did not exist between borrower and lender, even if notarization on loan modification application had been legally adequate, since borrower had never signed application, and borrower's signature on application, by itself, did not result in ratification of offer to contract. Curry v. Bank of Am. Home Loans Servicing, 802 F.Supp.2d 105, 2011 U.S. Dist. LEXIS 88299 (2011), affirmed by 466 Fed. Appx. 12, 2012 U.S. App. LEXIS 10310 (D.C. Cir. 2012).

Summary judgment.

Genuine issues of material fact existed regarding whether employer promised to employ employee for ten years, whether employee relied on such representations to his detriment, and whether such reliance was reasonable, precluding summary judgment on whether employer was equitably estopped from asserting a statute of fraud defense in employee's action alleging breach of oral contract that employment would last for ten years. Morris v. Buvermo Props., 510 F.Supp.2d 112, 2007 U.S. Dist. LEXIS 70337 (2007).

Waiver.

Employer's statements that it had long-term commitment to real estate market and business did not amount to a waiver of the statute of fraud defense, under Virginia and District of Columbia law, to employee's claim of breach of oral contract that employment would last for ten years, since such statements were not an admission that it had entered or intended to enter into an agreement to guarantee employee's employment for ten years. Morris v. Buvermo Props., 510 F.Supp.2d 112, 2007 U.S. Dist. LEXIS 70337 (2007).

Under Virginia and the District of Columbia law, where a party has admitted the existence of the agreement at issue that party has waived

and may not assert a statute of frauds objection to the enforcement of an oral agreement. Morris v. Buvermo Props., 510 F.Supp.2d 112, 2007 U.S. Dist. LEXIS 70337 (2007).

§ 28-3503. Declaration, grant, and assignment of trust.

A declaration or creation of trust or confidence of real estate which is not in writing, signed by the party who is by law enabled to declare the trust or by his last will in writing, is void.

A grant or assignment of a trust or confidence which is not in writing, signed by the party granting or assigning it, or by his last will, is void.

Where a conveyance is made of real estate by which a trust or confidence is or may arise or result by the implication or construction of law, or is transferred or extinguished by an act or operation of law, the trust or confidence is of the same effect as it would have been if this section had not been enacted.

(Aug. 30, 1964, 78 Stat. 676, Pub. L. 88-509, § 1.)

Cross references. — Estates, conveyances, see § 42-301 et seq.

Estates in land, see § 42-501 et seq.

Mortgages and deeds of trust, see § 42-801 et seq.

Prior Codifications. — 1981 Ed., § 28-3503.

1973 Ed., § 28-3503.

CASE NOTES

ANALYSIS

Assignments.
Constructive trusts.
Limitations and laches.
Oral agreements.
Persons to whom statute is available.
Resulting trusts.

Assignments.

Generally, all contractual rights may be assigned, including right to sue for enforcement of claim. D.C. Code §§ 28:9-102(1)(b), 28:9-104(f), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Constructive trusts.

The statute of frauds provides no obstacle to a claim for a constructive trust. In re Estate of Reilly, 933 A.2d 830, 2007 D.C. App. LEXIS 589 (2007).

Limitations and laches.

Suit to establish resulting trust in realty, instituted a little more than a year after trustee expressly disavowed trust, held not barred by laches. Haliday v. Haliday, 11 F.2d 565, 1926 U.S. App. LEXIS 2540 (1926).

Time, lapse of which constitutes laches, barring establishment of resulting trust, begins to run from trustee's disavowal of trust to knowledge of cestui que trust. Haliday v. Haliday, 11 F.2d 565, 1926 U.S. App. LEXIS 2540 (1926).

Oral agreements.

Oral agreements are exempt from the statute of frauds if acts of part performance constitute unequivocal evidence of the alleged agreement. In re Estate of Reilly, 933 A.2d 830, 2007 D.C. App. LEXIS 589 (2007).

Persons to whom statute is available.

Where purchaser and original owners of apartments had extended trust arrangement, tenant who asserted purchaser was not owner of property and therefore was barred from maintaining suit for possession, could not attack agreement to which she was stranger on basis of statute of frauds. D.C. Code 1981, § 28-3503. B.D.S., Inc. v. Gillis, 477 A.2d 1121, 1984 D.C. App. LEXIS 432 (1984).

Prospective purchaser, as assignor, alone had standing to challenge assignment of his interest in contract for sale of real estate on ground that statute of frauds barred assignee from proving oral assignment ever occurred. D.C. Code§§ 28-3501 to 28-3505. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Resulting trusts.

Implied or resulting trusts are recognized in District of Columbia, in view of Code 1924, § 1118. D.C. Code 1929, T. 11, § 3. Haliday v.

Haliday, 11 F.2d 565, 1926 U.S. App. LEXIS 2540 (1926).

Evidence of acts and conversations of parties after creating alleged resulting trust in realty was admissible as evidence of intent. Haliday v. Haliday, 11 F.2d 565, 1926 U.S. App. LEXIS 2540 (1926).

Implied or resulting trust may be established by parol evidence. Haliday v. Haliday, 11 F.2d 565, 1926 U.S. App. LEXIS 2540 (1926).

A resulting trust is a property relationship designed to effectuate the parties' intent when one party takes title to property for which another has furnished the consideration. Edwards v. Woods, 385 A.2d 780, 1978 D.C. App. LEXIS 499 (1978).

There may be a resulting trust of a partial interest in property. Edwards v. Woods, 385 A.2d 780, 1978 D.C. App. LEXIS 499 (1978).

Statute of frauds does not apply to resulting trusts. Edwards v. Woods, 385 A.2d 780, 1978 D.C. App. LEXIS 499 (1978).

Evidence as to parties' conduct after the creation of a resulting trust is admissible for whatever light it might shed on their intent at time of the disputed transaction. Edwards v. Woods, 385 A.2d 780, 1978 D.C. App. LEXIS 499 (1978).

A person seeking to prove a resulting trust must demonstrate his case by clear and convincing evidence; such a strict requirement is intended, and is necessary, to protect the sanctity of record titles and to prevent the defrauding of creditors. Edwards v. Woods, 385 A.2d 780, 1978 D.C. App. LEXIS 499 (1978).

§ 28-3504. New promise or acknowledgment of contract — Action against joint contractors.

In an action upon a simple contract, an acknowledgement, or promise, by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgement, or promise, is in writing, signed by the party chargeable thereby. This section does not alter or take away, or lessen the effect of a payment of principal or interest made by any person. In actions against two or more joint contractors, or executors, or administrators, if it appears at the trial, or otherwise, that the plaintiff, though barred by the statute of limitations as to one or more of the defendants, is nevertheless entitled to recover against any other defendant by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given for the plaintiff as to that defendant. An indorsement or memorandum of a payment written or made upon a promissory note, bill of exchange, or other writing, by or on behalf of the party to whom the payment is to be made, is not sufficient proof of the payment so as to take the case out of the operation of the statute of limitations.

(Aug. 30, 1964, 78 Stat. 677, Pub. L. 88-509, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(i), 44 DCR 1271.)

Cross references. — States of limitations, see § 12-301 et seq.

Prior Codifications. — 1981 Ed., § 28-3504.

1973 Ed., § 28-3504.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

CASE NOTES

ANALYSIS

Acknowledgment, new promise and part payment.

District of Columbia statute providing that an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract so as to take case out of statute of limitations does not apply to an arrangement having for its consideration, not simply moral obligation to honor an old debt, but a fresh contemporaneous consideration which would support a binding contract between parties. D.C. Code § 28-3504. Nyhus v. Travel Management Corp., 466 F.2d 440, 1972 U.S. App. LEXIS 7967 (C.A.D.C. 1972).

Written acknowledgment or promise of a new or continuing contract outside the operation of the statute of limitations must be distinct and unequivocal and must be made either to the creditor, to someone acting for him, or to some third person with intent that it be known by and influence the action of the creditor. D.C. Code 1981, § 28-3504. Partnership Placements v. Landmark Ins. Co., 722 A.2d 837, 1998 D.C. App. LEXIS 247 (1998).

Traditional distinction between setoff and counterclaim did not prelude lessees from invoking doctrine of acknowledgment in rebuttal when lessor, who sought recovery of real estate for failure to pay rent, asserted statute of limitations to bar lessees' counterdemand that lessor had promised to repay lessees for necessary maintenance and repair of property, a counterdemand which sounded in contract and related to obligation to pay rent upon which lessor's suit was based. D.C. Code 1981, § 28-3504. Griffith v. Butler, 571 A.2d 1161, 1990 D.C. App. LEXIS 58 (1990).

No new consideration is necessary for an acknowledgment so as to take case out of statute of limitations, for since unextinguished original debt remains in foro conscientiae as obligatory, it is itself a sufficient consideration for new promise. D.C. Code 1981, § 28-3504. Griffith v. Butler, 571 A.2d 1161, 1990 D.C. App. LEXIS 58 (1990).

Letter, by first attorney for person injured in automobile accident to second attorney to whom injured person's action against motorist had been referred, stating that both attorneys had to sue injured person on behalf of doctor for unpaid portion of such doctor's fee or they would have to personally take care of balance due the doctor was sufficient written acknowledgment of first attorney's debt to remove doctor's cause of action against first attorney under written assignment agreement from operation of statute of limitations. D.C. Code §§ 12-301(7), 28-3504. Heffelfinger v. Gibson, 290 A.2d 390, 1972 D.C. App. LEXIS 376 (1972).

Under statute providing that an acknowledgment by words only is not sufficient evidence of a continuing contract whereby to take action upon a simple contract out of operation of statute of limitations unless the acknowledgment is in writing and signed by party chargeable thereby, such acknowledgment must be made either to creditor or to someone acting for him, or to some third person with intent that it be known by and influence action of the creditor. D.C. Code § 28-3504. Heffelfinger v. Gibson, 290 A.2d 390, 1972 D.C. App. LEXIS 376 (1972).

A distinct and unequivocal acknowledgment of debt as a still subsisting personal obligation constitutes implied promise to pay it and takes contract out of statute of limitations. D.C. Code §§ 12-301, 28-3504. Heffelfinger v. Gibson, 290 A.2d 390, 1972 D.C. App. LEXIS 376 (1972).

Assignment of contract.

Contract for sale of real property did not amount to personal services contract, and thus assignment by prospective purchaser could not be contested on basis that rights assigned involved performance of unique personal services. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Vendor consented to assignment by prospective purchaser of his interest in contract for sale of real estate, even though interim agreement allowing prospective purchaser and assignee to reside in the property contained antiassignment provision, where vendor accepted rental payments from assignee after date of the oral assignment agreement, and vendor did not object when prospective purchaser vacated the premises leaving assignee in sole possession of the house. D.C. Code §§ 28:9-102(1)(b), 28:9-318(4), 28-2302 to 28-2304; D.C. Code SCR, Civil Rule 19(a). Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Contracts.

Acquiring corporation's alleged post-merger agreement to pay former owners of acquired corporation additional compensation if former owners would hold their stock until after spin-off transaction was not enforceable contract under District of Columbia and Connecticut law; letters allegedly confirming the agreement described the parties, debtors, and calculation of the debt differently, used different methods

to calculate the amount of money or stock options that the debtor would owe the plaintiffs, and referred to the contract as a "proposal." In re U.S. Office Products Co. Securities Litigat. Arturi v. United States Office Prods. Co. (In re United States Office Prods. Co. Sec. Litig.), 251 F.Supp.2d 58, 2003 U.S. Dist. LEXIS 3534 (2003), dismissed in part by 251 F. Supp. 2d 77, 2003 U.S. Dist. LEXIS 3488 (D.D.C. 2003).

Agreement executed by prospective purchaser and by vendor's alleged agent constituted contract for sale of property and not contract for lease, even though form used was standardized lease agreement, where term of the agreement was typed in by the alleged agent as "two months," the parties later initialed a handwritten modification of that term so as to permit occupants to reside "longer if necessary to obtain financing for purchase," the parties also agreed to include typewritten clauses providing for payments to be credited towards purchase price, and other circumstances surrounding execution showed that all parties contemplated sale rather than rental. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

When there is conflict or inconsistency between printed provision and one inserted by parties especially for particular transaction, the printed clause must yield to the insertion. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

Persons to whom statute is available.

Prospective purchaser, as assignor, alone had standing to challenge assignment of his interest in contract for sale of real estate on ground that statute of frauds barred assignee from proving oral assignment ever occurred. D.C. Code§§ 28-3501 to 28-3505. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

§ 28-3505. New promise or acknowledgement of debt incurred during infancy.

An action may not be maintained to charge a person upon an acknowledgment of, or promise to pay, a debt contracted during infancy, made after full age, except for necessaries, unless the acknowledgement or promise is in writing signed by the party to be charged therewith. This section does not affect ratification by conduct.

(Aug. 30, 1964, 78 Stat. 677, Pub. L. 88-509, § 1.)

Cross references. — Age of majority, contracts, see § 28:1-103.

Prior Codifications. — 1981 Ed., § 28-3505.

1973 Ed., § 28-3505.

CASE NOTES

Persons to whom statute is available.

Prospective purchaser, as assignor, alone had standing to challenge assignment of his interest in contract for sale of real estate on ground that statute of frauds barred assignee from proving oral assignment ever occurred. D.C. Code§§ 28-3501 to 28-3505. Flack v. Laster, 417 A.2d 393, 1980 D.C. App. LEXIS 321 (1980).

CHAPTER 36. DIRECT MOTOR VEHICLE INSTALLMENT LOANS.

§ 28-3601. Direct motor vehicle installment loans.

The provisions of the Act approved April 22, 1960 (Public Law 86-431, 74 Stat. 69; D.C. Code, 1967 Ed., Chapter 9 of Title 40, [Chapter 6 of Title 50, 2001 Ed.]), covering installment sales of motor vehicles, as amended, and the regulations issued thereunder, shall apply to the extent appropriate to, a direct installment loan, secured by a security interest in a motor vehicle, made by a federally insured bank or savings and loan association doing business in the District of Columbia, subject to section 28-3602.

(Dec. 17, 1971, 85 Stat. 666, Pub. L. 92-200, § 4.)

Cross references. — Automobile Consumer Protection Act, see § 50-501.

Prior Codifications. — 1981 Ed., § 28-3601.

1973 Ed., § 28-3601.

CASE NOTES

In general.

Under usury statute existing prior to enactment of Consumer Credit Protection Act of 1971, a retail merchant could enforce a revolving charge account agreement with a customer, terms of which required payment of one and one-half percent per month on balances remaining unpaid after first billing cycle for goods purchased on credit. D.C. Code §§ 28-3301 to 28-3303, 28-3601 et seq., 28-3701 et seq., 28-3801 et seq.; District of Columbia Consumer Credit Protection Act of 1971, § 9, 85 Stat. 665. Kass v. Garfinckel, Brooks Bros., Miller & Rhoads, Inc., 299 A.2d 542, 1973 D.C. App. LEXIS 214 (1973).

§ 28-3602. Finance charge.

Such a bank or savings and loan association may contract for and receive interest at the rate provided for in Chapter 33 of this subtitle, or, in lieu of such interest, a finance charge which, if expressed as an annual percentage rate, does not exceed a rate of 21% per annum on the unpaid balances of principal.

(Dec. 17, 1971, 85 Stat. 667, Pub. L. 92-200, § 4; Mar. 10, 1982, D.C. Law 4-70, § 4, 28 DCR 5236.)

Section references. — This section is referenced in § 28-3601.

Prior Codifications. — 1981 Ed., § 28-3602.

1973 Ed., § 28-3602.

Legislative history of Law 4-70. — Law 4-70, the "Consumer Credit Interest Rate Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-138, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on October 27, 1981, and November 10, 1981, respectively. Signed by the Mayor on December 2, 1981, it was assigned Act No. 4-117 and transmitted to both Houses of Congress for its review.

§ 28-3603. Definitions.

As used in this chapter, "finance charge" and "annual percentage rate" shall have the respective meanings under the provisions of the Truth-in-Lending Act (82 Stat. 146 et seq.; 15 U.S.C. 1601 et seq.) and the regulations and interpretations thereunder; and "federally insured bank or savings and loan association" means an insured bank as defined in section 3 of the Federal Deposit Insurance Act or an "insured institution" as defined in section 401 of the National Housing Act.

(Dec. 17, 1971, 85 Stat. 667, Pub. L. 92-200, § 4.)

Prior Codifications. — 1981 Ed., § 28-3603.

1973 Ed., § 28-3603.

References in text. — Section 3 of the Federal Deposit Insurance Act and section 401 of the National Housing Act, both referred to in this section, are codified in 12 U.S.C. §§ 1813 and 1724, respectively. 12 U.S.C. § 1724 was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

CHAPTER 37. REVOLVING CREDIT ACCOUNTS.

§ 28-3701. Definitions.

As used in this chapter —

(1) "revolving credit account" means an arrangement between a seller or financial institution and a buyer pursuant to which (A) the seller or financial institution may permit the buyer to purchase goods or services on credit from time to time, either directly from the seller or indirectly by use of a credit card or other device, whether issued by the seller or a financial institution, (B) the unpaid balances of amount financed arising from purchases and credit service and other appropriate charges are debited to an account, (C) a credit service charge if made is not precomputed but is computed on an outstanding unpaid balance of the buyer's account from time to time, and (D) the buyer has the privilege of paying the balances in full or in installments. The term "revolving credit account" shall not include loans obtained by a person from a financial institution where a check, credit card, or other device is used to access a line of credit.

(2) "credit service charge" means the sum of (A) all charges payable directly or indirectly by the buyer and imposed directly or indirectly by the seller or financial institution as an incident to the extension of credit, including any of the following types of charges which are applicable: time-price differential, service, carrying, or other charge, however denominated, premium or other charge for any guarantee or insurance protecting the seller or financial institution against the buyer's default or other credit loss, and (B) charges incurred for investigating the collateral or credit-worthiness of the buyer or for commissions or brokerage for obtaining the credit irrespective of the person to whom the charges are paid or payable, unless the seller or financial institution had no notice of the charges when the credit was granted.

(3) "seller" means a person engaged in the District of Columbia in the business of selling goods or services to retail buyers.

(4) "buyer" means a person who buys goods or obtains services from a seller pursuant to a retail credit sale and not principally for the purpose of resale; and includes a person who enters into a prior agreement with a financial institution whereby the latter agrees to pay the debts of the buyer as they accrue at various retail sellers, designated by the financial institution, in consideration of the buyer paying to the financial institution the cash sales price plus the credit service charge on the purchase.

(5) "person" includes any individual, partnership, corporation, association, trust, joint stock company, or any other group of persons however organized.

(6) "financial institution" means a person who enters into an agreement with a buyer whereby the former agrees to extend credit to the buyer and to

apply it as directed by the buyer pursuant to a credit card issued to the buyer by the financial institution; and this term includes any "insured bank" as defined in section 3 of the Federal Deposit Insurance Act, approved September 21, 1950 (64 Stat. 873; 12 U.S.C. sec. 1813) or any "insured institution" as defined in section 401 of the National Housing Act, approved June 27, 1934 (12 U.S.C. sec. 1724; 48 Stat. 1255) and any subsidiary corporation which is wholly-owned by a financial institution doing business in the District.

(Dec. 17, 1971, 85 Stat. 667, Pub. L. 92-200, § 4; Mar. 10, 1982, D.C. Law 4-70, § 5, 28 DCR 5236; Apr. 9, 1997, D.C. Law 11-255, § 27(j), 44 DCR 1271.)

Section references. — This section is referenced in § 28-3802 and § 28-3805.

Prior Codifications. — 1981 Ed., § 28-3701.

1973 Ed., § 28-3701.

Legislative history of Law 4-70. — Law 4-70, the "Consumer Credit Interest Rate Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-138, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on October 27, 1981, and November 10, 1981, respectively. Signed by the Mayor on December 2, 1981, it was assigned Act No. 4-117 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

References in text. — "12 U.S.C. 1724", referred to in (6), was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

CASE NOTES

In general.

Under usury statute existing prior to enactment of Consumer Credit Protection Act of 1971, a retail merchant could enforce a revolving charge account agreement with a customer, terms of which required payment of one and one-half percent per month on balances remaining unpaid after first billing cycle for goods purchased on credit. D.C. Code §§ 28-3301 to 28-3303, 28-3601 et seq., 28-3701 et seq., 28-3801 et seq.; District of Columbia Consumer Credit Protection Act of 1971, § 9, 85 Stat. 665. Kass v. Garfinckel, Brooks Bros., Miller & Rhoads, Inc., 299 A.2d 542, 1973 D.C. App. LEXIS 214 (1973).

§ 28-3702. Amount and computation of credit service charge.

(a) The seller or financial institution may contract for the payment by the buyer of a credit service charge not exceeding that permitted by this section.

(b) A credit service charge may be made in each billing cycle. For the purpose of computing the outstanding balance subject to the credit service charge (1) the outstanding balance on any day shall consist of an amount which shall not exceed the sum of the total charges to the account less the amounts paid or credited to the account prior to such day, or (2) the outstanding balance may be computed by the average daily balance method. The credit service charge may also be computed for all outstanding balances within a range of not in excess of $10 on the basis of the median amount within such range if as so computed such credit service charge is applied to all outstanding balance within such range.

(c)(1) If the billing cycle is monthly, a credit service charge may be imposed

in the maximum amount of 2%. If the billing cycle is not monthly, the maximum charge is that percentage which bears the relation to the applicable monthly percentage as the number of days in the billing cycle bears to 30. For the purposes of this section, a variation of not more than 4 days from month to month is "the same day of the billing cycle".

(2) Notwithstanding the terms of any revolving credit account or any other provision of law, a seller or financial institution, with respect to its revolving credit accounts may (A) impose or increase any credit service charge, (B) change the method of computing the balance upon which charges are imposed, or (C) increase the required minimum periodic payment; provided, that the seller or financial institution mails a written notice of the change to each affected buyer at least thirty (30) days before the effected date of the change; Provided, further, that the seller or financial institution shall permit each affected buyer to repay, under the existing terms, any debt incurred prior to the effective date of the change, unless the buyer incurs additional debt on or after that date or otherwise assents in writing to the changes. This paragraph does not authorize a seller or financial institution to impose a credit service charge in excess of that permitted under paragraph (1) of this subsection.

(3) The notice required by paragraph (2) of this subsection shall clearly set forth the new term or terms, the corresponding existing term or terms, and the effective date of the change; shall appear on a single document that contains no other information except the changed revolving credit account agreement or other material directly related to the change; and shall be in plain language. The notice shall clearly explain the two options available to the buyer. The options shall be presented more conspicuously than the rest of the notice by, for example, bold-faced type, larger type size, or contrasting color.

(d)(1) In addition to the credit service charge permitted in subsection (b) of this section, a seller or financial institution may impose a late fee, delinquency charge, or any similar assessment on each minimum payment not paid in full within 10 days after the date the minimum payment is due. The late fee, delinquency charge, or any similar assessment shall not exceed $15 for any one minimum payment not made within 10 days of the date the minimum payment was due.

(2) Notwithstanding the terms of any revolving credit account or any other provision of law, a seller or financial institution may impose a late fee, delinquency charge, or other similar assessment pursuant to paragraph (1) of this subsection provided that the seller or financial institution mails a written notice of the change to each affected buyer at least 30 days before the date of the effected change, and that the seller or financial institution shall permit each affected buyer to repay, under the existing terms, any debt incurred prior to the effective date of the change, unless the buyer incurs additional debt on or after that date or otherwise asserts in writing to the changes.

(3) The notice required by paragraph (2) of this subsection shall clearly set forth the new terms, the corresponding existing terms, and the effective date of the change; shall appear on a single document that contains no other information except the charged revolving account agreement or other material directly related to the change; and shall be in plain language.

(Dec. 17, 1971, 85 Stat. 668, Pub. L. 92-200, § 4; Mar. 10, 1982, D.C. Law 4-70, § 6, 28 DCR 5236; Mar. 14, 1984, D.C. Law 5-62, § 5, 31 DCR 114; July 14, 1995, D.C. Law 11-26, § 2, 42 DCR 2565; Apr. 18, 1996, D.C. Law 11-110, § 28, 43 DCR 530; Apr. 9, 1997, D.C. Law 11-255, § 27(k), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-3702.

1973 Ed., § 28-3702.

Legislative history of Law 4-70. — For legislative history of D.C. Law 4-70, see Historical and Statutory Notes following § 28-3701.

Legislative history of Law 5-62. — Law 5-62, the "Interest Rate Ceiling Amendment Act of 1983," was introduced in Council and assigned Bill No. 5-193, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on November 15, 1983, and December 6, 1983, respectively. Signed by the Mayor on December 23, 1983, it was assigned Act No. 5-93 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-26. — Law 11-26, the "Revolving Credit account Late Fee Act of 1995," was introduced in Council and assigned Bill No. 11-43, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on April 4, 1995 and May 2, 1995, respectively. Signed by the Mayor on May 15, 1995, it was assigned Act No. 11-54 and transmitted to both Houses of Congress for its review. D.C. Law 11-26 became effective on July 14, 1995.

Legislative history of Law 11-110. — Law 11-110, the "Technical Amendments Acts of 1996," was introduced in Council and assigned Bill No. 11-485, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-199 and transmitted to both Houses of Congress for its review. D.C. Law 11-110 became effective on April 18, 1996.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3701.

CHAPTER 38. CONSUMER PROTECTIONS.

Subchapter I. General.

§ 28-3801. Scope — Limitation on agreements and practices.

This chapter applies to actions to enforce rights arising from a consumer credit sale or a direct installment loan.

(Dec. 17, 1971, 85 Stat. 668, Pub. L. 92-200, § 4.)

Cross references. — Automobile Consumer Protection Act, see § 50-501.

Consumer protection procedures, unlawful trade practices, see § 28-3904.

Prior Codifications. — 1981 Ed., § 28-3801.

1973 Ed., § 28-3801.

CASE NOTES

ANALYSIS

Accrual of action.
Construction and application.
Limitation of actions.
Prejudgment interest.
Purpose.

Accrual of action.

Home mortgagors' claim against mortgage sub-servicing agent and substitute foreclosure trustees under District of Columbia Consumer Protection Act, relating to defendants' allegedly premature institution of foreclosure proceedings for deed of trust, listing of incorrect cure amount, and refusal to correct the cure amount and postpone the foreclosure sale, accrued, for limitations purposes, when the notice of foreclosure was issued; at such time, the fact of an injury could be readily determined. Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 2008 D.C. App. LEXIS 296 (2008).

Construction and application.

Coverage of the District of Columbia Consumer Protection Act is limited, by its terms, to actions pertaining to consumer credit sales or direct installment loans. Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 2008 D.C. App. LEXIS 296 (2008).

D.C. Consumer Credit Protection Act is limited to actions to enforce rights arising from consumer credit sale or direct installment loan. D.C. Code 1981, § 28-3801. Sterling Mirror of Maryland, Inc. v. Gordon, 619 A.2d 64, 1993 D.C. App. LEXIS 8 (1993).

Where commercial building management companies bought carpeting intending to use it rather than sell it, revolving credit provisions of Consumer Credit Protection Act of 1971 applied

to 1 ½ % monthly finance charge provided under the contract for sale of the carpeting; such provisions necessitated limitation of finance charge to 1% per month on balance exceeding $500 rather than eradication of the charge. D.C. Code §§ 15-108, 28-3302, 28-3801, 28-3802. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Under usury statute existing prior to enactment of Consumer Credit Protection Act of 1971, a retail merchant could enforce a revolving charge account agreement with a customer, terms of which required payment of one and one-half percent per month on balances remaining unpaid after first billing cycle for goods purchased on credit. D.C. Code §§ 28-3301 to 28-3303, 28-3601 et seq., 28-3701 et seq., 28-3801 et seq.; District of Columbia Consumer Credit Protection Act of 1971, § 9, 85 Stat. 665. Kass v. Garfinckel, Brooks Bros., Miller & Rhoads, Inc., 299 A.2d 542, 1973 D.C. App. LEXIS 214 (1973).

The Consumer Credit Protection Act applies to sales of motor vehicles in the District of Columbia. Franklin Inv. Co. v. King, 114 WLR 1993 (Super. Ct. 1986).

Limitation of actions.

Since no statute of limitations is specified for actions brought under the District of Columbia Consumer Protection Act, the residual three-year statute of limitations applies. Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 2008 D.C. App. LEXIS 296 (2008).

Prejudgment interest.

Where contract for sale of replacement carpeting by retail carpeting distributor to commercial building management companies provided for monthly finance charge of 1 ½ %, and the contract also provided for prejudgment interest, the distributor was entitled to prejudgment interest on award of contract price, less award on counterclaim of the management companies, at rate of 1 ½ % per month on first $500 and 1% per month on remaining balance until paid. D.C. Code §§ 15-108, 28-3302, 28-3801, 28-3802. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Purpose.

One of the purposes of the District of Columbia Consumer Protection Procedures Act is to assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices, while coverage of the District of Columbia Consumer Protection Act is limited to actions pertaining to consumer credit sales or direct installment loans, and thus, coverage of the Consumer Protection Procedures Act is much broader than that of the Consumer Protection Act. Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 2008 D.C. App. LEXIS 296 (2008).

§ 28-3802. Definitions.

As used in this chapter —

(1) "revolving credit account" means a revolving credit account as defined in section 28-3701 of this subtitle;

(2) "consumer credit sale" means a sale of goods or services in which —

(A) a credit is granted by a person who regularly engages as a seller in credit transactions of the same kind;

(B) the buyer is a natural person;

(C) the goods or services are purchased primarily for a personal, family, household, or agricultural purpose;

(D) either the debt is payable in installments or a finance charge is made; and

(E) the amount financed does not exceed $25,000.

The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(3) "direct installment loan" means a direct installment loan as that term

is used in section 28-3308 and does not include a loan secured on real estate or a direct motor vehicle installment loan covered by Chapter 36 of this subtitle.

(4) "cross collateral" means an arrangement wherein a seller in a "consumer credit sale" secures a debt arising from the sale by contracting for a security interest in other property if as a result of a prior sale the seller has an existing security interest in the other property. The seller may also contract for a security interest in the property sold in the subsequent sale as a security for the previous debt.

(Dec. 17, 1971, 85 Stat. 669, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(l), 44 DCR 1271; Apr. 20, 1999, D.C. Law 12-264, § 27(a), 46 DCR 2118.)

Prior Codifications. — 1981 Ed., § 28-3802.

1973 Ed., § 28-3802.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 12-264. — Law 12-264, the "Technical Amendments Act of 1998," was introduced in Council and assigned Bill No. 12-804, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 10, 1998, and December 1, 1998, respectively. Signed by the Mayor on January 7, 1999, it was assigned Act No. 12-626 and transmitted to both Houses of Congress for its review. D.C. Law 12-264 became effective on April 20, 1999.

CASE NOTES

Construction and application.

D.C. Consumer Credit Protection Act did not apply to attempts by mirror installation company to collect deposit under contract which debtor paid deposit and agreed to pay balance upon delivery and installation of mirrors; contract was neither consumer credit sale nor direct installment loan. D.C. Code 1981, §§ 28-3308(a), 28-3802(2)(A-E), (3). Sterling Mirror of Maryland, Inc. v. Gordon, 619 A.2d 64, 1993 D.C. App. LEXIS 8 (1993).

Where commercial building management companies bought carpeting intending to use it rather than sell it, revolving credit provisions of Consumer Credit Protection Act of 1971 applied to 1 ½ % monthly finance charge provided under the contract for sale of the carpeting; such provisions necessitated limitation of finance charge to 1% per month on balance exceeding $500 rather than eradication of the charge. D.C. Code §§ 15-108, 28-3302, 28-3801, 28-3802. Giant Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

§ 28-3803. Balloon payments.

With respect to a consumer credit sale or direct installment loans except for revolving credit accounts:

(1) No creditor shall at any time enter into an agreement which contains or anticipates a schedule of payments under which any one payment is not equal or substantially equal to all other payments, excluding any final payment which is less than the average of previous payments or any down payment received by the creditor contemporaneously with or prior to the consummation of the transaction, or under which the intervals between any consecutive payments differ substantially.

(2) Notwithstanding any provision of this section, where a consumer's livelihood is dependent upon seasonal or intermittent income, the parties may

agree in a separate writing that one or more payments or the intervals between one or more payments may be reduced or expanded in accordance with the needs of the consumer if such payments are expressly related to the consumer's income. The separate writing shall contain a conspicuous notice directly above the signature line stating: "I waive my right to have all payments to be made under this agreement in substantially equal amounts".

(3) In the event that the provisions of paragraph (2) of this subsection apply, the consumer shall have the right at any time, without further cost or obligation, to revise the schedule of payments to conform both as to amounts and intervals to the average of all installments and intervals.

(Dec. 17, 1971, 85 Stat. 669, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(m), 44 DCR 1271.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3803.

1973 Ed., § 28-3803.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

§ 28-3804. Assignment of earnings and authorization to confess judgment prohibited.

(a) A creditor may not take an assignment of earnings of the consumer for payment or as security for payment of an obligation arising out of a consumer credit sale or direct installment loan.

(b) A creditor may not take or accept from the consumer a warrant or power of attorney or other authorization for the creditor, or other person acting on his behalf, to confess judgment arising out of a consumer credit sale or direct installment loan.

(c) An assignment of earnings or an authorization in violation of this section is subject to the provisions of section 28-3813(d)(1) of this subtitle.

(Dec. 17, 1971, 85 Stat. 670, Pub. L. 92-200, § 4.)

Prior Codifications. — 1981 Ed., § 28-3804.

1973 Ed., § 28-3804.

§ 28-3805. Debts secured by cross-collateral.

(a) If debts arising from two or more consumer credit sales other than sales pursuant to a revolving charge account (section 28-3701), are secured by cross-collateral, or consolidated into one debt payable on a single schedule of payments, and the debt is secured by security interests taken with respect to one or more of the sales, payments received by the seller after the taking of the cross-collateral or the consolidation are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been first applied to the payment of the debts arising from the sales first made. To the extent debts are paid according to this section, security interests in items

of property terminate as the debts originally incurred with respect to each item are paid.

(b) Payment received by the seller upon a revolving charge are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of credit service charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made.

(c) If the debts consolidated arose from two or more sales made on the same day, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of the smallest debt.

(Dec. 17, 1971, 85 Stat. 670, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(n), 44 DCR 1271.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3805.

1973 Ed., § 28-3805.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

§ 28-3806. Attorney's fees.

With respect to a consumer credit sale or direct installment loan the agreement may provide for the payment by the consumer of reasonable attorney's fees not in excess of 15% of the unpaid balance of the obligation.

(Dec. 17, 1971, 85 Stat. 670, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(o), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-3806.

1973 Ed., § 28-3806.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

CASE NOTES

ANALYSIS

Amount of attorney fees.
In general.

Amount of attorney fees.

Failure by note's guarantor, which satisfied guarantee following mortgagors' default, to submit any affidavits, other than those from its own attorneys, attesting to "bracket" rates or to rates usually charged for collections cases or for cases of indebtedness secured by mortgages did not constitute failure to meet burden of proving reasonableness of $80 per hour rate actually charged by its attorneys in guarantor's attempt to foreclose. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

Reasonable number of hours expended by attorneys for guarantor of note secured by deed of trust, in attempting to foreclose after guarantor was required to satisfy guarantee, would include time spent preparing to foreclose or to otherwise attempt to enforce note and deed of trust, all activity related to mortgagors' attempts to block foreclosure, and all hours related to opposition of mortgagors' first appeal of summary judgment; however, reasonable number of hours would not include time related to guarantor's independent role as mortgagors' real estate broker. Singer v. Shannon & Luchs

Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to recover attorney fees incurred in attempting to foreclose in amount of $53,750.90, plus costs in amount of $3,574.74, under deed of trust's fee provision. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to attorney's fees of $12,377.16 and costs of $278.34 incurred in connection with its application for attorney's fees under deed of trust's fee provision. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

In general.

In absence of any evidence of actual intent of the parties, attorney's fee provision in deed of trust securing note allowed note's guarantor, which had satisfied guarantee following mortgagors' default, to recover attorney's fees incurred with respect to actual foreclosure, incurred in litigating complaint related to alleged violations of law governing terms of mortgages, and incurred in action initiated by mortgagors for guarantor's breach of its duties as trustee under deed of trust; however, guarantor could not recover fees for any work relating to its independent service to mortgagors under real estate brokerage contract, or fees based on any alleged vexatiousness or bad faith on part of mortgagors. Singer v. Shannon & Luchs Co., 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

§ 28-3807. Negotiable instruments prohibited.

(a) In a consumer credit sale, no seller shall take or otherwise arrange for the consumer to sign an instrument, except a check, payable "to order" or "to bearer" as evidence of the credit obligation of the consumer.

(b) Any holder of an instrument prohibited by subsection (a) of this section 28-3807, if he takes it with knowledge of a violation of this section, takes it subject to all claims and defenses of the consumer up to the amount owing on the transaction total at the time of the assignment.

(Dec. 17, 1971, 85 Stat. 670, Pub. L. 92-200, § 4.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3807.

1973 Ed., § 28-3807.

CASE NOTES

ANALYSIS

Construction and application.
Preemption.

Construction and application.

Provision of District of Columbia commercial code prohibiting use of negotiable instrument, except check, as evidence of consumer obligation did not apply to guaranteed student loans (GSL), which were subject to great number of regulations preventing them from qualifying for negotiable instrument's "payable on demand" criterion. D.C. Code 1981, §§ 28:3-104(1)(c), 28-3807. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Preemption.

Court of Appeals would decline to address merits of claim for declaratory judgment on whether provisions of District of Columbia Consumer Credit Protection Act (CCPA) actually conflicted with, and thus were preempted by,

federal Higher Education Act (HEA), for purposes of determining ability of students to assert their consumer defenses against school in any enforcement actions brought by holders of their guaranteed student loans; judgment might not serve any useful purpose in light of uncertainty on whether CCPA would even apply in any future enforcement suits brought by lenders or guaranty agencies located throughout country. D.C. Code 1981, §§ 28-3807, 28-3809; Higher Education Act of 1965, § 400 et seq., as amended, 20 U.S.C. § 1070 et seq. Jackson v. Culinary Sch., 27 F.3d 573, 1994 U.S. App. LEXIS 15602 (C.A.D.C. 1994), vacated by, remanded by 515 U.S. 1139, 115 S. Ct. 2573, 132 L. Ed. 2d 824, 1995 U.S. LEXIS 4088, 63 U.S.L.W. 3889, 95 D.A.R. 7979 (1995).

Provision of District of Columbia commercial code prohibiting use of negotiable instruments, except check, as evidence of consumer obligation was preempted by Higher Education Assistance Act (HEAA) to extent it purported to apply to guaranteed student loans (GSL). D.C. Code 1981, §§ 28:3-104(1)(c), 28-3807; Higher Education Act of 1965, § 421 et seq., as amended, 20 U.S.C. § 1071 et seq. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Higher Education Act preempted a District of Columbia provision discouraging the use of negotiable instruments and other transferable commercial paper in consumer credit sales; permitting recipients of guaranteed student loans to invoke that provision would frustrate clear congressional preference for transferability of student loan promissory notes. Higher Education Act of 1964, §§ 428, 428(c)(8), as amended, 20 U.S.C. §§ 1078, 1078(c)(8); D.C. Code 1981, § 28-3807; U.S. Const. Art. 6, cl. 2. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

§ 28-3808. Assignees subject to defenses.

(a) With respect to a consumer credit sale, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the consumer or lessee arising out of the sale notwithstanding any terms or agreements to the contrary, but the assignee's liability under this section may not exceed the amount owing to the assignee at the time of the assignment.

(b) Rights of the consumer or lessee can only be asserted as a matter of defense to or set-off against a claim by the assignee.

(Dec. 17, 1971, 85 Stat. 670, Pub. L. 92-200, § 4.)

Prior Codifications. — 1981 Ed., § 28-3808.
1973 Ed., § 28-3808.

CASE NOTES

Construction and application.

Borrowers who received student loans to attend privately owned proprietary school failed to state an actionable claim for relief under a District of Columbia consumer credit provision governing a consumer's right to assert claims and defenses against the seller or lessor against a claim by its assignee; section did not apply to consumer credit sale in which a private lender financed purchase of school's services, as the loan contract was between student and a lender which did not sell the services financed by the loan. D.C. Code 1981, § 28-3808. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

District of Columbia consumer credit provision, which could only be asserted as a matter of defense to or setoff against a claim by the assignee of the seller or lessor, could not be asserted as an affirmative ground for declaratory judgment, injunctive relief and rescission of guaranteed student loan promissory notes. D.C. Code 1981, § 28-3808. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Provision of consumer protection law that act can only be asserted as a defense to or setoff against claim by the assignee is not applicable and did not limit scope of counterclaim where the statute was enacted after the commence-

ment of that action. (Per Yeagley, J., with one Judge concurring in the result and another Judge concurring in part.) D.C. Code § 28-3808. J. H. Marshall & Associates, Inc. v. Burleson, 313 A.2d 587, 1973 D.C. App. LEXIS 411 (1973).

§ 28-3809. Lender subject to defenses arising from sales.

(a) A lender who makes a direct installment loan for the purpose of enabling a consumer to purchase goods or services is subject to all claims and defenses of the consumer against the seller arising out of the purchase of the goods or service if such lender acts at the express request of the seller, and —

(1) the seller participates in the preparation of the loan instruments, or

(2) the lender is a person or organization controlled by or under common control with the seller, or

(3) the seller receives or will receive a fee, compensation, or other consideration from the lender for arranging the loan.

(b) The lender's liability under this section may not exceed the amount of the loan. Rights of the debtor can only be asserted affirmatively in an action to cancel and void the sale from its inception, or as a matter of defense to or set-off against a claim by the lender.

(Dec. 17, 1971, 85 Stat. 671, Pub. L. 92-200, § 4.)

Prior Codifications. — 1981 Ed., § 28-3809.
1973 Ed., § 28-3809.

CASE NOTES

ANALYSIS

Construction and application.
Preemption.

Construction and application.

Provision of District of Columbia commercial code making lender subject to claims and defenses of consumer against seller under certain circumstances did not apply in guaranteed student loan (GSL) context, because lender did not act "at the expressed request of the seller" as contemplated by provision. D.C. Code 1981, § 28-3809(a). Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

In regulated context of student loans, fact that lenders extended loans through school with high default rate, without more, does not support contention that special relationship existed between school and lenders within meaning of District of Columbia's statute which makes a purchase money lender liable for wrongs of seller, under certain circumstances, because of close relationship of seller and lender. D.C. Code 1981, § 28-3809(a)(3). Jackson v. Culinary School of Washington, 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (1993), affirmed by, remanded by 27 F.3d 573, 307 U.S. App. D.C. 123, 1994 U.S. App. LEXIS 15602 (1994).

To recover under District of Columbia's statute which makes purchase money lender liable for wrongs of seller under certain circumstances because of close relationship of seller and lender, lender must have intentionally provided for this preferential treatment in return for business provided by borrower; there must have been explicit quid pro quo between lender and borrower. D.C. Code 1981, § 28-3809(a)(3). Jackson v. Culinary School of Washington, 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (1993), affirmed by, remanded by 27 F.3d 573, 307 U.S. App. D.C. 123, 1994 U.S. App. LEXIS 15602 (1994).

Student loan contracts were not "negotiable instruments" and thus guaranty agencies and loan marketing association could not qualify as holders in due course so as to preclude student loan recipients from raising defenses attributable to original lender's conduct. D.C. Code 1981, §§ 28-3809, 28:3-104(1). Jackson v. Culinary School of Washington, 788 F. Supp. 1233,

1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Preemption.

Guaranteed student loan recipient's claim that she could assert vocational school's alleged misconduct as defense against those seeking to enforce loan, pursuant to District of Columbia Consumer Credit Protection Act, conflicted with federal policy governing guaranteed student loans obtained during period in which recipient received loan and thus was preempted, in that claims subjected lenders and other loan holders to risks neither anticipated by them nor intended by guaranteed student loan program. D.C. Code 1981, § 28-3809. Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 168 F.3d 1362, 1999 U.S. App. LEXIS 4861 (C.A.D.C. 1999), amended by 177 F.3d 1036, 336 U.S. App. D.C. 203, 1999 U.S. App. LEXIS 11369 (1999), writ of certiorari denied by 528 U.S. 1073, 120 S. Ct. 785, 145 L. Ed. 2d 663, 2000 U.S. LEXIS 104, 68 U.S.L.W. 3429 (2000).

Court of Appeals would decline to address merits of claim for declaratory judgment on whether provisions of District of Columbia Consumer Credit Protection Act (CCPA) actually conflicted with, and thus were preempted by, federal Higher Education Act (HEA), for purposes of determining ability of students to assert their consumer defenses against school in any enforcement actions brought by holders of their guaranteed student loans; judgment might not serve any useful purpose in light of uncertainty on whether CCPA would even apply in any future enforcement suits brought by lenders or guaranty agencies located throughout country. D.C. Code 1981, §§ 28-3807, 28-3809; Higher Education Act of 1965, § 400 et seq., as amended, 20 U.S.C. § 1070 et seq. Jackson v. Culinary Sch., 27 F.3d 573, 1994 U.S. App. LEXIS 15602 (C.A.D.C. 1994), vacated by, remanded by 515 U.S. 1139, 115 S. Ct. 2573, 132 L. Ed. 2d 824, 1995 U.S. LEXIS 4088, 63 U.S.L.W. 3889, 95 D.A.R. 7979 (1995).

Provision of District of Columbia commercial code making lender subject to claims and defenses of consumer against seller under certain circumstances was preempted by the Higher Education Assistance Act to extent it purported to apply to guaranteed student loan (GSL), due to severe limits that would be placed on functioning of Act if lenders faced liability for following actions mandated by Congress. D.C. Code 1981, § 28-3809(a); Higher Education Act of 1965, § 421 et seq., as amended, 20 U.S.C. § 1071 et seq. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Higher Education Act preempted guaranteed student loan recipients' claims against lenders under District of Columbia law applicable to transactions in which seller participated in the preparation of the loan instruments, as the regulatory framework of the Act required the school to participate in the preparation of the loan documents. D.C. Code 1981, § 28-3809(a)(1, 2); Higher Education Act of 1965, § 428(a)(2), as amended, 20 U.S.C. § 1078(a)(2). Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Higher Education Act preempted expansion of contractual liability of lenders and guaranty agencies merely because they were under the "common control" of the Secretary of Education through the Higher Education Act guaranteed student loan program. D.C. Code 1981, § 28-3809(a)(3). Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

§ 28-3810. Referral sales.

With respect to a consumer credit sale, the seller or lessor may not give or offer to give a rebate or discount or otherwise pay or offer to pay value to the buyer or lessee as an inducement for a sale or lease in consideration of his giving to the seller or lessor the names of prospective purchasers or lessees, or otherwise aiding the seller or lessor in making a sale or lease to another person, if the earning of the rebate, discount, or other value is contingent upon the occurrence of an event subsequent to the time the buyer or lessee agrees to buy or lease. If a buyer or lessee is induced by a violation of this section to enter into a consumer credit sale, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his option, may rescind the agreement or retain the goods delivered and the benefit of any services performed, without any obligation to pay for them.

(Dec. 17, 1971, 85 Stat. 671, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(p), 44 DCR 1271.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3810. 1973 Ed., § 28-3810.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

§ 28-3811. Home solicitation sales.

(a) As used in this section, "home solicitation sale" means a cash sale or a consumer credit sale of goods, other than farm equipment, or services in which the seller or a person acting for him engages in a personal solicitation of the sale at or near a residence of the buyer and the buyer's agreement or offer to purchase is there given to a seller or a person acting for him. It does not include a sale made pursuant to a preexisting revolving credit account or prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale.

(b) Except as provided in subsection (f) of this section, in addition to any right otherwise to revoke an offer, the buyer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with this section.

(c) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(d) Notice of cancellation, if given by mail, is given when it is deposited in a mail box properly addressed and the postage prepaid.

(e) Notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home solicitation sale.

(f) The buyer may not cancel a home solicitation sale if the buyer requests the seller to provide goods or services without delay because of an emergency, and

(1) the seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notice of cancellation, and

(2) in the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer, and

(3) the buyer has signed separately the following notice which appears under the conspicuous caption: "WAIVER OF RIGHT TO CANCEL," and reads as follows: "Because of an emergency I waive any right I may have to cancel this home solicitation sale".

(g)(1) In a home solicitation sale, unless the buyer requests the seller to provide goods or services without delay in an emergency, the seller must present to the buyer and obtain his signature to a written agreement or offer to purchase which designates as the date of the transaction the date on which the buyer actually signs and contains a statement of the buyer's rights which complies with paragraph (2) of this subsection.

(2) The statement must—

(A) appear under this conspicuous caption: "BUYERS RIGHT TO CANCEL", and

(B) read as follows:

"If this agreement was solicited at or near your residence and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you signed this agreement. The notice must be mailed to: ______________________

____

(insert name and address of seller)

If you cancel, the seller may not keep any of your cash down payment."

(3) Until the seller has complied with this section the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of his intention to cancel.

(h)(1) Except as provided in this section, within ten days after a home solicitation sale has been canceled or an offer to purchase revoked the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. A provision permitting the seller to keep all or any part of any payment, note, or evidence of indebtedness is in violation of this section and unenforceable.

(2) If the down payment includes goods traded in, the goods must be tendered in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(3) The seller is not entitled to retain a cancellation fee.

(4) Until the seller has complied with the obligations imposed by this section the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods in his possession or control for any recovery to which he is entitled.

(i)(1) Except as provided by the provisions on retention of goods by the buyer (subsection (h)(4) of this section), within a reasonable time after a home solicitation sale has been canceled or an offer to purchase revoked, the buyer upon demand must tender to the seller any goods delivered by the seller pursuant to the sale but he is not obligated to tender at any place other than his residence. If the seller fails to demand possession of goods within a reasonable time after cancellation or revocation, the goods become the property of the buyer without obligation to pay for them. For the purpose of this section, forty days is presumed to be a reasonable time.

(2) The buyer has a duty to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(3) If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to no compensation.

(j) Subsections (b), (c), (d), (e), and (f) of this section shall not apply to a home

solicitation sale between a buyer and a public insurance adjuster, as defined in [§ 31-1631.01(c)]. [Section 31-1631.07] shall apply to all such sales.

(Dec. 17, 1971, 85 Stat. 671, Pub. L. 92-200, § 4; Apr. 9, 1997, D.C. Law 11-255, § 27(q), 44 DCR 1271; Mar. 27, 2003, D.C. Law 14-256, § 11(a), 50 DCR 238.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3811.

1973 Ed., § 28-3811.

Effect of amendments. — D.C. Law 14-256 added subsec. (j).

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

Legislative history of Law 14-256. — Law 14-256, the "Public Insurance Adjuster Licensure Act of 2002", was introduced in Council and assigned Bill No. 14-476, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 2002, and December 3, 2002, respectively. Signed by the Mayor on December 23, 2002, it was assigned Act No. 14-553 and transmitted to both Houses of Congress for its review. D.C. Law 14-256 became effective on March 27, 2003.

References in text. — Section 2(5) of the Public Insurance Adjuster Licensure Act of 2002, referred to in subsec. (j), is classified to § 31-1631.02(5).

Section 8 of the Public Insurance Adjuster Licensure Act of 2002, referred to in subsec. (j), is classified to § 31-1631.08.

Editor's notes. — Application of D.C. Law 14-256, including the amendments to this section: See section 12 of D.C. Law 14-256, codified as § 31-1631.12.

CASE NOTES

ANALYSIS

In general.

Evidence showing contract for sale of carpeting which set forth cash price of $2,051, $551 which was paid as deposit and $1,500 to be payable upon delivery of carpet which further provided that buyer could defer payment of $1,500, making it in 24-month installments with interest charges presented question of fact as to whether or not home solicitation sale occurred entitling consumer to relief under District of Columbia Consumer Credit Protection Act. D.C. Code 1973, § 28-3811. Etta v. Seaboard Enterprises, Inc., 674 F.2d 913, 1982 U.S. App. LEXIS 22789 (C.A.D.C. 1982).

Right to cancel.

Because contract by homeowners for renovation of their basement arose out of a home solicitation sale, homeowners had the right to cancel the agreement within three-day cooling-off period provided by statute. D.C. Code 1981, § 28-3811. Family Constr. v. District of Columbia Dep't of Consumer & Regulatory Affairs, 484 A.2d 250, 1984 D.C. App. LEXIS 527 (1984).

Where homeowner mailed notice of intent to cancel home improvement contract to president of contracting company on the third business day after formation of the contract and orally communicated desire to cancel, and where notice of intent to cancel was returned in mail after company president refused to accept it, administrative law judge properly found contract to be void and properly ordered contractor to return homeowners' home to its original condition. D.C. Code 1981, § 28-3811. Family Constr. v. District of Columbia Dep't of Consumer & Regulatory Affairs, 484 A.2d 250, 1984 D.C. App. LEXIS 527 (1984).

In administrative action for rescission of home improvement contract, although issue of whether homeowners cancelled agreement within three-day cooling-off period was not raised in the pleadings, it was argued by implied consent of parties because contractor did not object to those portions of the hearing, thus administrative law judge properly reached the merits of that issue. D.C. Code 1981, § 28-3811; Civil Rule 15(b). Family Constr. v. District of Columbia Dep't of Consumer & Regulatory Affairs, 484 A.2d 250, 1984 D.C. App. LEXIS 527 (1984).

The buyer is precluded from cancelling the sale if the buyer fails to exercise the degree of care required by paragraph (i)(2) of this section and remains liable for the contract price. Mileham & King, Inc. v. Fitzgerald, 110 WLR 637 (Super. Ct. 1982).

§ 28-3812. Limitation on creditors' remedies.

(a) This section applies to actions or other proceedings to enforce rights arising from consumer credit sales, consumer leases, and direct installment loans (other than a loan directly secured on real estate or a direct motor vehicle installment loan covered by Chapter 36 of Title 28, District of Columbia Official Code); and, in addition, to extortionate extensions of credit.

(b)(1) During the thirty-day period after a default consisting of a failure to pay money the creditor may not because of the default (A) accelerate the unpaid balance of the obligation, (B) bring action against the debtor, or (C) proceed against the collateral.

(2) Unless the creditor has first (A) notified the debtor that he has elected to accelerate the unpaid balance of the obligation because of default, (B) brought action against the debtor, or (C) proceeded against the collateral, the debtor may cure a default consisting of a failure to pay money by tendering the amount of all unpaid sums due at the time of tender, without acceleration, plus any unpaid delinquency or deferral charges. Cure restores the debtor to his rights under the agreement as though the defaults cured had not occurred.

(3) Posting of any notice required by law shall be deemed valid if mailed by certified mail to the debtor's last known address.

(c)(1) The debtor may redeem the collateral from the creditor at any time —

(A) within fifteen days of the creditor's taking possession of the collateral, or

(B) thereafter until the creditor has either disposed of the collateral, entered into a contract for its disposition, or gained the right to retain the collateral in satisfaction of the debtor's obligation pursuant to the provisions on disposition of collateral in section 9-505 of subtitle I of Title 28, District of Columbia Official Code.

(2) The debtor may redeem the collateral by tendering fulfillment of all obligations secured by the collateral including reasonable expenses incurred in realizing on the security interest.

(d) Subject to the provisions in this part, the parties may agree that the creditor has the right to take possession of the collateral on default. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace and with consent of the debtor. Those who take the collateral through repossession shall be deemed the agent of the creditor, and the creditor shall be civilly liable for any of the actions of its agents.

(e)(1) This subsection applies to consumer credit sales of goods or services and to direct installment loans served by interests in goods.

(2) A creditor may not maintain a proceeding for a deficiency unless he has disposed of the goods in good faith and in a commercially reasonable manner.

(3) If the creditor repossesses or voluntarily accepts surrender of goods which were the subject of the sale and in which he has a security interest, the consumer is not personally liable to the creditor for the unpaid balance of debt arising from the sale of a commercial unit of goods of which the cash price was

$2,000 or less. In that case the creditor is not obligated to resell the collateral unless the consumer has paid 60% or more of the cash price and has not signed after default a statement renouncing his rights in the collateral.

(4) If the creditor takes possession or voluntarily accepts surrender of goods which were not the subject of the sale but in which he has a security interest to secure a debt arising from a sale of goods or services or a combined sale of goods and services and the cash price of the sale was $2,000 or less, the debtor is not personally liable to the creditor for the unpaid balance of the debt arising from the sale and the creditor's duty to dispose of the collateral is governed by the provisions on disposition of collateral in section 9-505 of Subtitle I of Title 28, District of Columbia Official Code.

(5) If the creditor takes possession or voluntarily accepts surrender of goods in which he has a security interest to secure a debt arising from a direct installment loan and the net proceeds of the loan paid to or for the benefit of the debtor are $2,000 or less, the consumer is not personally liable to the lender for the unpaid balance of the debt arising from the loan and the lender's duty to dispose of the collateral is governed by the provisions on disposition of collateral in section 9-505 of Subtitle I of Title 28, District of Columbia Official Code.

(6) The consumer shall be liable in damages to the creditor if the debtor has wrongfully damaged the collateral or if, after default and demand, the debtor has wrongfully failed to make collateral available to the creditor.

(7) If the creditor elects to bring an action against the buyer for a debt arising from a consumer credit sale of goods or services, when under this section he would not be entitled to a deficiency judgment if he repossessed the collateral, and obtains judgment —

(A) he may not repossess the collateral, and

(B) the collateral is not subject to levy or sale on execution or similar proceedings pursuant to the judgment.

(f)(1) If it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person, the repayment of the extension of credit is unenforceable through civil judicial processes against the debtor.

(2) If it is shown that an extension of credit was made at an annual rate exceeding 45% and that the creditor then had a reputation for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof, there is prima facie evidence that the extension of credit was unenforceable under paragraph (1) of this subsection.

(g)(1) With respect to a consumer credit sale, or direct installment loan, if the court as a matter of law finds —

(A) the agreement to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or

(B) any clause of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may

enforce the remainder of the agreement without the unconscionable clause, or may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this section is not in and of itself unconscionable in the absence of other practices and circumstances.

(Dec. 17, 1971, 85 Stat. 673, Pub. L. 92-200, § 4.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3812.

1973 Ed., § 28-3812.

CASE NOTES

ANALYSIS

Deficiency judgment.
Penalties for violation of laws.

Deficiency judgment.

Creditor, by failing to give automobile purchasers the required notice of private sale, was not entitled to a deficiency judgment, and its recovery was limited to proceeds of private sale; the required notice of a private sale was not cured, and legally could not be cured, by trial court's determination of a reasonable value of the automobile, for which the buyers had been given credit, at the time of the sale. D.C. Code §§ 28:1-101 et seq., 28:9-101 et seq., 28:9-203(2), 28:9-504(2, 3), 28:9-504(3), 28:9-507(1), 28-3301 et seq., 28-3801 et seq., 28-3812(e)(3), 40-901 et seq., 40-902(e)(1); D.C. Code SCR, Civil Rule 55-II(b). Randolph v. Franklin Inv. Co., 398 A.2d 340, 1979 D.C. App. LEXIS 276 (1979).

Penalties for violation of laws.

Although used car dealer violated the 30-day grace period mandated by District of Columbia Consumer Credit Protection Act by repossessing car and accelerating balance due on contract only 25 days after scheduled payment was due, where, inter alia, buyers had been put in as good a position as if sellers had complied with chapter and where buyers did not prove consequential or special damages, discretionary award of statutory 10% penalty was unwarranted. D.C. Code §§ 28-3802(2), 28-3812(b)(1), 28-3813, 28-3813(a), (d)(1), 28-3816. Vines v. Hodges, 422 F. Supp. 1292, 1976 U.S. Dist. LEXIS 12780 (1976).

§ 28-3813. Consumers' remedies.

(a) The remedies provided by this section shall be liberally administered to the end that the consumer as the aggrieved party shall be put in at least as good a position as if the creditor had fully complied with this chapter. Except as is otherwise specifically provided where there are wilful and repeated violations of this chapter consequential and special damages may be had in lieu of the specific penalties allowed, and in addition punitive damages may be had as indicated.

(b) Any right or obligation declared by this chapter is enforceable by action unless the provision declaring it specifies a different and limited effect.

(c) "Transaction total" means —

(1) in the case of transactions pursuant to open end credit plans or consumer credit transactions, the total of the following calculated as if the

amount or amounts financed were paid over the maximum period of the plan or, if there is no such period, over twelve months beginning with the next billing cycle or cycles following the transaction or transactions:

(A) the amount financed, plus any down payment or required deposit balance, and

(B) the total finance charge, including any prepaid finance charge;

(2) in the case of other than open end transactions or consumer credit transactions, the total of the following:

(A) the amount financed, plus any down payment or required deposit balance, and

(B) the amount of all precomputed or precomputable finance charge, including any prepaid finance charge.

(d)(1) In the discretion of the court, a consumer may recover from the person violating this chapter, in addition to the damages the law otherwise allows, 10% of the transaction total, if applicable, or $100, whichever is greater, for violations to which this section applies.

(2) This section also applies to all violations for which no other remedy is specifically provided.

(e) If a consumer prevails in a suit brought under this chapter, the court may assess reasonable attorney's fees in addition to any other amounts recoverable under this chapter.

(f) Any charge, practice, term, clause, provision, security interest, or other action or conduct which can be shown to be in wilful violation of the provisions of this chapter shall confer no rights or obligations enforceable by action.

(Dec. 17, 1971, 85 Stat. 675, Pub. L. 92-200, § 4.)

Section references. — This section is referenced in § 28-3804.

Prior Codifications. — 1981 Ed., § 28-3813.

1973 Ed., § 28-3813.

CASE NOTES

ANALYSIS

Aider and abettor liability.
Common law actions.
Punitive damages.
Unfair trade practices.

Aider and abettor liability.

District of Columbia Consumer Protection Procedures Act (CPPA) does not create cause of action for aider-and-abettor liability. D.C. Code 1981, § 28-3904. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Common law actions.

Vocational school student stated common-law misrepresentation claim against nonprofit accrediting organization for allegedly making misrepresentations about vocational school, and thereby causing class of students to incur student loan obligations in order to attend vocational school. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Punitive damages.

Under District of Columbia law, punitive damages are normally available only in actions arising from intentional torts. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Punitive damages are generally not recoverable in the District of Columbia for breach of

contract, but in certain narrowly defined circumstances, where breach of contract merges with, and assumes the character of, a wilful tort, punitive damages may be assessed. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Under District of Columbia law, punitive damages for alleged breach of contract to renovate homes were not available against contractor who recommended, allegedly vouched for, and agreed to supervise repairman who performed work, absent evidence that contractor acted with intent to deceive and thus that he committed fraud or another willful tort. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Although used car dealer violated the 30-day grace period mandated by District of Columbia Consumer Credit Protection Act by repossessing car and accelerating balance due on contract only 25 days after scheduled payment was due, where, inter alia, buyers had been put in as good a position as if sellers had complied with chapter and where buyers did not prove consequential or special damages, discretionary award of statutory 10% penalty was unwarranted. D.C. Code §§ 28-3802(2), 28-3812(b)(1), 28-3813, 28-3813(a), (d)(1), 28-3816. Vines v. Hodges, 422 F. Supp. 1292, 1976 U.S. Dist. LEXIS 12780 (1976).

"Punitive damages" are a form of punishment. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

"Punitive damages" are to be awarded only in cases of outrageous or egregious wrongdoing where the defendant has acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

In the absence of gross fraud or comparable wrongdoing, proof of even intentional misrepresentation may not suffice to justify "punitive damages." Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

To obtain an award of "punitive damages," the plaintiff must prove egregious conduct and the requisite mental state by clear and convincing evidence. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Unfair trade practices.

Conduct of lender in providing guaranteed student loan (GSL) contract could not violate District of Columbia municipal regulation prohibiting "school" from using any contract provision to deny or breach benefits of any applicable law intended to protect consumer or credit purchasers, and thus was not actionable unfair trade practice based upon such regulation. D.C. Code 1981, § 28-3904(dd). Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Provision of District of Columbia commercial code making it unfair trade practice to sell consumer goods in condition or manner not consistent with that warranted by operation or requirement of federal law did not apply to guaranteed student loan (GSL) contract, which involved sale of services, not goods. D.C. Code 1981, § 28-3904(x). Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

§ 28-3814. Debt collection.

(a) This section only applies to conduct and practices in connection with collection of obligations arising from consumer credit sales, consumer leases, and direct installment loans (other than a loan directly secured on real estate or a direct motor vehicle installment loan covered by Chapter 36 of Title 28).

(b) As used in this section, the term —

(1) "claim" means any obligation or alleged obligation, arising from a consumer credit sale, consumer lease, or direct installment loan;

(1A) "creditor" means a claimant or other person holding a claim;

(2) "debt collection" means any action, conduct or practice in connection with the solicitation of claims for collection or in connection with the collection of claims, that are owed or due, or are alleged to be owed or due, a seller or lender by a consumer; and

(3) "debt collector" means any person engaging directly or indirectly in debt collection, and includes any person who sells or offers to sell forms

represented to be a collection system, device, or scheme intended or calculated to be used to collect claims.

(c) No creditor or debt collector shall collect or attempt to collect any money alleged to be due and owing by means of any threat, coercion, or attempt to coerce in any of the following ways:

(1) the use, or express or implicit threat of use, of violence or other criminal means, to cause harm to the person, reputation, or property of any person;

(2) the accusation or threat to falsely accuse any person of fraud or any crime, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule, or any conduct which, if true, would tend to disgrace such other person or in any way subject him to ridicule or contempt of society;

(3) false accusations made to another person, including any credit reporting agency, that a consumer has not paid a just debt, or threat to so make such false accusations;

(4) the threat to sell or assign to another the obligation of the consumer with an attending representation or implication that the result of such sale or assignment would be that the consumer would lose any defense to the claim or would be subjected to harsh, vindictive, or abusive collection attempts; and

(5) the threat that nonpayment of an alleged claim will result in the arrest of any person.

(d) No creditor or debt collector shall unreasonably oppress, harass, or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another in any of the following ways:

(1) the use of profane or obscene language or language that is intended to unreasonably abuse the hearer or reader;

(2) the placement of telephone calls without disclosure of the caller's identity or with the intent to harass or threaten any person at the called number; and

(3) causing expense to any person in the form of long-distance telephone tolls, telegram fees, or other charges incurred by a medium of communication, by concealment of the true purpose of the notice, letter, message, or communication.

(e) No creditor or debt collector shall unreasonably publicize information relating to any alleged indebtedness or debtor in any of the following ways:

(1) the communication of any false information relating to a consumer's indebtedness to any employer or his agent except where such indebtedness had been guaranteed by the employer or the employer has requested the loan giving rise to the indebtedness and except where such communication is in connection with an attachment or execution after judgments as authorized by law;

(2) the disclosure, publication, or communication of false information relating to a consumer's indebtedness to any relative or family member of the consumer unless such person is known to the creditor or debt collector to be a member of the same household as the consumer, except through proper legal

action or process or at the express and unsolicited request of the relative or family member;

(3) the disclosure, publication, or communications of any information relating to a consumer's indebtedness by publishing or posting any list of consumers, except for the publication and distribution of "stop lists" to point-of-sale locations where credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through proper legal action, process, or proceeding; and

(4) the use of any form of communication to the consumer, which ordinarily may be seen by any other persons, that displays or conveys any information about the alleged claim other than the name, address, and phone number of the creditor or debt collector.

(f) No creditor or debt collector shall use any fraudulent, deceptive, or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers in any of the following ways:

(1) the use of any company name, while engaged in debt collection, other than the creditor or debt collector's true company name;

(2) the failure to clearly disclose in all written communications made to collect or attempt to collect a claim or to obtain or attempt to obtain information about a consumer, that the creditor or debt collector is attempting to collect a claim and that any information obtained will be used for that purpose;

(3) any false representation that the creditor or debt collector has in his possession information or something of value for the consumer, that is made to solicit or discover information about the consumer;

(4) the failure to clearly disclose the name and full business address of the person to whom the claim has been assigned for collection, or to whom the claim is owed, at the time of making any demand for money;

(5) any false representation or implication of the character, extent, or amount of a claim against a consumer, or of its status in any legal proceeding;

(6) any false representation or false implication that any creditor or debt collector is vouched for, bonded by, affiliated with or an instrumentality, agent, or official of the District of Columbia or any agency of the Federal or District government;

(7) the use or distribution or sale of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source, authorization, or approval;

(8) any representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation; and

(9) any false representation or false impression about the status or true nature of or the services rendered by the creditor or debt collector or his business.

(g) No creditor or debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim in any of the following ways:

(1) the seeking or obtaining of any written statement or acknowledgment in any form that specifies that a consumer's obligation is one incurred for necessaries of life where the original obligation was not in fact incurred for such necessaries;

(2) the seeking or obtaining of any written statement or acknowledgment in any form containing an affirmation of any obligation by a consumer who has been declared bankrupt without clearly disclosing the nature and consequences of such affirmation and the fact that the consumer is not legally obligated to make such affirmation;

(3) the collection or the attempt to collect from the consumer all or any part of the creditor or debt collector's fee or charge for services rendered;

(4) the collection of or the attempt to collect any interest or other charge, fee, or expense incidental to the principal obligation unless such interest or incidental fee, charge, or expense is expressly authorized by the agreement creating the obligation and legally chargeable to the consumer or unless such interest or incidental fee, charge, or expense is expressly authorized by law; and

(5) any communication with a consumer whenever it appears that the consumer has notified the creditor that he is represented by an attorney and the attorney's name and address are known.

(h) No creditor or debt collector shall use, or distribute, sell, or prepare for use, any written communication that violates or fails to conform to United States postal laws and regulations.

(i) No creditor or debt collector shall take or accept for assignment any of the following:

(1) an assignment of any claim for attorney's fees which have not been lawfully provided for in the writing evidencing the obligation; or

(2) an assignment for collection of any claim upon which suit has been filed or judgment obtained, without the creditor or debt collector first making a reasonable effort to contact the attorney representing the consumer.

(j)(1) Proof, by substantial evidence, that a creditor or debt collector has wilfully violated any provision of the foregoing subsections of this section shall subject such creditor or debt collector to liability to any person affected by such violation for all damages proximately caused by the violation.

(2) Punitive damages may be awarded to any person affected by a wilful violation of the foregoing subsections of this section, when and in such amount as is deemed appropriate by the court and trier of fact.

(k) No creditor, debt collector, or collection agency, or their representatives or agents shall contact consumers by telephone before 8 a.m. and after 9 p.m. EST or EDT, whichever time zone is in effect.

(Dec. 17, 1971, 85 Stat. 675, Pub. L. 92-200, § 4; Dec. 2, 2011, D.C. Law 19-59, § 2, 58 DCR 8973; Sept. 26, 2012, D.C. Law 19-171, § 82, 59 DCR 6190.)

Cross references. — Consumer protection procedures, complaints, dismissal of debt collection action, see § 28-3905.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3814.

1973 Ed., § 28-3814.

Effect of amendments. — D.C. Law 19-59 added subsecs. (b)(1A) and (k); in subsec. (c),

substituted "creditor or debt collector" for "debt collectors"; and, in subsecs. (d), (e), (f), (g), (h), and (j)(1), substituted "creditor or debt collector" for "debt collector".

The 2012 amendment by D.C. Law 19-171 validated a previously made technical correction in (b)(1A).

Legislative history of Law 19-59. — Law 19-59, the "Creditor Calling Act of 2011", was introduced in Council and assigned Bill No. 19-230, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on July 12, 2011, and September 20, 2011, respectively. Signed by the Mayor on October 14, 2011, it was assigned Act No. 19-189 and transmitted to both Houses of Congress for its review. D.C. Law 19-59 became effective on December 2, 2011.

Legislative history of Law 19-171. — Law 19-171, the "Technical Amendments Act of 2012," was introduced in Council and assigned Bill No. 19-397. The Bill was adopted on first and second readings on Mar. 20, 2012, and Apr. 17, 2012, respectively. Signed by the Mayor on May 23, 2012, it was assigned Act No. 19-376 and transmitted to Congress for its review. D.C. Law 19-171 became effective on September 26, 2012.

CASE NOTES

Analysis

Regulations.
Strict liability.

Regulations.

Consumer retail credit regulations providing any consumer who suffers any damage as a result of unlawful trade practice with various types of relief has as condition precedent to suit that consumer suffer damage; statutory right to relief does not extend to consumer who has suffered no injury. D.C. Code 1981, § 28-3905(k)(1). Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 1991 D.C. App. LEXIS 37 (1991).

Alleged failure of merchants to comply with regulation requiring merchants to register with Office of Consumer Protection did not require that merchants return all monies paid for goods sold while allowing purchasers to retain goods. Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 1991 D.C. App. LEXIS 37 (1991).

Strict liability.

Doctrine of strict liability did not apply to merchant's approval of fraudulent credit card application. Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 1991 D.C. App. LEXIS 37 (1991).

§ 28-3815. Administrative enforcement.

(a) As used in this section —

(1) "Commissioner" ["Mayor"] means the Commissioner of the District of Columbia [Mayor of the District of Columbia] or his designated agent;

(b) Compliance with the requirements imposed under this chapter shall be enforced by the Commissioner [Mayor]. Nothing contained herein shall be construed to affect the authority and jurisdiction of the respective agencies designated in section 108 of the Truth-in-Lending Act (82 Stat. 146 et seq.; 15 U.S.C. 1601 et seq.).

(c) Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this act [this chapter], or any rules or regulations issued under the authority of this act [this chapter], pursuant to titles I-III of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 [Chapter 18 of Title 2]. Adjudication of any infraction of this act [this chapter] shall be pursuant to titles I-III of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 [Chapter 18 of Title 2].

(Dec. 17, 1971, 85 Stat. 678, Pub. L. 92-200, § 4; Mar. 8, 1991, D.C. Law 8-237, § 24, 38 DCR 314.)

Cross references. — Department of consumer and regulatory affairs, enforcement authority, see § 28-3903.

Prior Codifications. — 1981 Ed., § 28-3815.

1973 Ed., § 28-3815.

Legislative history of Law 8-237. — Law 8-237, the "Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 Technical and Clarifying Amendments Act of 1990," was introduced in Council and assigned Bill No. 8-203, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-320 and transmitted to both Houses of Congress for its review.

Change in Government. — This section originated at a time when local government powers were delegated to the District of Columbia Council and to a Commissioner of the District of Columbia. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made, in brackets, in this section.

§ 28-3816. Inconsistent laws: What law governs.

If any provision of law or regulation promulgated thereunder is inconsistent with this chapter, this chapter shall govern, unless this chapter or the inconsistent provision of the other laws specifically provides otherwise.

(Dec. 17, 1971, 85 Stat. 678, Pub. L. 92-200, § 4.)

Prior Codifications. — 1981 Ed., § 28-3816.

1973 Ed., § 28-3816.

§ 28-3817. Health spa sales.

(a) As used in this section, the term —

(1) "health spa" means a proposed or existing location or organization with indoor or outdoor facilities for physical sport, exercise, training, or therapy or rehabilitation. It does not include any location, the primary activity of which is training or instruction in a specific skill, such as dance, or swimming. It does not include any location which is operated primarily by a not-for-profit organization.

(2) "health spa sale" means a cash sale or a consumer credit sale in which a health spa or affiliated organization agrees, after the effective date of this section, to provide or make available, for a period of more than 30 days, goods or services (whether or not a membership is included) for physical sport, exercise, training, therapy or rehabilitation.

(3) "buyer" means any natural person who purchases a health spa sale contract for his, or another natural person's, personal use.

(4) "seller" means the seller of a health spa sale to a buyer.

(b) Every contract containing a health spa sale shall:

(1) be in writing;

(2) if renewable in whole or part, require the buyer's separate signature and payment for renewal;

(3) provide for a buyer's right (which may not be waived) to cancel, as explained in subsection (c);

(4) in close proximity to the space reserved for the buyer's signature, and in boldface type of at least ten points, include the following statement:

"NOTICE TO THE BUYER:

You have the right to cancel this contract during the first fifteen days after the contract is made, or after the first fifteen days, if, due to death, illness, injury, or a change in residence, you are unable to use the full membership privileges in this contract. If you cancel, you will have to pay only for the goods or services you are entitled to up through the month in which you cancel, plus a registration fee of 5% of the price of this contract (not counting any finance charge), not to exceed $25. You must notify the health spa, by certified or registered mail at the address given in this contract, of your intention to cancel, or your cancellation will not be effective. If your cancellation is due to illness or injury, a certificate from a doctor of your choice must accompany your notice of cancellation to the health spa. Contact the District of Columbia Office of Consumer Affairs if you have a question as to how to calculate your obligation or your refund after you cancel.";

(5) be presented, fully completed, to the buyer, and be signed and dated by the buyer, and then a copy, as so approved, be furnished to the buyer; and

(6) specify the seller's and the buyer's addresses.

(c)(1) The buyer, at his option, has the right to cancel a health spa sale during the first fifteen days after the sale is made, or after such fifteen days, if, due to death, illness, injury, or a change in residence, the buyer is unable to use all the goods and services provided in the sale.

(2) Notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer to be no longer bound by the health spa sale, and (whenever such notice is given more than 15 days after the contract is made) that, due to death, illness, injury, or a change in residence or in the location of the health spa, the buyer is unable to use all the goods or services promised in the sale. If the cancellation is due to illness or injury, a certificate from a doctor of the consumer's choice must accompany the notice of cancellation to the health spa.

(3) Cancellation occurs when the buyer mails written notice of cancellation to the seller at the seller's address as specified in the contract, by registered or certified mail.

(4) The cancellation balance shall be calculated as follows:

(A) Divide the number of months (counting a fraction as one month) which have elapsed from the date the contract (or renewal option then in effect) became effective to the date of cancellation, by the total number of months for which such services were contracted.

(B) Multiply the contract price (or the price for the renewal period then in effect) by the quotient obtained in subparagraph (A) of this paragraph.

(C) Add to the amount obtained in subparagraph (B) of this paragraph a registration fee of 5% of the original price of the contract (not counting any finance charge), but in no case more than $25.00.

(D) If the payment by the consumer of the contract price is financed, subtract from the amount obtained in subparagraph (C) of this paragraph the amount of interest, calculated by the method of 78ths, not yet accrued through the month of the contract during which cancellation occurs.

(E) Subtract the difference obtained in subparagraph (D) of this paragraph, or if not applicable, the amount obtained in subparagraph (C) of this paragraph, from the amount already paid by the buyer under the contract and finance agreement.

If this balance is a positive figure, it is the amount of the seller's refund to the buyer, and shall be due and payable within 15 days after the cancellation. If this balance is a negative figure, it is the amount of the buyer's obligation to the seller, and within 15 days after the cancellation, the seller shall notify the buyer of his obligation. Notice of such obligation, if given by mail, is given when it is deposited in a mail box postage prepaid and properly addressed to the buyer's address as stated in the notice of cancellation, or, if the buyer's address is not stated there, as stated in the contract.

(5) The buyer's right to cancel, as explained in this subsection, applies separately to all health spa sale contracts between the seller and the buyer.

(6) When there are two or more buyers (signatories, not necessarily beneficiaries, of the contract) of a health spa sale, the right to cancel, as explained in this subsection, is available only when all the buyers join in the notice of cancellation.

(7) After receiving notice of cancellation from the buyer, the seller shall mark his copy of the cancelled health spa sale contract "cancelled".

(d)(1) The seller shall maintain copies of all cancelled health spa sale contracts for a period of 2 years from their dates of cancellation, and such records shall be open to inspection by proper representatives of the District of Columbia Government.

(2) If a contract containing a health spa sale does not meet all the requirements of subsection (b) of this section, such health spa sale shall be void, and the buyer shall at any time be entitled to a complete refund of all payments made under that contract.

(3) Any person, company or organization which purchases a buyer's obligations under a health spa sale, makes such purchase subject to the buyer's right to cancel as explained in subsection (c) of this section, as if such person, company, or organization were the seller.

(4) The principal consumer protection agency or the Corporation Counsel of the District of Columbia Government may seek in the proper court or administrative agency an order requiring a health spa to include in all health spa sale contracts the notice required in subsection (b)(4) of this section.

(e)(1) Each health spa which contracts health spa sales for goods or services to be provided or made available at a health spa which is planned, under construction, or in operation shall be required by the Department of Consumer and Regulatory Affairs ("Department") to maintain a bond, issued by a surety company licensed to do business in the District of Columbia, in an amount not less than $50,000, or shall file with the Department an irrevocable letter of credit or cash in that amount. A buyer of a health spa sale who suffers or

sustains any loss or damage by reason of breach of contract or bankruptcy by the seller or by reason of a violation by the seller of the provisions of this act [this section] may bring an action based on the bond and recover against the surety, the liability of the surety under any bond may not exceed the aggregate amount of the bond, regardless of the number or amount of claims filed. If the claims filed should exceed the amount of the bond, the surety shall pay the amount of the bond to the Department for distribution to claimants entitled to restitution and shall be relieved of all liability under the bond.

(2) A health spa which states in writing, at the time it registers with the Department pursuant to subsection (f) of this section, that it will make health spa sales to no more than 100 persons, shall for as long as it abides by the agreement be required to purchase a surety bond in the amount of $25,000 or to file with the Department an irrevocable letter of credit or cash in that amount.

(3) Each health spa, prior to making or contracting for any health spa sale, shall complete the registration required by subsection (f) of this section and shall file with the Department evidence that the bond or letter of credit is in force or shall file cash in lieu of the bond or letter of credit. Each health spa obtaining a bond or letter of credit shall file annually with the Department evidence that the bond or letter of credit remains in force, and shall maintain accurate records of the bond and premium payments on it, or of the letter of credit. These records shall be open to inspection by the Department at any time during normal business hours.

(f)(1) Each person or health spa which makes health spa sales in the District of Columbia shall register with the Department on forms provided by the Department. The person or health spa shall furnish the full name and address of each business location where health spa sales are contracted, a financial statement, and any other information the department deems appropriate.

(2) Each seller of health spa sales in the District of Columbia shall designate a resident of the District of Columbia to serve as resident agent for receipt of service of process.

(g) Any person or health spa which makes or contracts to make any health spa sale in violation of subsection (e)(3) of this section shall be subject to a fine of not less than $1,000 and not more than the amount set forth in [§ 22-3571.01].

(h) The Department may bring an action to enjoin the sale of health spa memberships by any health spa which fails to comply with subsection (e)(3) of this section.

(Apr. 15, 1976, D.C. Law 1-62, § 2(a), 22 DCR 6044; Mar. 13, 1985, D.C. Law 5-138, § 2, 31 DCR 5747; Apr. 9, 1997, D.C. Law 11-255, § 27(r), 44 DCR 1271; June 11, 2013, D.C. Law 19-317, § 285(c), 60 DCR 2064.)

Cross references. — Department of consumer and regulatory affairs, establishment as principal consumer protection agency, see § 28-3902.

Section references. — This section is referenced in § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3817.

1973 Ed., § 28-3817.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "not more than the amount set forth in [§ 22-

3571.01]" for "not more than $5,000" in (g).

Legislative history of Law 1-62. — Law 1-62, the "Health Spa Consumer Protection Act," was introduced in Council and assigned Bill No. 1-63, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on December 16, 1975 and January 13, 1976, respectively. Signed by the Mayor on February 10, 1976, it was assigned Act No. 1-92 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-138. — Law 5-138, the "Health Spa Consumer Protection Act Amendments Act of 1984," was introduced in Council and assigned Bill No. 5-405, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on September 12, 1984, and October 9, 1984, respectively. Signed by the Mayor on October 25, 1984, it was assigned Act No. 5-196 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3701.

Legislative history of Law 19-317. — Law 19-317, the "Criminal Fine Proportionality Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-214. The Bill was adopted on first and second readings on Oct. 16, 2012, and Nov. 1, 2012, respectively. Signed by the Mayor on Jan. 23, 2013, it was assigned Act No. 19-641 and transmitted to Congress for its review. D.C. Law 19-317 became effective on June 11, 2013.

References in text. — "This act", referred to in the second sentence of paragraph (1) of subsection (e), is D.C. Law 5-138.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

§ 28-3818. Layaway plans.

(a) *Definitions.* — As used in this section the term:

(1) "consumer goods" means chattels owned, used, or bought by an individual for personal, family, or household purposes. The term consumer goods does not include goods acquired for commercial or business use or resale;

(2) "layaway plan" means a plan or agreement whereby a seller of consumer goods offers for sale or sells such goods to a buyer on terms which contemplate completion of three (3) or more agreed payments all of which must be made prior to the release or delivery of such goods;

(3) "service charge" means a one time charge, not to exceed one dollar ($1.00) on any layaway plan, to cover the administrative costs associated with such layaway plan; provided, that the one dollar ($1.00) service charge shall cover all layaway plan transactions between the retailer and a single consumer occurring in the same business day.

(b) *Disclosures.* — The seller shall, prior to the time of executing a layaway plan agreement, provide the buyer with a copy of a written, clear, and conspicuous disclosure. Failure of the seller to comply with this provision shall be deemed an executed trade practice in violation of the law of the District of Columbia for which the penalties in section 6(i)(3) of the District of Columbia Consumer Protection Procedures Act, effective July 22, 1976 (D.C. Law 1-76) [§ 28-3905(i)(3)] shall apply. The disclosure required by this subsection shall include:

(1) a statement as to the schedule or period of payments to be made by the buyer towards the purchase of consumer goods under a layaway plan;

(2) a statement that the consumer goods identified in the layaway plan will be retained in stock or set aside from stock but retained by the seller and made available for release or delivery to the buyer upon final payment or within fourteen (14) days after final payment;

(3) a statement as to the refund and exchange policies and charges

restrictive of the seller pursuant to subsections (c), (d), (f), (g), and (h) of this section to the extent applicable;

(4) a statement as to the seller's right to deduct late charges as set forth in subsection (g) of this section; and

(5) a statement that the buyer shall receive from the seller a written statement, upon request, and shall obtain a receipt for any and all payments made towards the purchase of consumer goods under a layaway plan as set forth in subsections (i)(1) and (i)(2) of this section.

(c) *Buyer's right to cancel.* — The buyer, at his option, has the right to cancel an executed layaway plan within two (2) weeks after entering into the layaway plan and to obtain a full refund of any amount of money paid toward the purchase of consumer goods under the layaway plan. Such refund is payable upon cancellation or within two (2) weeks after cancellation.

(d) *Cancellation fee.* — If a buyer notifies a seller of his intention to cancel a purchase of consumer goods under a layaway plan after the expiration of the two (2) week cancellation period set forth in subsection (c) of this section, the seller shall promptly refund the full amount of money paid by the buyer towards the purchase of the consumer goods under the layaway plan. The seller may, however, retain an amount not to exceed eight percent (8%) of the purchase price of the consumer goods purchased under the layaway plan or sixteen dollars ($16.00), whichever is less.

(e) *Seller's default.* — If, for any reason, the seller is unable to provide the consumer goods identified in the layaway plan or their exact duplicate to the buyer upon final payment or within fourteen (14) days thereafter, the seller shall refund the entire amount paid by the buyer towards the purchase of such goods under the layaway plan plus eight percent (8%) of the purchase price of the consumer goods purchased under the layaway plan or sixteen dollars ($16.00), whichever is less.

(f) *Charges restricted.* — The seller shall not require a buyer who has executed a layaway plan to pay a charge or fee of any kind on such goods except for those fees pursuant to subsections (d), (g), and (j) of this section to the extent applicable.

(g) *Late fee.* — If, for any reason, the buyer is unable to make payment in accordance with the terms of a layaway plan, the seller shall send prompt notice informing the buyer of the delinquency in payment. If the seller does not receive payment on the consumer goods identified in the layaway plan within fourteen (14) days after such notice is sent to the buyer, the seller may deduct an amount not to exceed one dollar ($1.00) from the full amount of money paid by the buyer towards the purchase of such goods under the layaway plan and refund the remaining amount to the buyer.

(h) *Acceleration of payment prohibited.* — The seller shall not accelerate any payments under a layaway plan. The seller shall be entitled to the amount of payments due to date under the layaway plan including those charges pursuant to subsections (d) and (g) of this section to the extent applicable.

(i) *Receipt and statement of payments.* —

(1) The seller shall promptly provide the buyer with a receipt for any and all payments made towards the purchase of consumer goods under a layaway

plan. If payment is made by mail or by any means other than in person, a receipt shall be provided no later than seven (7) days after a payment is made. Such receipt shall include:

(A) a description of the consumer goods identified in the layaway plan; and

(B) the amount and date of such payment.

(2) The seller, upon request of the buyer, shall provide the buyer, within a reasonable time thereafter, a written statement of any and all payments made towards the purchase of consumer goods under the layaway plan. Such statement shall include:

(A) a description of the consumer goods identified in the layaway plan;

(B) the amount and date of any and all payments made to date;

(C) the total of all payments made to date; and

(D) the balance of all payments remaining.

(j) *Service charge.* — The seller is allowed to charge the buyer a service charge, which is not to exceed one dollar ($1.00), for goods purchased under a layaway plan, to cover the administrative costs associated with such layaway plan; provided, that the one dollar ($1.00) service charge shall cover all layaway plan transactions between the retailer and a single consumer occurring in the same business day.

(Oct. 4, 1978, D.C. Law 2-115, § 2, 25 DCR 1997; Oct. 18, 1979, D.C. Law 3-28, § 2, 26 DCR 676; Apr. 9, 1997, D.C. Law 11-255, § 27(s), 44 DCR 1271.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Consumer protection procedures, unlawful trade practices, see § 28-3904.

Department of consumer and regulatory affairs, enforcement authority, see § 28-3903.

Section references. — This section is referenced in § 28-3903, § 28-3904, and § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3818.

1973 Ed., § 28-3818.

Legislative history of Law 2-115. — Law 2-115, the "District of Columbia Consumer Lay Away Plan Act of 1978," was introduced in Council and assigned Bill No. 2-130, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 13, 1978 and June 27, 1978, respectively. Signed by the Mayor on July 24, 1978, it was assigned Act No. 2-241 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-28. — Law 3-28, the "District of Columbia Consumer Lay Away Plan Service Charge Amendments Act of 1979," was introduced in Council and assigned Bill No. 3-117, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 19, 1979 and July 3, 1979, respectively. Signed by the Mayor on August 1, 1979, it was assigned Act No. 3-77 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

CASE NOTES

Consumer goods.

Buyer of power stapler through Internet auction service, who resold stapler to third-party, was a "merchant," rather than a "consumer," under Consumer Protection Act (CPA), and resale converted stapler from a "consumer good" for personal use to inventory for resale, which was not entitled to protections of CPA in action against seller. Nicely v. Jones, 132 WLR 2101 (Super. Ct. 2004).

§ 28-3819. Rental housing locators.

(a) *Definitions.* — As used in this section the term or terms:

(1) "Fee" means any fee, commission, charge, deposit, down payment or other valuable consideration, including any fee or charge for a credit check or consultation.

(2) "Rental housing locator" or "locator" means any person who for a fee identifies or purports to identify or who provides or purports to provide any other information about any rental unit available for rent, other than a rental unit owned or managed by such person.

(3) "Rental housing locator contract" means a contract between a rental housing locator and another person that obligates the locator for a fee to identify any number of rental units as available for rent or to provide any other information about them.

(4) "Rental unit" means any room, suite, apartment, or single family house rented or offered for rent as a residence, including any appurtenant services, facilities, improvements or land.

(b) Repealed.

(c) *Accuracy of information.* —

(1) Every rental housing locator shall revise and correct all information to be provided pursuant to a rental housing locator contract or otherwise made available to any customer, potential customer, or the general public, every 24 hours for rental units it advertises and every 48 hours for rental units it does not advertise, or else remove such units from its lists and discontinue the advertising of such units.

(2) A rental housing locator shall identify as available for rent or provide other information about a rental unit only if the locator has been given permission to do so by the owner/manager of the unit, or the rental unit has been advertised, posted, or otherwise publicly offered or held out as available for rent, by the owner/manager of the rental unit.

(3) Rental housing locator agencies shall be required to make available, upon request, records of all unadvertised and advertised listings provided to customers and potential customers to the Office of Consumer Protection and the Metropolitan Police Department.

(d) *Contracts.* —

(1) Contracts between the rental housing locator agency and the customer shall be written, and a copy of the contract shall be supplied to the customer.

(2) The contract shall clearly state the duration of the locator service contract.

(3) Every rental housing locator shall refund, upon request, any fee to any customer within thirty (30) days of said request if any of the rental housing information provided to that customer by the locator fails to comply with the requirements of accuracy as defined by subsection (c) of this section or if the locator fails, upon demand, to provide the correct street address or telephone number of any rental housing unit it advertises or otherwise describes to a customer; or if the locator fails to provide a customer with rental housing listings as called for in the contract.

(4) The contract shall include in a prominent place and in bold face type the following clauses:

(A) The first clause shall read as follows:

SAVE THIS DOCUMENT AND ANY RENTAL HOUSING LISTINGS PROVIDED TO YOU. WE ARE AN INFORMATION SERVICE ONLY. WE MAKE NO ATTEMPT TO SECURE YOU HOUSING. THE SERVICE OFFERS ONLY COMPILED INFORMATION CONCERNING AVAILABLE RENTAL HOUSING UNITS. NO GUARANTEE IS MADE THAT YOU WILL FIND RENTAL PROPERTY BY USING THIS SERVICE. YOU MAY BE ENTITLED TO A REFUND IF ANY OF THE RENTAL HOUSING INFORMATION PROVIDED TO YOU IS NOT CURRENT, ACCURATE OR OTHERWISE NOT IN COMPLIANCE WITH THE LAW; and

(B) The second clause shall state that all inquiries should be made to the District of Columbia Office of Consumer Protection followed by the current address, telephone number, and hours of that office.

(June 21, 1980, D.C. Law 3-71, § 2, 27 DCR 1891; Apr. 9, 1997, D.C. Law 11-255, § 27(t), 44 DCR 1271; Apr. 20, 1999, D.C. Law 12-261, § 2003(t), 46 DCR 3142.)

Cross references. — Consumer protection procedures, restraining prohibited acts, see § 28-3909.

Consumer protection procedures, unlawful trade practices, see § 28-3904.

Section references. — This section is referenced in § 28-3904 and § 28-3909.

Prior Codifications. — 1981 Ed., § 28-3819.

Legislative history of Law 3-71. — Law 3-71, the "Rental Housing Locator Consumer Protection Act of 1979," was introduced in Council and assigned Bill No. 3-124, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on March 18, 1980 and April 1, 1980, respectively. Signed by the Mayor on May 1, 1980, it was assigned Act No. 3-179 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3802.

Legislative history of Law 12-261. — Law 12-261, the "Second Omnibus Regulatory Reform Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-845, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 31, 1998, it was assigned Act No. 12-615 and transmitted to both Houses of Congress for its review. D.C. Law 12-261 became effective on April 20, 1999.

Subchapter II. Consumer Security Breach Notification.

§ 28-3851. Definitions.

For purposes of this subchapter, the term:

(1) "Breach of the security of the system" means unauthorized acquisition of computerized or other electronic data, or any equipment or device storing such data, that compromises the security, confidentiality, or integrity of personal information maintained by the person or business. The term "breach of the security system" shall not include a good faith acquisition of personal information by an employee or agent of the person or business for the purposes of the person or business if the personal information is not used improperly or subject to further unauthorized disclosure. Acquisition of data that has been

rendered secure, so as to be unusable by an unauthorized third party, shall not be deemed to be a breach of the security of the system.

(2) "Notify" or "notification" means providing information through any of the following methods:

(A) Written notice;

(B) Electronic notice, if the customer has consented to receipt of electronic notice consistent with the provisions regarding electronic records and signatures set forth in the Electronic Signatures in Global and National Commerce Act, approved June 30, 2000 (114 Stat. 641; 15 U.S.C. § 7001); or

(C)(i) Substitute notice, if the person or business demonstrates that the cost of providing notice to persons subject to this subchapter would exceed $50,000, that the number of persons to receive notice under this subchapter exceeds 100,000, or that the person or business does not have sufficient contact information.

(ii) Substitute notice shall consist of all of the following:

(I) E-mail notice when the person or business has an e-mail address for the subject persons;

(II) Conspicuous posting of the notice on the website page of the person or business if the person or business maintains one; and

(III) Notice to major local and, if applicable, national media.

(3)(A) "Personal information" means:

(i) An individual's first name or first initial and last name, or phone number, or address, and any one or more of the following data elements:

(I) Social security number;

(II) Driver's license number or District of Columbia Identification Card number; or

(III) Credit card number or debit card number; or

(ii) Any other number or code or combination of numbers or codes, such as account number, security code, access code, or password, that allows access to or use of an individual's financial or credit account.

(B) For purposes of this paragraph, the term "personal information" shall not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

(Mar. 8, 2007, D.C. Law 16-237, § 2(c), 54 DCR 393.)

Legislative history of Law 16-237. — Law 16-237, the "Consumer Personal Information Security Breach Notification Act of 2006", was introduced in Council and assigned Bill No. 16-810, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 14, 2006, and December 5, 2006, respectively. Signed by the Mayor on December 28 2006, it was assigned Act No. 16-593 and transmitted to both Houses of Congress for its review. D.C. Law 16-237 became effective on March 8, 2007.

Editor's notes. — Section 3 of D.C. Law 16-237 provided: "This act shall apply as of July 1, 2007."

§ 28-3852. Notification of security breach.

(a) Any person or entity who conducts business in the District of Columbia, and who, in the course of such business, owns or licenses computerized or other electronic data that includes personal information, and who discovers a breach

of the security of the system, shall promptly notify any District of Columbia resident whose personal information was included in the breach. The notification shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (d) of this section, and with any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

(b) Any person or entity who maintains, handles, or otherwise possesses computerized or other electronic data that includes personal information that the person or entity does not own shall notify the owner or licensee of the information of any breach of the security of the system in the most expedient time possible following discovery.

(c) If any person or entity is required by subsection (a) or (b) of this section to notify more than 1,000 persons of a breach of security pursuant to this subsection, the person shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined by section 603(p) of the Fair Credit Reporting Act, approved October 26, 1970 (84 Stat. 1128; 15 U.S.C. § 1681a(p)), of the timing, distribution and content of the notices. Nothing in this subsection shall be construed to require the person to provide to the consumer reporting agency the names or other personal identifying information of breach notice recipients. This subsection shall not apply to a person or entity who is required to notify consumer reporting agencies of a breach pursuant to Title V of the Gramm-Leach-Bliley Act, approved November 12, 1999 (113 Stat. 1436; 15 U.S.C. § 6801 et seq[.]).

(d) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation but shall be made as soon as possible after the law enforcement agency determines that the notification will not compromise the investigation.

(e) Notwithstanding subsection (a) of this section, a person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this subchapter shall be deemed to be in compliance with the notification requirements of this section if the person or business provides notice, in accordance with its policies, reasonably calculated to give actual notice to persons to whom notice is otherwise required to be given under this subchapter. Notice under this section may be given by electronic mail if the person or entity's primary method of communication with the resident is by electronic means.

(f) A waiver of any provision of this subchapter shall be void and unenforceable.

(g) A person or entity who maintains procedures for a breach notification system under Title V of the Gramm-Leach-Bliley Act, approved November 12, 1999 (113 Stat. 1436; 15 U.S.C. § 6801 et seq.) ("Act"), and provides notice in accordance with the Act, and any rules, regulations, guidance and guidelines thereto, to each affected resident in the event of a breach, shall be deemed to be in compliance with this section.

(Mar. 8, 2007, D.C. Law 16-237, § 2(c), 54 DCR 393.)

Legislative history of Law 16-237. — For Law 16-237, see notes following § 28-3851.

§ 28-3853. Enforcement.

(a) Any District of Columbia resident injured by a violation of this subchapter may institute a civil action to recover actual damages, the costs of the action, and reasonable attorney's fees. Actual damages shall not include dignitary damages, including pain and suffering.

(b) The Attorney General may petition the Superior Court of the District of Columbia for temporary or permanent injunctive relief and for an award of restitution for property lost or damages suffered by District of Columbia residents as a consequence of the violation of this subchapter. In an action under this subsection, the Attorney General may recover a civil penalty not to exceed $100 for each violation, the costs of the action, and reasonable attorney's fees. Each failure to provide a District of Columbia resident with notification in accordance with this section shall constitute a separate violation.

(c) The rights and remedies available under this section are cumulative to each other and to any other rights and remedies available under law.

(Mar. 8, 2007, D.C. Law 16-237, § 2(c), 54 DCR 393.)

Legislative history of Law 16-237. — For Law 16-237, see notes following § 28-3851.

Subchapter III. Consumer Security Freeze.

§ 28-3861. Definitions.

For the purposes of this subchapter, the term:

(1) "Consumer" means an individual who resides in the District of Columbia.

(2) "Credit report" means information maintained by a credit reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for:

(A) Serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes;

(B) Employment purposes; or

(C) Any other purpose authorized under the Fair Credit Reporting Act, approved October 26, 1970 (84 Stat. 1127; 15 U.S.C. § 1681b).

(3) "Credit reporting agency" means any person who, for consideration, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of maintaining consumers' credit information for the purpose of furnishing the information to third parties.

(4) "Proper identification" means information generally considered suffi-

cient to identify a person. Additional information concerning the consumer's employment and personal or family history shall not be included within the term "proper identification" unless the consumer is unable to reasonably identify himself or herself with other information generally considered sufficient.

(5) "Security freeze" or "freeze" means a restriction, at the request of the consumer and subject to certain exceptions, that prohibits the credit reporting agency from releasing all or any part of a credit report or any information derived from it without the express authorization of the consumer.

(Mar. 8, 2007, D.C. Law 16-238, § 2(b), 54 DCR 397.)

Legislative history of Law 16-238. — Law 16-238, the "Consumer Security Freeze Act of 2006", was introduced in Council and assigned Bill No. 16-811, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 14, 2006, and December 5, 2006, respectively. Signed by the Mayor on December 28 2006, it was assigned Act No. 16-594 and transmitted to both Houses of Congress for its review. D.C. Law 16-238 became effective on March 8, 2007.

Editor's notes. — Section 4 of D.C. Law 16-238 provided: "This act shall apply as of July 1, 2007."

§ 28-3862. Security freeze.

(a) A credit reporting agency shall place a security freeze on a consumer's credit report if a consumer, providing proper identification, makes a request to the credit reporting agency by certified mail. In addition, on or before January 31, 2009, a credit reporting agency shall make available an Internet-based method of requesting a security freeze and shall accept requests by one of the following methods: telephone or regular mail.

(b) A credit reporting agency shall place the security freeze on the consumer's credit report no later than 3 business days after receiving the request.

(c) The credit reporting agency shall send a written confirmation of the security freeze to the consumer within 5 business days of placing the freeze and at the same time shall provide the consumer with a unique personal identification number or password to be used by the consumer when providing authorization for the release of his or her credit report to a specific party or for a specific period of time.

(d) A consumer may thereafter request that a credit reporting agency allow his or her credit report to be accessed by a specific party or for a specific period of time by providing the following:

(1) Proper identification;

(2) The unique personal identification number or password provided by the credit reporting agency pursuant to subsection (c) of this section; and

(3) The identity of the third party to receive the credit report or the time period for which the report shall be available to users of the credit report, if applicable.

(e)(1) A credit reporting agency that receives a request pursuant to subsection (d) of this section shall comply with the request no later than 3 business days after receiving the request.

(2) On or before September 1, 2008, the consumer reporting agency shall develop the capability, and offer the option to the consumer, of honoring a

request under subsection (d) of this section, through Internet-based and telephonic methods, within 15 minutes after the consumer's request is received by the consumer reporting agency. A consumer reporting agency shall not be required to lift a security freeze within 15 minutes if:

(A) The consumer fails to meet the requirements of subsection (d) of this section; or

(B) The consumer reporting agency is unable to lift the security freeze because of:

(i) An act of God, including fire, earthquakes, hurricanes or storms;

(ii) Unauthorized or illegal acts by a third party, including terrorism, sabotage, riot, vandalism, labor strikes, or disputes disrupting operations;

(iii) Operational interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, or computer hardware or software failures inhibiting response time;

(iv) Governmental action, including emergency orders or regulations, judicial or law enforcement action, or similar directives;

(v) Regularly scheduled maintenance during other than normal business hours of, or updates to, the consumer reporting agency's systems; or

(vi) Commercially reasonable maintenance of, or repair to, the consumer reporting agency's systems that is unexpected or unscheduled.

(f) A credit reporting agency may develop procedures involving the use of telephone, fax, or, upon the consent of the consumer in the manner required by the Electronic Signatures in Global and National Commerce Act, approved June 30, 2000 (114 Stat. 464; 15 U.S.C. § 7001 et seq.), for legally required notices, by the Internet, e-mail, or other electronic media, to receive and process a request from a consumer to temporarily lift a freeze on a credit report pursuant to subsection (d) of this section.

(g) A credit reporting agency may permanently remove a freeze placed on a credit report, without a request from the consumer, if the credit reporting agency placed the freeze as a result of a material misrepresentation of fact by the consumer.

(h) A credit reporting agency shall send written notification to the consumer 5 business days prior to permanently removing a freeze on a credit report pursuant to subsection (g) of this section.

(i) If a third party requests access to a credit report on which a security freeze is in effect in connection with an application for credit and the consumer does not allow his or her consumer report to be accessed by that specific party or for that period of time, the third party may treat the application as incomplete.

(j) If a security freeze is in place, a credit report shall not be released to a third party without prior express authorization from the consumer. A credit reporting agency may advise a third party that a security freeze is in effect with respect to the credit report.

(k) A security freeze shall remain in place until the consumer requests its permanent removal in writing. On or before January 31, 2009, a credit reporting agency shall remove a security freeze within 3 business days of receiving a request for permanent removal from the consumer.

(l) A credit reporting agency shall not suggest or otherwise state or imply to a third party that the consumer's security freeze reflects a negative credit score, history, report, or rating.

(m) Nothing in this section shall prevent the lawful use of a credit report by any of the following:

(1)(A) A person or entity (including a subsidiary, affiliate, or agent of that person or entity; an assignee of a financial obligation owing by the consumer to that person or entity; or a prospective assignee of a financial obligation owing by the consumer to that person or entity), with which the consumer has or had prior to assignment an account or contract, including a demand deposit account, or to whom the consumer issued a negotiable instrument, for the purposes of reviewing the account in conjunction with the proposed purchase of a financial obligation or collecting the financial obligation owing for the account, contract, or negotiable instrument.

(B) For purposes of this paragraph, the term "reviewing the account" includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements;

(2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this section for purposes of facilitating the extension of credit or other permissible use;

(3) A person or entity acting pursuant to a court order, warrant, subpoena, or other compulsory process;

(4) A state or local agency that administers a program for establishing and enforcing child support obligations;

(5) A third party for the purposes of prescreening under section 604(e) of the Fair Credit Reporting Act, approved October 26, 1970 (84 Stat. 1129; 15 U.S.C. § 1681b(e));

(6) A person or entity for the purpose of providing a consumer with a copy of his or her credit report upon the consumer's request;

(7) An insurance company, licensed in the District, for the purpose of setting or adjusting a rate or premium, adjusting a claim, or underwriting for property and casualty insurance purposes;

(8) A person or entity administering a credit file monitoring subscription service to which the consumer has subscribed; or

(9) A state, local, or federal government agency and its agents acting pursuant to a lawful investigation or to fulfill any of its other official duties.

(n) The following persons are not required to place a security freeze on a credit report:

(1) A person or entity that acts only as a reseller of credit information by assembling and merging information contained in the database of another person or entity, or multiple persons or entities, and does not maintain a permanent database of credit information from which new credit reports are produced; provided, that a person or entity acting as a reseller shall honor any security freeze placed on a credit report by a credit reporting agency;

(2) A check services or fraud prevention services company which issues reports on incidents of fraud or authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payments; and

(3) A deposit account information service company which issues reports regarding account closures due to fraud, substantial overdrafts, ATM abuse, or similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.

(o) A consumer reporting agency may charge a consumer for a security freeze service only as follows:

(1) For the initial application for the consumer's first personal identification number or password, the consumer may be charged $10.

(2) If the consumer fails to retain the original personal identification number or password provided by the agency, the consumer may not be charged for a one-time reissue of the same or a new personal identification number or password, but may be charged an amount not to exceed $10 for subsequent instances of loss and reissuance of a new personal identification number or password.

(3) Notwithstanding the foregoing, a consumer who has been a victim of identity theft shall not be charged any fee, but may be charged an amount not to exceed $10 for second or subsequent instances of loss and reissuance of a new personal identification number or password, for placement of a security freeze on his or her report.

(Mar. 8, 2007, D.C. Law 16-238, § 2(b), 54 DCR 397.)

Section references. — This section is referenced in § 28-3864.

Legislative history of Law 16-238. — For Law 16-238, see notes following § 28-3861.

§ 28-3863. Notice of rights.

Each time a credit reporting agency provides a consumer with a copy of the consumer's credit report under section 609 of the Fair Credit Reporting Act, approved October 26, 1970 (84 Stat. 1131; 15 U.S.C. § 1681g), the credit reporting agency shall include the following notice with the credit report:

District of Columbia Consumers Have the Right to Obtain a Security Freeze

District of Columbia law gives you the right to place a "security freeze" on your credit report. A security freeze restricts when a credit reporting agency may release information in your credit report without your express authorization or approval.

A security freeze is designed to help prevent credit, loans, and services from being approved in your name without your consent. To obtain a security freeze, you should contact each credit reporting agency. When you place a security freeze on your credit report, the credit reporting agency will send you a personal identification number or password to use if you later choose to lift the freeze from your credit report, or to authorize the release of your credit report to a specific party or parties, or for a specific period of time after the freeze is in place. To provide that authorization, you must contact the credit reporting agency and provide all of the following:

1. The unique personal identification number or password provided by the credit reporting agency.
2. Verification of your identity.
3. Information regarding who may receive the credit report or the period of time for which the report shall be made available.

Upon receiving your proper request to lift temporarily a freeze from your credit report, the credit reporting agency shall comply within 3 business days. Beginning September 1, 2008, the credit reporting agency is required to provide methods, including web-based and telephonic methods, for you to request that the freeze be temporarily lifted within 15 minutes.

A security freeze does not apply when you have an existing account relationship and a copy of your report is requested by your existing creditor or its agents or affiliates for certain types of account review, collection, fraud control or similar activities.

If you are actively seeking credit, the procedures involved in lifting a security freeze may slow your own applications for credit. You should plan ahead and consider lifting a freeze — either completely if you are shopping around, or for a specific creditor before actually applying for new credit. Beginning September 1, 2008, you will be able to have a credit reporting agency temporarily lift a freeze on your credit report within 15 minutes of your request.

You have a right to take legal action against someone who violates your rights under the credit reporting laws. The action can be brought against a credit reporting agency or anyone who fraudulently caused the release of your credit information.".

(Mar. 8, 2007, D.C. Law 16-238, § 2(b), 54 DCR 397.)

Legislative history of Law 16-238. — For Law 16-238, see notes following § 28-3861.

§ 28-3864. Enforcement.

(a) A credit reporting agency that discovers a security breach of credit information in violation of a security freeze shall provide written notice to the affected consumer of the security breach of credit information in accordance with Subchapter II [of this chapter].

(b) If a credit reporting agency willfully violates the security freeze by releasing credit information that has been placed under a security freeze, the affected consumer may bring a civil action against the credit reporting agency for the following:

(1) Injunctive relief to prevent or restrain further violation of the security freeze;

(2) Actual damages;

(3) Punitive damages; and

(4) Reasonable attorney's fees and costs of the action.

(c) If a credit reporting agency negligently violates the security freeze by releasing credit information that has been placed under a security freeze, the

affected consumer may bring a civil action against the credit reporting agency for the following:

(1) Injunctive relief to prevent or restrain further violation of the security freeze;

(2) Actual damages; and

(3) Reasonable attorney's fees and costs of the action.

(d)(1) The Attorney General may petition the Superior Court of the District of Columbia for temporary or permanent injunctive relief against, and for an award of restitution for property lost or damages suffered by a consumer as a consequence of, a violation of this subchapter by a credit reporting agency, or fraudulent or deceptive conduct that causes the improper release or use of credit information that is subject to a security freeze. Notwithstanding any other provision of this section, only the Attorney General shall enforce the requirements under § 28-3862(e)(2).

(2) In an action under this section, the Attorney General may recover:

(A) A civil penalty not to exceed $1,000 for each violation; and

(B) Reasonable attorney's fees and costs of the action.

(Mar. 8, 2007, D.C. Law 16-238, § 2(b), 54 DCR 397.)

Legislative history of Law 16-238. — For Law 16-238, see notes following § 28-3861.

CHAPTER 39. CONSUMER PROTECTION PROCEDURES.

§ 28-3901. Definitions and purposes.

(a) As used in this chapter, the term —

(1) "person" means an individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized;

(2) "consumer" means:

(A) When used as a noun, a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice;

(B) When used as an adjective, describes anything, without exception, that:

(i) A person does or would purchase, lease (as lessee), or receive and normally use for personal, household, or family purposes; or

(ii) A person described in § 28-3905(k)(1)(B) or (C) purchases or receives in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(3) "merchant" means a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice;

(4) "complainant" means one or more consumers who took part in a trade practice, or one or more persons acting on behalf of (not the legal representative or other counsel of) such consumers, or the successors or assigns of such consumers or persons, once such consumers or persons complain to the Department about the trade practice;

(5) "respondent" means one or more merchants alleged by a complainant to have taken part in or carried out a trade practice, or the successors or assigns of such merchants, and includes other persons who may be deemed legally responsible for the trade practice;

(6) "trade practice" means any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services;

(7) "goods and services" means any and all parts of the economic output of society, at any stage or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types;

(8) "Department" means the Department of Consumer and Regulatory Affairs;

(9) "Director" means the Director of the Department of Consumer and Regulatory Affairs;

(10) "Chief of the Office of Compliance" means the senior administrative officer of the Department's Office of Compliance who is delegated the responsibility of carrying out certain duties specified under section 28-3905;

(11) "Office of Adjudication" means the Department's Office of Adjudication which is responsible for carrying out certain duties specified under section 28-3905;

(12) "Office of Consumer Protection" means the Department's Office of Consumer Protection which is responsible for carrying out the statutory requirements set forth in § 28-3906; and

(13) "Committee" means the Advisory Committee on Consumer Protection which is responsible for carrying out the statutory requirements set forth in section 28-3907.

(14) "nonprofit organization" means a person who:

(A) Is not an individual; and

(B) Is neither organized nor operating, in whole or in significant part, for profit.

(15) "public interest organization" means a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers.

(b) The purposes of this chapter are to:

(1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices;

(2) promote, through effective enforcement, fair business practices throughout the community; and

(3) educate consumers to demand high standards and seek proper redress of grievances.

(c) This chapter shall be construed and applied liberally to promote its purpose. This chapter establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.

(July 22, 1976, D.C. Law 1-76, § 2, 23 DCR 1185; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 8, 1991, D.C. Law 8-234, § 2(b), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(b), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(u), 44 DCR 1271; Oct. 19, 2000, D.C. Law 13-172, § 1402(b), 47 DCR 6308; Oct. 20, 2005, D.C. Law 16-33, § 2032(b), 52 DCR 7503; June 12, 2007, D.C. Law 17-4, § 2(a), 54 DCR 4085; Apr. 23, 2013, D.C. Law 19-282, § 2(b)(1), 60 DCR 2132.)

Cross references. — Automobile Consumer Protection Act, see § 50-501 et seq.

Employer-paid personnel services, operation requirements, see § 32-406.

Employment agencies and counseling services, operation requirements, see §§ 32-404 and 32-405.

Job listing services, operation requirements, see § 32-407.

Section references. — This section is referenced in § 1-350.10, § 28-3301, and § 28-3905.

Prior Codifications. — 1981 Ed., § 28-3901.

1973 Ed., T. 28, Appx., § 2.

Effect of amendments. — D.C. Law 13-172 in subsec. (b)(1) inserted "and deter the continuing use of such practices" following "practices" in subsec. (b)(1) and added subsec. (c) providing for liberal construction of the chapter.

D.C. Law 16-33 rewrote subsec. (a)(12), which had read:

"(12) 'Office of Consumer Education and Information' means the Department's Office of Consumer Education and Information which is responsible for carrying out the statutory requirements set forth in section 28-3906; and"

D.C. Law 17-4 rewrote subsec. (a)(3), which had read as follows: "(3) 'merchant' means a person who does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice;".

The 2013 amendment by D.C. Law 19-282 rewrote (a)(2); added (a)(14) and (a)(15); and added the last sentence in (c).

Emergency legislation. — For temporary (90-day) amendment of section, see § 1402(b) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) amendment of section, see § 1402(b) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

For temporary (90 day) amendment of section, see § 2032(b) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 1-76. — Law 1-76, the "District of Columbia Consumer Protection Procedures Act," was introduced in Council and assigned Bill No. 1-253, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on April 6, 1976 and April 20, 1976, respectively. Signed by the Mayor on May 14, 1976, it was assigned Act No. 1-118 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-85. — Law 3-85, the "Enacted Titles Numbering and Amendment Act of 1980," was introduced in Council and assigned Bill No. 3-296, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 20, 1980 and June 3, 1980, respectively. Signed by the Mayor on June 20, 1980, it was assigned Act No. 3-202 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 10-68. — Law 10-68, the "Technical Amendments Act of 1993," was introduced in Council and assigned Bill No. 10-166, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 29, 1993, and July 13, 1993, respectively. Signed by the Mayor on August 23, 1993, it was assigned Act No. 10-107 and transmitted to both Houses of Congress for its review. D.C. Law 10-68 became effective on February 5, 1994.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 13-172. — Law 13-172, the "Fiscal Year 2001 Budget Support Act of 2000," was introduced in Council and assigned Bill No. 13-679, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 15, 2000, and June 6, 2000, respectively. Signed by the Mayor on June 26, 2000, it was assigned Act No. 13-175 and transmitted to both Houses of Congress for its review. D.C. Law 13-172 became effective on October 19, 2000.

Legislative history of Law 16-33. — Law 16-33, the "Fiscal Year 2006 Budget Support Act of 2005", was introduced in Council and assigned Bill No. 16-200 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 10, 2005, and June 21, 2005, respectively. Signed by the Mayor on July 26, 2005, it was assigned Act No. 16-166 and transmitted to both Houses of Congress for its review. D.C. Law 16-33 became effective on October 20, 2005.

Legislative history of Law 17-4. — Law 17-4, the "Nonprofit Organizations Oversight Improvement Amendment Act of 2007", was introduced in Council and assigned Bill No.

17-53 which was referred to Committee on the Public Safety and Judiciary. The Bill was adopted on first and second readings on March 6, 2007, and April 3, 2007, respectively. Signed by the Mayor on April 19, 2007, it was assigned Act No. 17-33 and transmitted to both Houses of Congress for its review. D.C. Law 17-4 became effective on June 12, 2007.

Legislative history of Law 19-282. — Law 19-282, the "Consumer Protection Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-581. The Bill was adopted on first and second readings on Dec. 4, 2012 and Dec. 18, 2012, respectively. Signed by the Mayor on Jan. 25, 2013, it was assigned Act No. 19-647 and transmitted to Congress for its review. D.C. Law 19-282 became effective on April 23, 2013.

Short title. — Short title of subtitle D of title II of Law 16-33: Section 2031 of D.C. Law 16-33 provided that subtitle D of title II of the act may be cited as the Department of Consumer and Regulatory Affairs Consumer Protection Revitalization Act of 2005.

Delegation of Authority. — Delegation of authority pursuant to Law 1-76, see Mayor's Order 86-132, August 12, 1986.

CASE NOTES

ANALYSIS

Burden of proof.

For District of Columbia Consumer Procedures and Protection Act (CPPA) violation based on intentional misrepresentation, plaintiff must demonstrate required nexus between conduct and entrepreneurial aspect of physician's practice by satisfying common-law standard of clear and convincing evidence. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Violations of the Consumer Protection Procedures Act (CPPA) must be proven by clear and convincing evidence. Pearson v. Soo Chung, 961 A.2d 1067, 2008 D.C. App. LEXIS 486 (2008).

The Consumer Protection Procedures Act (CPPA) requires clear and convincing evidence of intentional misrepresentation; it does not lessen the burden of proof for consumers. D.C. Code 1981, § 28-3901 et seq. Osbourne v. Capital City Mortg. Corp., 727 A.2d 322, 1999 D.C. App. LEXIS 76 (1999).

Choice of law.

Under District of Columbia conflict of laws principles, consumer protection law of Virginia, where clients of Muslim advocacy organization were citizens, rather than consumer protection law of District of Columbia, where organization was headquartered, applied to clients' consumer protection claims, stemming from organization's employment of non-lawyer to represent clients in various legal matters; Virginia had most significant relationship with the case and its policies would be more advanced by application of its law, since most of the relevant contacts occurred in Virginia, three of the plaintiffs were citizens of Virginia, and all alleged misrepresentations occurred there. Lopez v. Council on American-Islamic Rels. Action Network, Inc., 741 F.Supp.2d 222, 2010 U.S. Dist. LEXIS 104934 (2010).

Under District of Columbia choice of law rules, District of Columbia Consumer Protection Procedures Act (CPPA) could not be applied to remedy allegedly improper trade practices which took place outside the District of Columbia to a Michigan resident who sustained injuries as a guest of Maryland-based corporation's Russian hotel. Shaw v. Marriott Int'l, Inc., 570 F.Supp.2d 78, 2008 U.S. Dist. LEXIS 62498 (2008), affirmed in part and reversed in part by, remanded by 605 F.3d 1039, 390 U.S. App. D.C. 422, 2010 U.S. App. LEXIS 10969 (2010).

Class actions.

Think tank's allegations that it used funds to pay for stays at hotel owner's Russian hotels and that it suffered pecuniary harm as a result of hotel's pricing practices were sufficient to plead standing, as required for think tank's putative class action under District of Columbia Consumer Protection Procedures Act

(CPPA). Shaw v. Marriott Intern., Inc., 605 F.3d 1039, 2010 U.S. App. LEXIS 10969 (C.A.D.C. 2010).

Non-profit consumer group's action alleging that cereal manufacturer made false representations, in violation of District of Columbia's Consumer Protection Procedures Act (CPPA) did not have to be brought as class action; non-profit, as suing party, suffered no injury and would never meet typicality requirement of class members' claims, and since damages would be payable to consumers, not person who brought the claim, there was no risk of windfall to non-profit. Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Non-profit consumer group's action alleging that cereal manufacturer made false representations, in violation of District of Columbia's Consumer Protection Procedures Act (CPPA) was not a "mass action" removable to federal court under Class Action Fairness Act (CAFA), rather, action fell under CAFA exception for suits brought on behalf of the general public. Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Provision of proposed class settlement agreement calling for $10,000 incentive awards for named plaintiffs was reasonable, and thus would be approved in class action alleging that automobile insurer's settlement practices violated District of Columbia Consumer Protection Procedures Act, where plaintiffs Wells devoted their time and effort to assist in prosecution of action, action produced $800,000 recovery for class's benefit, and no objection to incentive awards was filed. Wells v. Allstate Ins. Co., 557 F.Supp.2d 1, 2008 U.S. Dist. LEXIS 41348 (2008).

Approval of proposed settlement of insureds' class claims for $800,000 was warranted in insureds' class action alleging that automobile insurer violated District of Columbia Consumer Protection Procedures Act by adopting "scorched-earth litigation tactic" against policyholders who litigated after refusing to settle, where settlement was result of arms' length negotiations, class members were each to receive additional cash payments of either $150, $600, or $1,200, agreement was result of years of litigation, only one class member chose to opt out, and experienced mediator believed that settlement was fair and reasonable. Wells v. Allstate Ins. Co., 557 F.Supp.2d 1, 2008 U.S. Dist. LEXIS 41348 (2008).

Common law liability.

Hospital and blood bank, which were not liable under common-law theories of lack of informed consent and negligence, in action brought by parents of infant who contracted AIDS as result of blood transfusions given at birth were not liable for same conduct despite statutory provision under District of Columbia Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901 et seq. Kozup v. Georgetown University, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

Trade practices that violate other laws, including the common law, also fall within enforcement provisions of the Consumer Protection Procedures Act (CPPA). Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Consumers could invoke the Consumer Protection Procedures Act (CPPA) to challenge cable company's increase in late fee from $2.43 to $5.00 as an unlawful trade practice in violation of common law rule against punitive liquated damages clauses. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Construction and application.

Under District of Columbia law, borrower's claim that mortgage brokerage and mortgage broker breached their fiduciary duties by failing to provide him with best available mortgage rate, failing to provide written document describing service and agreement, failing to disclose yield spread premium (YSP) fee and broker's involvement in loan, charging fees for services not reasonably related to services performed, misrepresenting reason interest note offered by lender was higher than borrower expected, and failing to disclose mandatory prepayment penalty provision of original loan offer accrued, pursuant to discovery rule, when borrower signed final loan documents, where settlement statement stated that YSP would be paid "by the Lender" to broker. Newland v. Aurora Loan Servs., LLC, 806 F.Supp.2d 65, 2011 U.S. Dist. LEXIS 93280 (2011).

Lender did not show that issues presented when court previously resolved merits of borrower's claim under District of Columbia's Consumer Protection Procedures Act and remaining three factual allegations supporting claims for breach of contract, breach of fiduciary duty, and negligence were "the same," such that they would counsel in favor of reaching "the same result," as required for law of case doctrine to apply to remaining allegations, by quoting from court's prior decision and stating that court's previous decision similarly precluded plaintiff from recovering. Sloan v. Urban Title Servs., 770 F.Supp.2d 216, 2011 U.S. Dist. LEXIS 28660 (2011).

Former staff attorney's settlement of his post-employment compensation claims against law firm fell outside of consumer-merchant relationship regulated under District of Columbia Consumer Protection Procedures Act. Cuneo Law Group, P.C. v. Joseph, 669 F.Supp.2d 99, 2009 U.S. Dist. LEXIS 108064 (2009), affirmed by 428 Fed. Appx. 6, 2011 U.S. App. LEXIS 12498 (D.C. Cir. 2011).

Valves used in heating, ventilation, and air conditioning (HVAC) systems in multi-family housing buildings were not "consumer goods" within the meaning of District of Columbia's Consumer Protection Act; valves were not furniture, furnishings, or personal effects used in the home. Quality Air Servs., L.L.C. v. Milwaukee Valve Co., 567 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 55431 (2008).

Provisions of District of Columbia Consumer Protection Procedures Act (CPPA) barring unlawful trade practices applies to real estate transactions. Chelsea Condominium Unit Owners Ass'n v., 468 F.Supp.2d 136 (1815).

District of Columbia Consumer Procedures and Protection Act (CPPA) applies to medical profession if plaintiff satisfies threshold requirements in CPPA, demonstrates nexus between claim at issue and entrepreneurial aspect of medical practice, and meets "clear and convincing" burden of proof standard. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Physician's alleged statement to patient regarding her eye problem that "[w]hat you have, I can fix" was not intentional misrepresentation made with entrepreneurial motives, as required for claim under District of Columbia Consumer Protection Procedures Act (CPPA), rather, such statement was conduct within "actual practice of medicine," which was not subject to CPPA. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Claims relating to the actual competence of the medical practitioner do not qualify for protection under District of Columbia Consumer Protection Procedures Act (CPPA). Dorn v. McTigue, 121 F.Supp.2d 17, 2000 U.S. Dist. LEXIS 17021 (2000).

District of Columbia Consumer Protection and Procedures Act (CPPA) supplies consumers with private cause of action against merchants. D.C. Code 1981, § 28-3901 et seq. Slaby v. Fairbridge, 3 F.Supp.2d 22, 1998 U.S. Dist. LEXIS 4827 (1998).

Lenders subjected themselves to the District of Columbia's Consumer Protection Practices Act (CPPA) by issuing loan to D.C. resident and taking his D.C. home as collateral, even though loan transactions were formally consummated outside D.C. and lenders were not themselves D.C. corporations. D.C. Code 1981, § 28-3901 et seq. Williams v. Central Money Co., 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

The alleged failure to include a notice of defenses cause in standard form student loan contracts could enable student borrowers to void the contract if they could demonstrate the absence of meaningful choice, together with contract terms which were unreasonably favorable to the other party, in violation of the District of Columbia Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901 et seq. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Student loan recipients alleged sufficient nexus with the District of Columbia to assert a claim under the District of Columbia Consumer Protection Procedures Act; although only one student borrower was a resident of the District, the proprietary school which allegedly perpetrated the fraud was incorporated in the district, some loan recipients applied for guaranteed student loans at the school's offices in the District and student loan checks were allegedly endorsed to the school at its offices in the District. D.C. Code 1981, § 28-3901 et seq. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

District of Columbia consumer protection statute was not applicable in action by District resident against Virginia corporations for allegedly fraudulent and negligent lending practices; statute is not intended to apply to every commercial transaction involving District of Columbia resident, wherever and with whomever that transaction occurs. D.C. Code 1981, §§ 28-3901 to 28-3908. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

The Consumer Protection Procedures Act (CPPA) is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers. Snowder v. District of Columbia, 949 A.2d 590, 2008 D.C. App. LEXIS 261 (2008).

Consumer Protection Procedures Act (CPPA) is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Consumer Protection and Procedures Act did not apply to nonprofit corporation that allegedly misused fees it accepted for arranging sale of insurance to its members. D.C. Code 1981, § 28-3901 et seq. Schiff v. AARP, 697 A.2d 1193, 1997 D.C. App. LEXIS 110 (1997).

Consumer Protection Procedures Act applies to nonlawyers who purport to practice law. D.C. Code 1981, §§ 28-3901 et seq., 28-3903(c)(2)(C). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993

D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

The District of Columbia Consumer Protection Procedures Act establishes the Department of Consumer and Regulatory Affairs as the consumer protection agency of the D.C. Government and sets up procedures for the agency to investigate and remedy consumer complaints; it enumerates a broad array of "unfair trade practices" and provides mechanisms for consumers to pursue both administrative and judicial remedies. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

The extensive administrative mechanism created by this chapter demonstrates a legislative objective to vest primary jurisdiction for resolving consumer disputes in the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) and to have consumer complaints resolved in the DCRA before a lawsuit filed by a merchant may proceed. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

The Consumer Protection Procedures Act applies to motor vehicle sales, and unlawful trade practices regarding such sales are prohibited. Franklin Inv. Co. v. King, 114 WLR 1993 (Super. Ct. 1986).

Construction with other laws.

References to Fourth Amendment in cardholders' first amended complaint did not constitute federal question for purposes of removal in action alleging credit card services company violated District of Columbia Consumer Protection Procedures Act (DCCPA) by outsourcing handling of cardholders' private data to foreign countries without notice or disclosure; cardholders' complaint relied exclusively on District of Columbia law and asserted only causes of action under DCCPA, cardholders had not pled any violation of Fourth Amendment or sought any relief under Fourth Amendment, and central issue in complaint was whether company's actions were deceptive under DCCPA, not whether their actions constituted violation of Fourth Amendment. Stein v. Am. Express Travel Related Servs., 813 F.Supp.2d 69, 2011 U.S. Dist. LEXIS 108614 (2011).

Under District of Columbia law, borrower's claim that mortgage lender, mortgage servicer, employer of substituted trustees, mortgagee of record, mortgage brokerages, and mortgage brokers fraudulently conspired to provide borrower with higher interest rate than he should have received and violated Consumer Protection Act accrued when borrower signed final loan documents, despite borrower's contention that his broker never disclosed existence or conditions of yield spread premium (YSP), where settlement statement stated that YSP would be paid "by the Lender" to broker, and all material terms and conditions of mortgage transaction, as well as required disclosures, were provided to borrower when he closed his loan. Newland v. Aurora Loan Servs., LLC, 806 F.Supp.2d 65, 2011 U.S. Dist. LEXIS 93280 (2011).

Arbitration agreement in contract for sale of penthouse precluded federal litigation of purchasers' claims that contract violated Interstate Land Sales Full Disclosure Act (ILSFDA), the District of Columbia Condominium Act, and the District of Columbia Consumer Protection Act prior to arbitration of such claims, where arbitration clause encompassed any fraud or misrepresentation, the claims that comprised the gravamen of purchasers' complaint. Olle v. 5401 W. Ave. Residential, LLC, 569 F.Supp.2d 141, 2008 U.S. Dist. LEXIS 59054 (2008).

Consumer.

Issue of whether borrower purchased property as his personal residence or as investment property involved fact question that could not be resolved on motion to dismiss borrower's claim against lender and loan servicer under District of Columbia Consumer Protection Procedures Act (CPPA) on ground that mortgage transaction was commercial transaction. Poblete v. Indymac Bank, 657 F.Supp.2d 86, 2009 U.S. Dist. LEXIS 89181 (2009), dismissed by 2010 U.S. Dist. LEXIS 84559 (D.D.C. Aug. 17, 2010).

Under District of Columbia Consumer Procedures and Protection Act (CPPA), where physician was merchant, who supplied services that were subject matter of medical practice, physician's patient was "consumer," as she provided economic demand for physician's medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Self-employed author and scientist was not "consumer" within meaning of District of Columbia Consumer Protection and Procedures Act (CPPA), and thus federal agency, publishers of scientific journals, and broadcast corporation did not violate CPPA by rejecting unsolicited research proposal and manuscripts regarding theory for earthquake prediction, as claims did not arise from purchase, lease, or receipt of consumer goods or services from defendants. D.C. Code 1981, §§ 28-3901(a)(2), 28-3904. Slaby v. Fairbridge, 3 F.Supp.2d 22, 1998 U.S. Dist. LEXIS 4827 (1998).

Corporate owner of apartment complex that had available liquid assets in excess of $5 million was not a "consumer" within meaning of District of Columbia Consumer Protection Practices Act. D.C. Code 1981, §§ 28-3901 et seq., 28-3904. Clifton Terrace Assoc., Ltd. v. United Technologies Corp., 728 F. Supp. 24, 1990 U.S. Dist. LEXIS 322 (1990), affirmed in

part and vacated in part by 929 F.2d 714, 289 U.S. App. D.C. 121, 1991 U.S. App. LEXIS 5392 (1991).

Taxicab operator was not a "consumer" within meaning of District of Columbia unfair trade practice statute, with respect to purchases of gasoline and supplies which taxi owners' association required to be purchased through the association. D.C. Code 1981, §§ 28-3901(a)(2), 28-3904. Mazanderan v. Independent Taxi Owners' Asso., 700 F. Supp. 588, 1988 U.S. Dist. LEXIS 14381 (1988).

The District of Columbia's Consumer Protection Act was not applicable in lender's action against person, who had attended law school and who reviewed language of loan agreement, to recover for damages arising from borrower's default on loan; lender was not "consumer" under the Act and loan in question could not be considered purchase, lease, or receipt of consumer goods or services. D.C. Code 1981, §§ 28-3901 to 28-3908, 28-3901(a)(2). Barlow v. McLeod, 666 F. Supp. 222, 1986 U.S. Dist. LEXIS 17018 (1986), affirmed without opinion by 861 F.2d 303, 274 U.S. App. D.C. 70, 1988 U.S. App. LEXIS 18672 (1988).

Corporation engaged in interstate sale of long distance telephone services was not "consumer" within meaning of Consumer Protection Procedures Act, and thus could not maintain action against competitor under Act for allegedly engaging in unfair trade practices; Act supplies consumers with private cause of action against merchants and is not intended to supply merchants with private cause of action against other merchants. D.C. Code 1981, §§ 28-3901(a)(2, 4), 28-3905(k)(1, 2). Independent Communications Network, Inc. v. MCI Telecommunications Corp., 657 F. Supp. 785, 1987 U.S. Dist. LEXIS 2889 (1987).

Auction sale of antique blanket chest was "consumer transaction" subject to Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Consumer transactions.

Patient could not as a matter of law bring claims under District of Columbia's Consumer Protection Procedures Act (CPPA), for alleged misrepresentations by hospital and doctors regarding the availability of a rape kit and defendants' ability to perform one on patient following her alleged drugging and sexual assault; CPPA did not allow recovery for personal injuries of a tortious nature, such as patient's CPPA claims, which constituted attacks on the actual performance of a medical service that were more appropriately addressed in the context of medical malpractice claims. McGaughey v. District of Columbia, 740 F.Supp.2d 23, 2010 U.S. Dist. LEXIS 100962 (2010).

Consumers who sued officers and employees of defunct advertising company, stemming from receipt of unwanted facsimile transmissions, failed to state claim against officer under District of Columbia Consumer Protection and Procedures Act (CPPA), where complaint did not aver consumer-merchant relationship within meaning of statute. Kopff v. Battaglia, 425 F.Supp.2d 76, 2006 U.S. Dist. LEXIS 13638 (2006).

Patient was engaging in a "consumer transaction" when he sought copies of his medical records through an attorney for use in a personal injury action, for purposes of determining whether he could, under the Consumer Protection Procedures Act (CPPA), bring action against medical records company for charging unconscionably high fees; attorney was acting on patient's behalf and as his agent, CPPA applied whether a merchant made a sale to a consumer directly or indirectly, though patient acquired medical records to seek a financial recovery in personal injury action patient nonetheless obtained them for personal use, CPPA recognized that a consumer in a consumer transaction was allowed to have a financial motive, and patient did not obtain his medical records as part of a regular business. Julian Ford v. ChartOne, Inc., 908 A.2d 72, 2006 D.C. App. LEXIS 533 (2006).

A merchant-consumer relationship can exist, as required for claim under Consumer Protection Procedures Act (CPPA), if defendant advertised or offered his services to plaintiff without the intent to sell them as advertised or offered, though defendant did not enter into formal contractual relationship with plaintiff and did not receive money for services. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

Policies of neither District of Columbia nor Wisconsin would be more advanced by application of its law to plaintiff borrowers' complaint challenging defendant Student Loan Marketing Association's (Sallie Mae) collection and disclosure of late fees, as element of choice of law analysis in District of Columbia; Wisconsin had powerful interest in protecting its residents from fraud and misrepresentation, while District of Columbia had equally strong interest in ensuring that its corporate citizens refrained from fraudulent activities. Washkoviak v. Sallie Mae, 900 A.2d 168, 2006 D.C. App. LEXIS 300 (2006).

Homeowner who mortgaged her home as security for a loan purchased "consumer credit" from lender within meaning of Consumer Protection Procedures Act (CPPA) section declaring it an unlawful trade practice for a person to make or enforce unconscionable terms or provisions of sales or leases. D.C. Code 1981, §§ 28-3901(a)(2, 3, 7), 28-3904(r). DeBerry v.

First Gov't Mortg. & Investors Corp., 743 A.2d 699, 1999 D.C. App. LEXIS 307 (1999).

It is not use to which purchaser ultimately puts goods or services, but rather nature of purchaser that determines nature of transaction for purposes of Consumer Protection Procedures Act; if purchaser is regularly engaged in business of buying goods or service in question for later resale to another in distribution chain or retail to general public, then transaction in course of that business is not within Act but, on the other hand, if purchaser is not engaged in regular business of purchasing this type of goods or service and reselling it, then transaction will usually fall within the Act. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Transactions along distribution chain that do not involve ultimate retail customer are not consumer transactions that Consumer Protection Procedures Act seeks to reach; rather, it is ultimate retail transaction between final distributor and individual member of consuming public that Act covers. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Though the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 et seq., claims in the complaint arose out of an insurance policy obtained by defendant mortgagee in connection with plaintiff's business, the plaintiff failed to allege facts sufficient to show her CPPA claims arose from a consumer transaction, therefore all of plaintiff's CPPA claims were dismissed. Cannon v. Wells Fargo Bank, N.A., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 27927 (D.D.C. Mar. 1, 2013).

Contractors.

This act is not designed to protect contractors but consumers, and the administrative remedies are for their benefit. Feinstone v. Potomac Group, Inc., 122 WLR 233 (Super. Ct. 1993).

A contractor has no right to initiate proceedings under this act and no standing to invoke this act on its own behalf. Feinstone v. Potomac Group, Inc., 122 WLR 233 (Super. Ct. 1993).

Damages.

Punitive damages awards of $2 million against property purchaser, $1.1 million against company owned by purchaser, and $200,000 against purported money lender, in former homeowner's action for fraud and violation of Consumer Protection Procedures Act (CPPA), arising out of sale of home prior to foreclosure sale, were not excessive and did not violate due process; scheme to purchase home and lease it back to former homeowner by using confusing paperwork that was purposely mislabeled was reprehensible and caused more than economic injury, former homeowner was disabled, lender and purchaser had been involved in prior similar transactions, treble compensatory damages award of $180,000 was not substantial given loss in equity in home, punitive damages awards did not exceed 11 to 1 ratio with regard to compensatory damages award, lender had substantial net worth, and CPPA did not contain provision imposing civil fines for transaction. Modern Mgmt. Co. v. Wilson, 997 A.2d 37, 2010 D.C. App. LEXIS 283 (2010), writ of certiorari denied by 132 S. Ct. 111, 181 L. Ed. 2d 36, 2011 U.S. LEXIS 5544, 80 U.S.L.W. 3182 (U.S. 2011).

Discretion of court.

Trial court did not abuse its discretion by denying customer's late-filed motion for a jury trial, in common law fraud and Consumer Protection Procedures Act (CPPA) action customer brought against dry cleaning business and its owners after business allegedly lost customer's pants; customer premised his motion on two accusations of judicial misconduct, in which judge assigned to the case allegedly indicated he had formed a view of the case adverse to customer's position, but such accusations were not supported by the record, and when motion was denied trial court recognized it had discretion to grant or deny the motion, and considered the relevant factors before denying motion. Pearson v. Soo Chung, 961 A.2d 1067, 2008 D.C. App. LEXIS 486 (2008).

Fraud.

Residential customer failed to state claims against long-distance telephone company for common-law fraud under federal or District of Columbia law, negligent misrepresentation, or deceptive acts or practices or false advertising in violation of District of Columbia Consumer Protection Act, as company's challenged billing practices could not mislead reasonable customer, in action in which customer contended that company misled customers by rounding up to next full minute for billing purposes without disclosing rounding-up policy on customer bill; because no reasonable customer could actually believe that each and every telephone call she made terminated at end of full minute, a customer had to be aware that company charged in full-minute increments only. D.C. Code 1981, §§ 28-3901 et seq., 28-3904(e, f); Fed.Rules Civ.Proc.Rule 12(b)(6), 18 U.S.C. Alicke v. MCI Communs. Corp., 111 F.3d 909, 1997 U.S. App. LEXIS 8853 (C.A.D.C. 1997).

Fraud consisting of misstatements or omissions that were not in accord with facts regarding essential terms of loan arrangement produced single injury, that is, foreclosure of debtors' home, and, therefore, justified award of joint and several liability under District of Columbia law against mortgage corporation,

president, loan brokers, settlement attorney, and note buyer. D.C. Code 1981, §§ 28-3901 to 28-3908. Faison v. Nationwide Mortg. Corp., 839 F.2d 680, 1987 U.S. App. LEXIS 14419 (C.A.D.C. 1987), writ of certiorari denied by 488 U.S. 823, 109 S. Ct. 70, 102 L. Ed. 2d 46, 1988 U.S. LEXIS 3384, 57 U.S.L.W. 3230 (1988).

Under District of Columbia law, lender and its principal violated Consumer Protection Procedures Act (CPPA) by engaging in predatory loan scheme whereby they fraudulently took title to borrower's house and re-sold it without her knowledge, where lender and principal failed to tell borrower that she was not required to complete agreement and that she could lose her home and any money put into it by not meeting her obligations under loan, failed to tell borrower that they had sold residence, misrepresented nature and significance of various documents presented to borrower for her signature, failed to inform borrower that lender intended to use power of attorney to convey title to her residence, and failed to provide corrected copy of agreement to borrower. Griffith v. Barnes, 560 F.Supp.2d 29, 2008 U.S. Dist. LEXIS 45058 (2008).

Insurance, cancellation or revocation by insurer.

A law protecting consumers from arbitrary cancellation of their insurance policies was a consumer protection law, subject to remedies under the Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3901 to 28-3908, 35-1561. Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Jurisdiction.

Hotel guest's allegations that he stayed in hotel owner's Russian hotels and that hotels engaged in unfair pricing scheme were insufficient to state a claim under District of Columbia Consumer Protection Procedures Act (CPPA), as required for guest's putative class action against owners, where guest was resident of Michigan, and hotel owner was not a business entity located in District of Columbia. Shaw v. Marriott Intern., Inc., 605 F.3d 1039, 2010 U.S. App. LEXIS 10969 (C.A.D.C. 2010).

Like aggregation of damages, aggregation of attorneys' fees is not appropriate to establish amount in controversy for removal of District of Columbia Consumer Protection Procedures Act (CPPA) suit to federal court under diversity jurisdiction. Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Cereal manufacturer's potential attorney fees and costs were not includable in determining amount in controversy for diversity jurisdiction in non-profit consumer group's removed action alleging misrepresentation under District of Columbia's Consumer Protection Procedures Act (CPPA). Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Cereal manufacturer's potential costs to remove cereal boxes from store shelves was not includable in determining amount in controversy required for diversity jurisdiction, in non-profit consumer group's removed action against manufacturer alleging that it made false representations, in violation of District of Columbia's Consumer Protection Procedures Act (CPPA). Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Condominium purchasers' state law claims against building owners for fraud and violations of state consumer protection act shared common nucleus of operative facts with their claims against owners under Real Estate Settlement Procedures Act (RESPA) for failing to disclose conflict of interest arising from use of affiliated title company's settlement services, and thus federal district court would exercise supplemental jurisdiction over state law claims, where both sets of claims were based on owners' alleged influence over purchasers to use company's settlement services without disclosing their conflict of interest, and state law claims did not involve complex or novel issue of state law. Chelsea Condominium Unit Owners Ass'n v., 468 F.Supp.2d 136 (1815).

Recipients of allegedly unsolicited facsimile advertisements had common and undivided interest in their claims against telecommunications provider under Telephone Consumer Protection Act (TCPA) and District of Columbia Consumer Protection and Procedures Act, and thus their claims could be aggregated for purposes of determining whether they met amount in controversy requirement for diversity jurisdiction, where offending faxes were sent to single fax machine that recipients jointly utilized in their work for single business. Kopff v. World Research Group, LLC, 298 F.Supp.2d 50, 2003 U.S. Dist. LEXIS 23641 (2003), dismissed in part by 2006 U.S. Dist. LEXIS 77018 (D.D.C. Oct. 24, 2006).

Fact that one of two counts in Chapter 13 debtor's adversary proceeding claiming violations of the District of Columbia Usury and Consumer Protection Procedure statutes, D.C. Code 1981, § 28-3901 et seq., might have arisen entirely under local law did not preclude conclusion that adversary proceeding was a core proceeding which bankruptcy court had jurisdiction to hear and determine, since principal defendant was creditor of debtors, filing of

bankruptcy petition was precipitated by imminent foreclosure, and adversary proceeding seeking, inter alia, determination of validity and extent of defendants' lien on debtors' residence concerned adjustment of debtor-creditor relationship. 18 U.S.C. § 157(b)(2, 3); Bankr.Code, 11 U.S.C. § 1301 et seq. In re Blackman, 55 B.R. 437, 1985 Bankr. LEXIS 5241 (1985).

Administrative law judge of the Department of Consumer and Regulatory Affairs had jurisdiction to adjudicate claims brought by insured against his former insurer for alleged violation of 30-day notice provision for cancellation of automobile liability policy and failure to provide insured with a copy of statute under "consumer protection" statute, which was a part of the compulsory no-fault motor vehicle insurance statute, even though the proceeding was instituted pursuant to the Consumer Protection Procedures Act, and the claims made were not listed in the "unlawful trade practices" enumerated in the Act. D.C. Code 1981, §§ 28-3901 to 28-3908, 35-2101 et seq., 35-2109, 35-2109(b, m). Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Plaintiffs' claims concerning a telecommunication company's unfair trade practices, fraud, negligence, breach of contract, and unjust enrichment, all based on District of Columbia statutory and common law, were dismissed for failing to state a claim for which relief can be granted in light of the federal filed tariff doctrine. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

Merchant.

Facilitator of residential real property transaction between vendor and purchaser was not "merchant" within meaning of District of Columbia Consumer Protection Procedures Act (CPPA), since facilitator did not supply, or hold himself out as person who would supply, goods or services to vendor in connection with her ownership or sale of house, did not offer his services to help vendor avoid foreclosure, and did not receive payment for his role in contract of sale. Ali v. Tolbert, 636 F.3d 622, 2011 U.S. App. LEXIS 3867 (C.A.D.C. 2011).

For purposes of consumer's claim alleging that merchant violated District of Columbia's Consumer Protection Procedures Act (CPPA), the merchant need not be the actual seller of the goods or services complained of, but must be connected with the supply side of the consumer transaction. Sloan v. Urban Title Servs., Inc., 689 F.Supp.2d 94, 2010 U.S. Dist. LEXIS 12604 (2010).

Senders of unsolicited faxes were not "merchants," and thus were not subject to District of Columbia Consumer Protection and Procedures Act (DCCPPA), where fax recipients did not purchase, lease, or receive any services or products from senders. Adler v. Vision Lab Telcoms., Inc., 393 F.Supp.2d 35, 2005 U.S. Dist. LEXIS 23691 (2005).

In order to fall within scope of District of Columbia Consumer Protection and Procedures Act (DCCPPA), merchant need not be actual seller of goods or services complained of, but must be connected with supply side of consumer transaction. Adler v. Vision Lab Telcoms., Inc., 393 F.Supp.2d 35, 2005 U.S. Dist. LEXIS 23691 (2005).

Physician was "merchant" under District of Columbia Consumer Procedures and Protection Act (CPPA) because he supplied services that were subject matter of trade practice, namely, services that were subject of medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Hospital and blood bank were not "merchants" as defined under District of Columbia Consumer Protection Procedures Act, and thus, parents of infant who contracted AIDS as result of blood transfusions given at birth could not maintain claim against hospital and blood bank under Act; though blood bank charged hospital for provision of blood and hospital passed those charges on to its patients, nonprofit entities were not converted into "merchants" based upon fact that organizations managed businesses in order to survive and continue to perform functions for which they were founded. D.C. Code 1981, §§ 28-3901 et seq., 28-3901(a)(3, 6). Kozup v. Georgetown University, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

District of Columbia was not a merchant, under the Consumer Protection Procedures Act (CPPA), and thus the District was not subject to liability under the CPPA to vehicle owners who sought damages arising out of towing and storage fees for vehicles towed without timely notice; although the police department was involved in towing of vehicles in the District, it was not a commercial enterprise. Snowder v. District of Columbia, 949 A.2d 590, 2008 D.C. App. LEXIS 261 (2008).

Auctioneer was "merchant" as defined in Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901(a)(3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Nonprofit educational institution was not a "merchant" within context of Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901 et seq. Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory School, Inc., 514 A.2d 1152, 1986 D.C. App. LEXIS 423 (1986).

Plaintiff who supplied consumer credit to defendants could properly be considered a

"merchant" under the terms of this section. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

Section's use of the term "merchant" rather than "respondent" was not a conscious legislative decision to necessarily exclude merchants' assignees from the coverage of § 28-3905(k)(4). Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

Nonprofit educational institutions did not act in the capacity of merchants. Hendel v. World Health Plan Executive Council, 124 WLR 957 (Super. Ct. 1996).

Buyer of power stapler through Internet auction service, who resold stapler to third-party, was a "merchant," rather than a "consumer," under Consumer Protection Act (CPA), and resale converted stapler from a "consumer good" for personal use to inventory for resale, which was not entitled to protections of CPA in action against seller. Nicely v. Jones, 132 WLR 2101 (Super. Ct. 2004).

Pleadings.

Allegations by hotel guests that they stayed in hotel owner's Russian hotels, that hotels engaged in unfair pricing scheme, and that their interest in being free from improper trade practices was violated were insufficient to plead injury-in-fact, as required for standing in guests' putative class action alleging owners violated District of Columbia Consumer Protection Procedures Act (CPPA), where guests' hotel stays were paid for by their employers. Shaw v. Marriott Intern., Inc., 605 F.3d 1039, 2010 U.S. App. LEXIS 10969 (C.A.D.C. 2010).

Allegations by users of medication for chronic pain relief, that manufacturers which promoted their products to physicians and patients but which actually sold only to wholesalers or large pharmacies for re-sale, issued misleading brochures and a videotape directed to consumer-patients sufficiently pled a consumer-merchant relationship between the manufacturers and the users, as required to support claim under the District of Columbia Consumer Protection Procedures Act (CPPA); activities alleged in complaint may have created consumer-merchant relationship sufficient for CPPA coverage. Williams v. Purdue Pharma Co., 297 F.Supp.2d 171, 2003 U.S. Dist. LEXIS 23369 (2003), dismissed by 2004 U.S. App. LEXIS 12718 (D.C. Cir. June 23, 2004).

Purpose.

The purpose of the District of Columbia Consumer Protection Procedures Act (DCCPPA) is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out. Ihebereme v. Capital One, N.A., 730 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 80018 (2010).

One of the purposes of the District of Columbia Consumer Protection Procedures Act is to assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices, while coverage of the District of Columbia Consumer Protection Act is limited to actions pertaining to consumer credit sales or direct installment loans, and thus, coverage of the Consumer Protection Procedures Act is much broader than that of the Consumer Protection Act. Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 2008 D.C. App. LEXIS 296 (2008).

Questions of law.

Whether the Consumer Protection Procedures Act authorizes tenants to seek enhanced relief for the alleged misrepresentations of landlord, management company, and company's principals concerning the condition of leased apartment presented a question of law. Childs v. Purll, 882 A.2d 227, 2005 D.C. App. LEXIS 470 (2005).

Reconsideration of prior order.

Employer and its employees, who were guests at operator's Russian hotels, failed to cite any intervening change of controlling law or new factual information, and had not suffered any manifest injustice, as would warrant reconsideration of court's prior order granting summary judgment for operator on employer and employees' claims that operator engaged in unlawful trade practices in violation of the District of Columbia Consumer Protection Procedures Act (CPPA), on grounds that employer and employees were not consumers under the CPPA; motion for reconsideration merely presented he same arguments and caselaw as they did in opposing summary judgment. Shaw v. Marriott Int'l, Inc., 587 F.Supp.2d 223, 2008 U.S. Dist. LEXIS 95470 (2008).

Remand.

Trial court's failure to discuss or decide certain of vehicle owners' claims against towing companies required that proceedings be remanded for consideration of the conversion, civil conspiracy, unjust enrichment, and Consumer Protection Procedures Act (CPPA) claims, in vehicle owners' action seeking damages arising from the towing and storage of their vehicles without adequate notice. Snowder v. District of Columbia, 949 A.2d 590, 2008 D.C. App. LEXIS 261 (2008).

Trade practice.

Tenants association's Consumer Protection Procedures Act (CPPA) claim against owners of apartment buildings was expressly premised on its unsuccessful claim that transfer of ownership percentage between owners violated the Rental Housing Conversion and Sale Act, and thus association could not prevail on CPPA

claim, even assuming CPPA covered landlord-tenant relations; complaint characterized the alleged violations of the Sale Act as "unlawful trade practices" prohibited by the CPPA, and association's briefs stated that the "violation of the Sale Act also gives rise to remedies under the Consumer Protection Procedures Act," that "violations of the Sale Act's disclosure obligations are unlawful trade practices actionable under the CPPA," and that the "unfair trade practices" were "the failure to make the disclosures and offers of sale required by the Sale Act." Twin Towers Plaza Tenants Ass'n v. Capitol Park Assocs., L.P., 894 A.2d 1113, 2006 D.C. App. LEXIS 143 (2006).

The performance of medical services is a "trade practice" under the Consumer Protection Procedures Act (CPPA). Caulfield v. Stark, 893 A.2d 970, 2006 D.C. App. LEXIS 93 (2006).

Performance of legal services is "trade practice" under Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3901 et seq., 28-3903(c)(2)(C). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Selling compact discs (CDs) was a "trade practice," under the Consumer Protection Procedures Act, and, thus, alleged price fixing of CDs was an improper trade practice under Act, for which consumer had a right to bring an action against CD producers and distributors. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

The definitional language and legislative history of the Consumer Protection Procedure Act indicate that it applies only to "unlawful trade practices" arising from a consumer-merchant relationship. Knox v. McDaniel, 117 WLR 1897 (Super. Ct. 1989).

§ 28-3902. Department of Consumer and Regulatory Affairs as consumer protection agency.

(a) The Department of Consumer and Regulatory Affairs shall be the principal consumer protection agency of the District of Columbia government and shall carry out the purposes of this chapter.

(b) Repealed.

(c) The Director of the Department of Consumer and Regulatory Affairs shall exercise the powers set forth in section 28-3905 through the Office of Compliance, and shall appoint a Chief of the Office of Compliance from among active members of the unified District of Columbia Bar. The Chief of the Office of Compliance may carry out investigative, conciliatory, and other duties assigned by the Director.

(d) Repealed.

(e) The Mayor shall appoint one or more attorneys qualified to serve as administrative law judges or attorney examiners to conduct adjudicatory proceedings. Any administrative law judge or attorney examiner appointed pursuant to this subsection may hear cases pursuant to § 2-1801.03.

(f) Repealed.

(g) Repealed.

(h) Repealed.

(i) Notwithstanding any other provision of District law, enforcement of this chapter by the Department of Consumer and Regulatory Affairs is suspended until October 1, 2002. This subsection shall not prevent the Department of Consumer and Regulatory Affairs from cooperating with, and making appropriate referrals to, another law enforcement agency.

(July 22, 1976, D.C. Law 1-76, § 3, 23 DCR 1185; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 5, 1981, D.C. Law 3-159, § 2(a), 27 DCR 5147; Oct. 5, 1985, D.C. Law 6-42, § 422, 32 DCR 4450; Mar. 8, 1991, D.C. Law 8-234, § 2(c), 38 DCR 296; Mar. 8, 1991, D.C. Law 8-237, § 4, 38 DCR 314;

Feb. 5, 1994, D.C. Law 10-68, § 27(a), (c), 40 DCR 6311; Sept. 26, 1995, D.C. Law 11-52, § 812, 42 DCR 3684; Apr. 9, 1997, D.C. Law 11-255, § 27(v), 44 DCR 1271; Apr. 29, 1998, D.C. Law 12-86, § 1301(a), 45 DCR 1172; Mar. 26, 1999, D.C. Law 12-175, § 1403, 45 DCR 7193; Apr. 20, 1999, D.C. Law 12-264, § 27(b), 46 DCR 2118; Oct. 19, 2000, D.C. Law 13-172, § 1402(c), 47 DCR 6308.)

Cross references. — Prescription drug price posting, enforcement, cease and desist orders, see § 48-804.03.

Prescription drug price posting, informational posters provided to pharmacies, see § 48-801.02.

Prior Codifications. — 1981 Ed., § 28-3902.

1973 Ed., T. 28, Appx., § 3.

Effect of amendments. — D.C. Law 13-172 in subsec. (i) substituted 2002 for 2000 and added a new sentence at the end thereof providing cooperating with and making referrals to another law enforcement agency.

Temporary Amendment of Section. — For temporary (225 day) amendment of section, see § 503 of Health Insurance Portability and Accountability Federal Law Conformity, Motor Vehicle Insurance, Regulatory Reform, and Consumer Law Temporary Amendment Act of 1998 (D.C. Law 12-154, September 18, 1998, law notification 45 DCR 6951).

Emergency legislation. — For temporary amendment of section, see § 811 of the Omnibus Budget Support Congressional Review Emergency Act of 1995 (D.C. Act 11-124, July 27, 1995, 42 DCR 4160).

For temporary amendment of section, see § 503 of the Health Insurance Portability and Accountability Federal Law Conformity Emergency Amendment Act of 1998 (D.C. Act 12-339, May 4, 1998, 45 DCR 2947) and § 503 of the Health Insurance Portability and Accountability Federal Law Conformity, Motor Vehicle Insurance, Regulatory Reform, and Consumer Law Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-429, August 6, 1998, 45 DCR 5890).

For temporary amendment of section, see § 1003 of the Fiscal Year 1999 Budget Support Emergency Act of 1998 (D.C. Act 12-401, July 13, 1998, 45 DCR 4794) and § 1003 of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1998 (D.C. Act 12-564, January 12, 1999, 46 DCR 669).

For temporary (90-day) amendment of section, see § 1003 of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1999 (D.C. Act 13-41, March 31, 1999, 46 DCR 3446).

For temporary (90-day) amendment of section, see § 1402(c) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) amendment of section, see § 1402(c) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-159. — Law 3-159, the "Office of Consumer Protection Administrative Law Judge Act of 1980," was introduced in Council and assigned Bill No. 3-339, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 14, 1980 and October 28, 1980, respectively. Signed by the Mayor on November 10, 1980, it was assigned Act No. 3-286 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-42. — Law 6-42, the "Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985," was introduced in Council and assigned Bill No. 6-187, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 25, 1985, and July 9, 1985, respectively. Signed by the Mayor on July 16, 1985, it was assigned Act No. 6-60 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 8-237. — Law 8-237, the "Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 Technical and Clarifying Amendments Act of 1990," was introduced in Council and assigned Bill No. 8-203, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-320 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-68. — For legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 11-52. — Law 11-52, the "Omnibus Budget Support Act of 1995," was introduced in Council and assigned Bill No. 11-218, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on April 19, 1995, and June 6, 1995, respectively. Signed by the Mayor on July 13, 1995, it was assigned Act No. 11-94 and transmitted to both Houses of Congress for its review. D.C. Law 11-52 became effective on September 26, 1995.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 12-86. — Law 12-86, the "Omnibus Regulatory Reform Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-458, which was referred to the Committee on Public Works and the Environment and the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 19, 1997, it was assigned Act No. 12-256 and transmitted to both Houses of Congress for its review. D.C. Law 12-86 became effective on April 29, 1998.

Legislative history of Law 12-175. — Law 12-175, the "Fiscal Year 1999 Budget Support Act of 1998," was introduced in Council and assigned Bill No. 12-618, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 5, 1998, and June 2, 1998, respectively. Signed by the Mayor on June 23, 1998, it was assigned Act No. 12-399 and transmitted to both Houses of Congress for its review. D.C. Law 12-175 became effective on March 26, 1999.

Legislative history of Law 12-264. — Law 12-264, the "Technical Amendments Act of 1998," was introduced in Council and assigned Bill No. 12-804, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 10, 1998, and December 1, 1998, respectively. Signed by the Mayor on January 7, 1999, it was assigned Act No. 12-626 and transmitted to both Houses of Congress for its review. D.C. Law 12-264 became effective on April 20, 1999.

Legislative history of Law 13-172. — For Law 13-172, see notes following § 28-3901.

CASE NOTES

In general.

Transfer of apartment building by corporation to its subsidiary, followed by transfer of 99% of the stock of the subsidiary to new shareholder, was not an unfair trade practice under the Consumer Protection Procedures Act (CPPA), though it may have triggered tenants' right to purchase the building under the Rental Housing Conversion and Sale Act; the CPPA did not mention the Sales Act though the CPPA explicitly stated that violations of other statutes constituted a violation of the CPPA, Sales Act contained its own detailed provisions for implementation and enforcement, and the CPPA expressly forbade the Department of Consumer and Regulatory Affairs (DCRA) from applying the administrative remedies of the CPPA to landlord-tenant relations. Gomez v. Independence Mgmt. of Delaware, Inc., 967 A.2d 1276, 2009 D.C. App. LEXIS 56 (2009).

§ 28-3903. Powers of the consumer protection agency.

(a) The Department, in its discretion, may:

(1) receive and investigate any consumer complaint and initiate its own investigation of deceptive, unfair, or unlawful trade practices against consumers where the:

(i) amount in controversy totals $250 or more; or

(ii) case, or cases, indicates a pattern or practice of abuse on the part of a business or industry;

(2) issue summonses and subpoenas to compel the production of documents, papers, books, records, and other evidence, hold hearings, compel the attendance of witnesses, administer oaths, and take the testimony of any person under oath, concerning any trade practice;

(3) issue cease and desist orders with respect to trade practices determined to be in violation of District law by the Department;

(4) report to appropriate governmental agencies any information concerning violation of any law;

(5) present the interest of consumers before administrative and regulatory agencies and legislative bodies;

(6) assist, advise, and cooperate with private, local and federal agencies and officials to protect and promote the interest of the District of Columbia consumer public;

(7) assist, develop, and conduct programs of consumer education and information through public hearings, meetings, publications, or other materials prepared for distribution to the consumer public of the District of Columbia;

(8) undertake activities to encourage local business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion, and sale of consumer goods and services and in the extension of credit;

(9) exercise and perform such other functions and duties consistent with the purposes or provisions of this chapter which may be deemed necessary or appropriate to protect and promote the welfare of District of Columbia consumers;

(10) [repealed];

(11) implead and interplead persons who are properly parties to a case before the Department under section 28-3905;

(12) negotiate, agree to, and sign consent decrees;

(13) determine whether a person has executed a trade practice in violation of any law of the District of Columbia, and provide full remedy for such violation by:

(A) damages in contract, and orders for restitution, rescission, reformation, repair, and replacement,

(B) stipulations, conditions, and directives, both temporary and permanent, of all kinds,

(C) enforcement of orders and decrees, collection of civil penalties, and other activities, in the courts,

(D) and other lawful methods;

(14) maintain both confidential and public records, and publicize its own actions, in accordance with section 28-3905; and

(15) [repealed];

(16) appoint private attorneys from the District of Columbia bar, who shall take action in the name of the Department, and shall promulgate regulations implementing this provision, in order to assist in the enforcement of any consumer complaint.

(b) The Department shall:

(1) perform the functions of the Mayor, Department of Consumer Affairs, Board of Consumer Goods Repairs Services or Department of Economic Development in:

(A) the District of Columbia Consumer Credit Protection Act of 1971 (Title 28, Chapters 36, 37, 38, et al.),

(B) the District of Columbia Consumer Retail Credit Regulation (16 DCMR Ch. 1),

(C) the District of Columbia Consumer Goods Repair Regulation (16 DCMR Ch. 6); and

(D) the District of Columbia Consumer LayAway Plan Act (section 28-3818);

(2) render annual reports to the Council and the Mayor as to the number of complaints filed and the nature, status, and disposition thereof, and about the other activities of the Department undertaken during the previous year.

(c) The Department may not:

(1) order damages for personal injury of a tortious nature;

(2) apply the provisions of section 28-3905 to:

(A) landlord-tenant relations;

(B) persons subject to regulation by the Public Service Commission of the District of Columbia;

(C) professional services of clergymen, lawyers, and Christian Science practitioners engaging in their respective professional endeavors;

(D) a television or radio broadcasting station or publisher or printer of a newspaper, magazine, or other form of printed advertising, which broadcasts, publishes, or prints an advertisement which violates District law, except insofar as such station, publisher or printer engages in a trade practice which violates District law in selling or offering for sale its own goods or services, or has knowledge of the advertising being in violation of District law; or

(E) an action of an agency of government.

(July 22, 1976, D.C. Law 1-76, § 4, 23 DCR 1185; June 11, 1977, D.C. Law 2-8, § 4(a), 24 DCR 726; Oct. 4, 1978, D.C. Law 2-115, § 3, 25 DCR 1997; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 8, 1991, D.C. Law 8-234, § 2(d), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(a), (d), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(w), 44 DCR 1271; Apr. 29, 1998, D.C. Law 12-86, § 1301(b), 45 DCR 1172; Oct. 20, 2005, D.C. Law 16-33, § 2032(c), 52 DCR 7503; Mar. 2, 2007, D.C. Law 16-191,§ 100, 53 DCR 6794; Aug. 16, 2008, D.C. Law 17-219, § 2024, 55 DCR 7598.)

Cross references. — Hearing aid dealers and consumers, office of consumer protection, powers and duties, see § 28-4002.

Prescription drug price posting, enforcement, cease and desist orders, see § 48-804.03.

Prescription drug price posting, informational posters provided to pharmacies, see § 48-801.02.

Section references. — This section is referenced in § 28-3905, § 28-3906, and § 28-4002.

Prior Codifications. — 1981 Ed., § 28-3903.

1973 Ed., T. 28, Appx., § 4.

Effect of amendments. — D.C. Law 16-33 repealed subsecs. (a)(10) and (a)(15), which had read:

"(10) publish rules and regulations governing the Department's procedures, developed by the Director in accordance with the District of Columbia Administrative Procedure Act (sections 2-501 et seq.);"

"(15) issue rules that interpret, define, state general policy, or prescribe requirements to prevent unfair, deceptive, and unlawful trade practices as set forth in section 28-3904;"

D.C. Law 16-191, in subsecs. (a)(13)(D) and (14), validated previously made technical corrections.

D.C. Law 17-219, in subsec. (a)(1)(i), substituted "$250" for "$2,500".

Temporary Amendment of Section. — For temporary (225 day) amendment of section, see § 2 of the Cooperative Association Amendment Act of 1998 (D.C. Law 12-117, April 13, 1999, law notification 46 DCR 3839).

For temporary (225 day) amendment of section, see § 2 of the Omnibus Regulatory Reform Temporary Amendment Act of 1999 (D.C. Law 13-3, May 28, 1999, law notification 46 DCR 5303).

Emergency legislation. — For temporary amendment of section, see § 2 of the Omnibus Regulatory Reform Amendment Act of 1998 Emergency Repealer Act of 1998 (D.C. Act 12-297, March 4, 1998, 45 DCR 1773), and see § 2 of the Omnibus Regulatory Reform Congressio-

nal Review Emergency Repealer Act of 1998 (D.C. Act 12-387, July 13, 1998, 45 DCR 4792).

For temporary amendment of section, see § 2 of the Omnibus Regulatory Reform and Alcoholic Beverage Control DC Arena Clarifying Emergency Amendment Act of 1999 (D.C. Act 13-1, January 29, 1999, 46 DCR 2284).

For temporary (90 day) amendment of section, see § 2032(c) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 2-8. — Law 2-8, the "Consumer Goods Repair Board Act of 1977," was introduced in Council and assigned Bill No. 2-49, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on March 8, 1977 and March 22, 1977, respectively. Signed by the Mayor on April 7, 1977, it was assigned Act No. 2-28 and transmitted to both Houses of Congress for its review.

Legislative history of Law 2-115. — Law 2-115, the "District of Columbia Consumer Lay Away Plan Act of 1978," was introduced in Council and assigned Bill No. 2-130, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 13, 1978 and June 27, 1978 respectively. Signed by the Mayor on July 24, 1978, it was assigned Act No. 2-241 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 10-68. — For legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 12-86. — For legislative history of D.C. Law 12-86, see Historical and Statutory Notes following § 28-3902.

Legislative history of Law 16-33. — For Law 16-33, see notes following § 28-3901.

Legislative history of Law 16-191. — Law 16-191, the "Technical Amendments Act of 2006", was introduced in Council and assigned Bill No. 16-760, which was referred to the Committee of the whole. The Bill was adopted on first and second readings on June 20, 2006, and July 11, 2006, respectively. Signed by the Mayor on July 31, 2006, it was assigned Act No. 16-475 and transmitted to both Houses of Congress for its review. D.C. Law 16-191 became effective on March 2, 2007.

Legislative history of Law 17-219. — For Law 17-219, see notes following § 28-3301.

Short title. — Short title: Section 2023 of D.C. Law 17-219 provided that subtitle J of title II of the act may be cited as the "Consumer Protection Act of 2008".

CASE NOTES

ANALYSIS

Administrative law judge authority.

Administrative law judge did not have statutory authority to award victorious merchant attorney fees and punitive damages in administrative action brought by Department of Consumer and Regulatory Affairs alleging violations of Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3903, 28-3903(c)(1), (c)(2)(E), 28-3905, 28-3905(g)(5), (i)(3)(B), (l). Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1992 D.C. App. LEXIS 1 (1992).

Administrative law judge did not have inherent equitable authority to award victorious merchant attorney's fees and punitive damages in administrative action brought by Department of Consumer and Regulatory Affairs alleging violations of Consumer Protection Procedures Act; imposition of attorney fees or punitive damages as remedy and sanction after decision on merits without statutory or regulatory authorization and in spite of statutory language barring unspecified relief would have far exceeded scope of ALJ's limited power to regulate procedures and events within hearing process itself. D.C. Code 1981, §§ 28-3903, 28-3905(l). Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1992 D.C. App. LEXIS 1 (1992).

Authority of consumer protection office.

Office of Consumer Protection, as plaintiff in action to enforce settlement contract, could not request that Superior Court adjudicate the merits of the underlying contract dispute between contractor and consumer, where settle-

ment agreement contained denial of illegality on contractor's part and reservation of right to hearing before the agency on underlying claim. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Office of Consumer Protection was not entitled to rescission of underlying porch extension contract between contractor and consumer in agency's action for enforcement of consent decree, particularly where there were issues of material fact as to contract performance, even though contractor admitted in his answer that he did not have license to perform work and that he received advance payments from consumer, in violation of licensing law [D.C. Code §§ 47-2842, 47-2844]. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Choice of law.

Fraud claim challenging validity of debt would be determined under Virginia law, though borrower was resident of District of Columbia, where all allegedly fraudulent conduct occurred in Virginia, loan papers where signed in Virginia, and borrower's performance under contract, in form of periodic loan payments, was to occur in Virginia. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

Construction and application.

District of Columbia consumer protection statute was not applicable in action by District resident against Virginia corporations for allegedly fraudulent and negligent lending practices; statute is not intended to apply to every commercial transaction involving District of Columbia resident, wherever and with whomever that transaction occurs. D.C. Code 1981, §§ 28-3901 to 28-3908. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

Transfer of apartment building by corporation to its subsidiary, followed by transfer of 99% of the stock of the subsidiary to new shareholder, was not an unfair trade practice under the Consumer Protection Procedures Act (CPPA), though it may have triggered tenants' right to purchase the building under the Rental Housing Conversion and Sale Act; the CPPA did not mention the Sales Act though the CPPA explicitly stated that violations of other statutes constituted a violation of the CPPA, Sales Act contained its own detailed provisions for implementation and enforcement, and the CPPA expressly forbade the Department of Consumer and Regulatory Affairs (DCRA) from applying the administrative remedies of the CPPA to landlord-tenant relations. Gomez v. Independence Mgmt. of Delaware, Inc., 967 A.2d 1276, 2009 D.C. App. LEXIS 56 (2009).

Administrative remedies of Consumer Protection Procedures Act (CPPA) do not apply to landlord-tenant relations. Parker v. Martin, 905 A.2d 756, 2006 D.C. App. LEXIS 488 (2006).

Consumer Protection Procedures Act applies to nonlawyers who purport to practice law. D.C. Code 1981, §§ 28-3901 et seq., 28-3903(c)(2)(C). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

A law protecting consumers from arbitrary cancellation of their insurance policies was a consumer protection law, subject to remedies under the Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3901 to 28-3908, 35-1561. Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Landlord-tenant claims.

Plaintiffs' claim that their landlord's practices in leasing parking spots at their apartment complex violated the District of Columbia Consumer Protection Procedures Acts was not a landlord-tenant claim barred by D.C. Code § 28-3903(c)(2)(A); although plaintiffs were apartment residents, all customers of the landlord's parking facility could bring a similar claim. Chaney v. Capitol Park Assocs., — WLR —, 2013 D.C. Super. LEXIS 2 (Mar. 11, 2013).

Because the District of Columbia's Consumer Protection Procedures Act specifically excluded the professional services of lawyers from its purview, the trial court properly dismissed a client's count brought against a law firm. Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP, 68 A.3d 697, 2013 D.C. App. LEXIS 154 (2013).

Procedure.

Once complaint is filed with Office of Consumer Protection, merchant must be given chance to explain the occurrence complained of by consumer and thorough investigation must be made. D.C. Code 1981, § 28-3905(b). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Superior Court is forum of first instance, in actions involving settlement agreements between Office of Consumer Protection, merchant and consumer, only for enforcement and collection of the agency's orders, and the agency's Section of Hearings is the proper initial forum for all other determinations. D.C. Code 1981, § 28-3905(g), (h)(1), (i)(3)(B). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Purpose of law.

The District of Columbia Consumer Protection Procedures Act, at least insofar as it is

enforceable at the administrative level, was designed to police trade practices arising only out of consumer-merchant relationships. D.C. Code 1978 Supp., Tit. 28 App. §§ 1-10. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

The Council, in enacting District of Columbia Consumer Protection Procedures Act, did not seek to impose liability as guarantor upon any private individual or his employer who recommends goods or services of particular merchant to another party. D.C. Code 1978 Supp., Tit. 28 App. §§ 1-10. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

§ 28-3904. Unlawful trade practices.

It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

(a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;

(b) represent that the person has a sponsorship, approval, status, affiliation, certification, or connection that the person does not have;

(c) represent that goods are original or new if in fact they are deteriorated, altered, reconditioned, reclaimed, or second hand, or have been used;

(d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;

(e) misrepresent as to a material fact which has a tendency to mislead;

(e-1) [r]epresent that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(f) fail to state a material fact if such failure tends to mislead;

(f-1) [u]se innuendo or ambiguity as to a material fact, which has a tendency to mislead;

(g) disparage the goods, services, or business of another by false or misleading representations of material facts;

(h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered;

(i) advertise or offer goods or services without supplying reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition which has no tendency to mislead;

(j) make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time;

(k) falsely state that services, replacements, or repairs are needed;

(l) falsely state the reasons for offering or supplying goods or services at sale or discount prices;

(m) harass, or threaten a consumer with any act other than legal process, either by telephone, cards, or letters;

(n) cease work on, or return after ceasing work on, an electrical or mechanical apparatus, appliance, chattel or other goods, or merchandise, in other than the condition contracted for, or to impose a separate charge to reassemble or restore such an object to such a condition without notification of such charge prior to beginning work on or receiving such object;

(o) replace parts or components in an electrical or mechanical apparatus,

appliance, chattel or other goods, or merchandise when such parts or components are not defective, unless requested by the consumer;

(p) falsely state or represent that repairs, alterations, modifications, or servicing have been made and receiving remuneration therefor when they have not been made;

(q) fail to supply to a consumer a copy of a sales or service contract, lease, promissory note, trust agreement, or other evidence of indebtedness which the consumer may execute;

(r) make or enforce unconscionable terms or provisions of sales or leases; in applying this subsection, consideration shall be given to the following, and other factors:

(1) knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer;

(2) knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(3) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in transactions by like buyers or lessees;

(4) that the person contracted for or received separate charges for insurance with respect to credit sales with the effect of making the sales, considered as a whole, unconscionable; and

(5) that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors;

(s) pass off goods or services as those of another;

(t) use deceptive representations or designations of geographic origin in connection with goods or services;

(u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not;

(v) misrepresent the authority of a salesman, representative or agent to negotiate the final terms of a transaction;

(w) offer for sale or distribute any consumer product which is not in conformity with an applicable consumer product safety standard or has been ruled a banned hazardous product under the federal Consumer Product Safety Act (15 U.S.C. § 2051-83), without holding a certificate issued in accordance with section 14(a) of that Act to the effect that such consumer product conforms to all applicable consumer product safety rules (unless the certificate holder knows that such consumer product does not conform), or without relying in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to a consumer product safety rule issued under that Act;

(x) sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law;

(y) violate any provision of the District of Columbia Consumer LayAway Plan Act (section 28-3818);

(z) violate any provision of the Rental Housing Locator Consumer Protection Act of 1979 (section 28-3819) or, if a rental housing locator, to refuse or fail to honor any obligation under a rental housing locator contract;

(z-1) violate any provision of Chapter 46 of this title;

(aa) violate any provision of sections 32-404, 32-405, 32-406, and 32-407;

(bb) refuse to provide the repairs, refunds, or replacement motor vehicles or fails to provide the disclosures of defects or damages required by the Automobile Consumer Protection Act of 1984;

(cc) violate any provision of the Real Property Credit Line Deed of Trust Act of 1987;

(dd) violate any provision of title 16 of the District of Columbia Municipal Regulations;

(ee) violate any provision of the Public Insurance Adjuster Act of 2002 [Chapter 16A of Title 31];

(ff) violate any provision of Chapter 33 of this title;

(gg) violate any provision of the Home Equity Protection Act of 2007 [Chapter 24A of Title 42]; or

(hh) fail to make a disclosure as required by § 26-1113(a-1).

(July 22, 1976, D.C. Law 1-76, § 5, 23 DCR 1185; Oct. 4, 1978, D.C. Law 2-115, § 3, 25 DCR 1997; June 21, 1980, D.C. Law 3-71, § 3(a), 27 DCR 1891; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 13, 1985, D.C. Law 5-136, § 16, 31 DCR 5727; Mar. 14, 1985, D.C. Law 5-162, § 9(a), 32 DCR 160; Jan. 28, 1988, D.C. Law 7-67, § 5, 34 DCR 7441; Mar. 8, 1991, D.C. Law 8-234, § 2(e), 38 DCR 296; Mar. 8, 1991, D.C. Law 8-236, § 9, 38 DCR 306; Feb. 5, 1994, D.C. Law 10-68, § 27(e), 40 DCR 6311; July 25, 1995, D.C. Law 11-30, § 7(h), 42 DCR 1547; Apr. 9, 1997, D.C. Law 11-255, § 27(x), 44 DCR 1271; Mar. 27, 2003, D.C. Law 14-256, § 11(b), 50 DCR 238; Mar. 13, 2004, D.C. Law 15-105, § 63, 51 DCR 881; Nov. 24, 2007, D.C. Law 17-42, § 3(b), 54 DCR 9988; Jan. 29, 2008, D.C. Law 17-87, § 7, 54 DCR 11913; Jan. 29, 2008, D.C. Law 17-90, § 3, 54 DCR 11925; Mar. 25, 2009, D.C. Law 17-353, § 222, 56 DCR 1117; Apr. 23, 2013, D.C. Law 19-282, § 2(b)(2), 60 DCR 2132.)

Cross references. — Automobile Consumer Protection Act, limitations of actions, see § 50-507.

Automobile Consumer Protection Act, rules and regulations for implementation, see § 50-508.

Education licensure commission, criminal sanctions, fines and penalties, see § 38-1312.

Employment Services Licensing and Regulation Act, penalties for violations, see § 32-414.

Hearing aid dealers and consumers, grounds for revocation and suspension, see § 28-4006.

Section references. — This section is referenced in § 16-4431, § 28-3905, § 28-3909, § 28-4006, and § 38-1312.

Prior Codifications. — 1981 Ed., § 28-3904.

1973 Ed., T. 28, Appx., § 5.

Effect of amendments. — D.C. Law 14-256 added subsec. (ee).

D.C. Law 15-105, in subsec. (ee), validated a previously made technical correction.

D.C. Law 17-42, in subsec. (cc), deleted "or" from the end; in subsec. (dd), substituted a semicolon for a period; in subsec. (ee), substituted "; or" for a period; and added subsec. (ff).

D.C. Law 17-87, in subsec. (ee), deleted "or" from the end; in subsec. (ff), substituted "; or" for a period; and added subsec. (gg).

D.C. Law 17-90, in subsec. (ff), deleted "or" from the end; in subsec. (gg), substituted "; or" for a period; and added subsec. (hh).

D.C. Law 17-353 validated previously made technical corrections in pars. (ff), (gg), and (hh).

The 2013 amendment by D.C. Law 19-282 added (e-1) and (f-1).

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 2-115. — For legislative history of D.C. Law 2-115, see Historical and Statutory Notes following § 28-3903.

Legislative history of Law 3-71. — Law 3-71, the "Rental Housing Locator Consumer Protection Act of 1979," was introduced in Council and assigned Bill No. 3-124, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on March 18, 1980 and April 1, 1980, respectively. Signed by the Mayor on May 1, 1980, it was assigned Act No. 3-179 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 5-136. — Law 5-136, the "Employment Services Licensing and Regulation Act of 1984," was introduced in Council and assigned Bill No. 5-280, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on September 12, 1984, and October 9, 1984, respectively. Signed by the Mayor on October 25, 1984, it was assigned Act No. 5-194 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-162. — Law 5-162, the "Automobile Consumer Protection Act of 1984," was introduced in Council and assigned Bill No. 5-288, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 20, 1984, and December 4, 1984, respectively. Signed by the Mayor on December 7, 1984, it was assigned Act No. 5-227 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-67. — Law 7-67, the "Real Property Credit Line Deed of Trust Act of 1987," was introduced in Council and assigned Bill No. 7-163, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 13, 1987, and October 27, 1987, respectively. Signed by the Mayor on November 5, 1987, it was assigned Act No. 7-100 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-51. — Law 8-51, the "Natural Disaster Consumer Protection Temporary Act of 1989," was introduced in Council and assigned Bill No. 8-330. The Bill was adopted on first and second readings on June 27, 1989 and July 11, 1989, respectively. Signed by the Mayor on August 1, 1989, it was assigned Act No. 8-85 and transmitted to both Houses of Congress for its review. D.C. Law 8-51 became effective on October 19, 1989.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 8-236. — Law 8-236, the "District of Columbia Consumer Credit Service Organization Amendment Act of 1990," was introduced in Council and assigned Bill No. 8-70, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-319 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-68. — For legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 11-30. — Law 11-30, the "Technical Amendments Act of 1995," was introduced in Council and assigned Bill No. 11-58, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on February 7, 1995, and March 7, 1995, respectively. Signed by the Mayor on March 22, 1995, it was assigned Act No. 11-32 and transmitted to both Houses of Congress for its review. D.C. Law 11-30 became effective on July 25, 1995.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 14-256. — For Law 14-256, see notes following § 28-3811.

Legislative history of Law 15-105. — Law 15-105, the "Technical Amendments Act of 2003", was introduced in Council and assigned Bill No. 15-437, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 2003, and December 2, 2003, respectively. Signed by the Mayor on January 6, 2004, it was assigned Act No. 15-291 and transmitted to both Houses of Congress for its review. D.C. Law 15-105 became effective on March 13, 2004.

Legislative history of Law 17-42. — For Law 17-42, see notes following § 28-3301.

Legislative history of Law 17-87. — Law 17-87, the "Home Equity Protection Act of 2007", was introduced in Council and assigned Bill No. 17-101 which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on October 2, 2007, and November 6, 2007, respectively. Signed by the Mayor on November 27, 2007, it was assigned Act No.

17-205 and transmitted to both Houses of Congress for its review. D.C. Law 17-87 became effective on January 29, 2008.

Legislative history of Law 17-90. — Law 17-90, the "Mortgage Disclosure Amendment Act of 2007", was introduced in Council and assigned Bill No. 17-167 which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on October 2, 2007, and November 6, 2007, respectively. Signed by the Mayor on November 27, 2007, it was assigned Act No. 17-208 and transmitted to both Houses of Congress for its review. D.C. Law 17-90 became effective on January 29, 2008.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 28-3151.

Legislative history of Law 19-282. — See note to § 28-3901.

Effective date. — Section 4 of D.C. Law 17-42 provided: "This act shall take effect following the certification by the Chief Financial Officer, through a revised quarterly revenue estimate for fiscal year 2008, that local funds exceed the annual revenue estimates incorporated in the fiscal year 2008 budget and financial plan in an amount sufficient to account for its fiscal effect. The Chief Financial Officer shall set aside revenue to account for the cost of fully implementing this act."

References in text. — The Public Insurance Adjuster Licensure Act of 2002, referred to in subsec. (ee), is D.C. Law 14-256.

The "Automobile Consumer Protection Act of 1984", referred to in paragraph (bb) of this section, is D.C. Law 5-162, codified as Chapter 5 of Title 50.

The "Real Property Credit Line Deed of Trust Act of 1987," referred to in subsection (cc) of this section, is codified as Chapter 23 of Title 42.

Editor's notes. — Application of D.C. Law 14-256 including the amendments to this section: See section 12 of D.C. Law 14-256, codified as § 31-1631.12.

CASE NOTES

ANALYSIS

Actions and proceedings, generally.

Jury's verdict that home refinancing lender violated District of Columbia Consumer Protection Procedures Act (CPPA), either by making loan that it knew borrower would not be able to repay or by taking advantage of borrower's inability to protect his interests, was supported by evidence that borrower was 61 years old and retired due to disability at time 30-year loan was made to him, monthly loan payment was $686 though lender knew that borrower's income was no more than $1200 per month, borrower had only sixth-grade education from segregated school, and loan officer did not explain loan documents to borrower. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Jury's finding that home refinancing loan was unconscionable under District of Columbia Consumer Protection Procedures Act (CPPA), either because lender knew that borrower would be unable to repay loan or because lender took advantage of borrower's inability to protect his interests, had no binding effect on trial court's subsequent fact-finding, in determining that lender was not liable for common law unconscionability, since jury was not asked to specify which provision of CPPA it applied in reaching its verdict. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Residential customer failed to state claims against long-distance telephone company for common-law fraud under federal or District of Columbia law, negligent misrepresentation, or

deceptive acts or practices or false advertising in violation of District of Columbia Consumer Protection Act, as company's challenged billing practices could not mislead reasonable customer, in action in which customer contended that company misled customers by rounding up to next full minute for billing purposes without disclosing rounding-up policy on customer bill; because no reasonable customer could actually believe that each and every telephone call she made terminated at end of full minute, a customer had to be aware that company charged in full-minute increments only. D.C. Code 1981, §§ 28-3901 et seq., 28-3904(e, f); Fed.Rules Civ.Proc.Rule 12(b)(6), 18 U.S.C. Alicke v. MCI Communs. Corp., 111 F.3d 909, 1997 U.S. App. LEXIS 8853 (C.A.D.C. 1997).

To state claim under District of Columbia Consumer Protection Act based upon unfair trade practice, plaintiff must allege that defendant made material misrepresentation or omission that has tendency to mislead. D.C. Code 1981,§ 28-3904(e, f). Alicke v. MCI Communs. Corp., 111 F.3d 909, 1997 U.S. App. LEXIS 8853 (C.A.D.C. 1997).

Whether mortgagee's acts over period of mortgage loan constituted acts that altered or effectuated or provided information about sale of mortgage in violation of District of Columbia Consumer Protection Procedures Act (DCCPPA) could not be resolved at pleading stage on motion to dismiss for failure to state claim upon which relief could be granted. Ihebereme v. Capital One, N.A., 730 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 80018 (2010).

Worker's guilty plea to engaging in a home improvement business and work without being licensed and to accepting payment in advance of completion of a home improvement contract without a license established a violation of District of Columbia Consumer Protection Procedures Act (DCCPPA) for worker's and worker's employer's contract to install copper roof for homeowner; plea established statutory elements of DCCPPA violation including that value of roof was more than $300, that homeowner paid in advance of full completion of all work, and that worker and worker's employer were not licensed as home improvement contractors. Hume v. Watson, 680 F.Supp.2d 48, 2010 U.S. Dist. LEXIS 2871 (2010).

Plaintiff failed to allege actual or threatened injury-in-fact from consuming food containing trans fat purchased from national restaurant chain, as required to have standing to bring claim against restaurant chain pursuant to District of Columbia Consumer Protection Procedures Act (DCCPPA) for allegedly failing to disclose presence of trans fat in its food products. Hoyte v. Yum! Brands, Inc., 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

Under District of Columbia choice-of-law principles, District of Columbia Consumer Protection Procedures Act (CPPA), rather than Russian law, was applicable to a dispute between hotel guests from various local jurisdictions in the United States, including the District of Columbia, and a United States corporate hotel owner headquartered in the District of Columbia, regarding omissions and misrepresentations made to hotel guests regarding its pricing practices at its Moscow hotels; District of Columbia, with its interest in protecting consumers and promoting fair business practices by corporate entities headquartered within the city limits, had the most significant relationship to the case. Shaw v. Marriott Int'l, Inc., 474 F.Supp.2d 141, 2007 U.S. Dist. LEXIS 11761 (2007).

Automobile buyers' allegations that automobile companies and national dealer associations conspired among themselves and with unnamed dealers to prevent less-expensive Canadian vehicles from entering the American market failed to state a claim against dealer associations under District of Columbia Consumer Protection Procedures Act (DCCPPA) since complaint did not allege that dealer associations had any merchant-consumer relationship with buyers; however, complaint stated DCCPPA claim against automobile companies since DCCPPA could be used as a remedy for improper trade practices that violated other laws. In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F.Supp.2d 160, 2004 U.S. Dist. LEXIS 26328 (D.Me. 2004).

An action brought pursuant to the District of Columbia Consumer Protection Procedures Act (CPPA) required a showing that the consumer suffered actual damages because of the misrepresentation or omission claimed to violate the act, notwithstanding provision of act stating that the Act is violated by any illegal trade practice "whether or not any consumer is in fact misled, deceived or damaged thereby." Williams v. Purdue Pharma Co., 297 F.Supp.2d 171, 2003 U.S. Dist. LEXIS 23369 (2003), dismissed by 2004 U.S. App. LEXIS 12718 (D.C. Cir. June 23, 2004).

Evidence that borrower was coerced or pressured to consummate home improvement loan that was secured by her residence was sufficient to create jury question as to whether inclusion of balloon payment rendered loan unconscionable so as to constitute violation of District of Columbia Consumer Protection Procedures Act (DCCPPA). D.C. Code 1981, § 28-3904. Wiggins v. Avco Fin. Servs., 62 F.Supp.2d 90, 1999 U.S. Dist. LEXIS 12120 (1999).

Consumers bear the burden of proving by clear and convincing evidence claims of intentional misrepresentation under the District of Columbia Consumer Protection Procedures Act (DCCPPA). D.C. Code 1981, § 28-3904. Wiggins v. Avco Fin. Servs., 62 F.Supp.2d 90, 1999 U.S. Dist. LEXIS 12120 (1999).

Trial court was required to allow discovery and hold evidentiary hearing before determining alleged unconscionability of arbitration agreement between automobile purchaser, dealership, and lender, in purchaser's action alleging claim under Consumer Protection Procedures Act (CPPA); trial court was required to determine facts including whether purchaser had options to purchase automobile at a different dealership, significance of the imbalance of power in arbitrator selection given dealer's status as a "repeat player" in the arbitration system, the fact that the clause reserved some litigation avenues to dealership while entirely barring purchaser from seeking judicial action, as well as the costs imposed on purchaser by the arbitration procedure and their impact on her ability to seek redress. Keeton v. Wells Fargo Corp., 987 A.2d 1118, 2010 D.C. App. LEXIS 6 (2010).

Trial court's failure to discuss or decide certain of vehicle owners' claims against towing companies required that proceedings be remanded for consideration of the conversion, civil conspiracy, unjust enrichment, and Consumer Protection Procedures Act (CPPA) claims, in vehicle owners' action seeking damages arising from the towing and storage of their vehicles without adequate notice. Snowder v. District of Columbia, 949 A.2d 590, 2008 D.C. App. LEXIS 261 (2008).

Borrowers were entitled to amend their complaint to allege that federal law did not preempt claims that Student Loan Marketing Association (Sallie Mae) violated District of Columbia's Consumer Protection Procedures Act (DCCPPA) by making affirmative misrepresentations about accrual and collection of late fees. Washkoviak v. Sallie Mae, 849 A.2d 37, 2004 D.C. App. LEXIS 201 (2004), remanded by 900 A.2d 168, 2006 D.C. App. LEXIS 300 (D.C. 2006).

Borrowers alleged sufficient injury to maintain misrepresentation claim against lender under Consumer Protection Procedures Act and under Interest Rate Ceiling Amendment Act, based on borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note, thereby causing economic and emotional damages. D.C. Code 1981, §§ 28-3904, 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Counterclaim by purchasers of cooling and heating system, which asserted that heating contractor violated Consumer Protection Act, was sufficient to put contractor on notice that it was subject to all penalties provided for by Act, including punitive damages. D.C. Code 1981, § 28-3905(k)(1)(B); Civil Rule 8. Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Trial court's finding that heating contractor was guilty of continuing failure to admit to its mistake in design and installation of heating and cooling system and of unwillingness to rectify situation was sufficient to support award of punitive damages under the Consumer Protection Act. D.C. Code 1981,§ 28-3905(k)(1)(C). Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Purchasers of defective heating and cooling system were not entitled to award of attorneys' fees under the Consumer Protection Act incurred in appeal from award in favor of purchasers in action alleging breach of contract and violation of Act; trial court erred in computing amount of damages. D.C. Code 1981, § 28-3905(k)(1)(B). Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Administrative procedure.

— Evidence, administrative procedure.

Evidence supported finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provisions governing unlawful trade practices, despite fact that client understood that nonlawyer was not licensed lawyer; nonlawyer misrepresented himself as advocate in labor area with skills equivalent to those of lawyer, calling himself "administrative advocate." D.C. Code 1981, § 28-3904(a, b, d). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Substantial evidence did not support finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act unlawful trade practices provision prohibiting misrepresenting as to material fact which has tendency to mislead when nonlawyer accepted partial payment from client for services he did not render; even if nonlawyer implicitly misrepresented that he performed services for the payment, there was no discernible tendency to mislead, as client dismissed nonlawyer before he had opportunity to perform any service. D.C. Code 1981, § 28-3904(e). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

No substantial evidence supported finding of Department of Consumer and Regulatory Af-

fairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provision, prohibiting representing that subject of transaction has been supplied in accordance with previous representation when it has not, by refusing to refund client's fee payment after client dismissed nonlawyer despite lawyer's agreement to refund; nonlawyer did not represent that he was entitled to payment as compensation for services or as damages for breach of contract. D.C. Code 1981, § 28-3904(u). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Substantial evidence did not support finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provision, prohibiting failing to supply to consumer copy of service contract, by failing to provide written contract to client who had retained nonlawyer respecting labor-related dispute; nonlawyer had promised to give client contract after filing fees had been paid and initial paper work had been completed, but client dismissed nonlawyer before he could complete initial paper work. D.C. Code 1981, § 28-3904(q). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

— In general.

By failing to present them to Department of Consumer and Regulatory Affairs (DCRA), individual who was charged with Consumer Protection Procedures Act violations for rendering legal advice as nonlawyer failed to preserve for appeal constitutional and statutory issues. D.C. Code 1981, § 28-3904. Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Department of Consumer and Regulatory Affairs (DCRA) could use Court of Appeals' analysis in prior unauthorized practice of law action respecting nonlawyer as basis for defining practice of law for purposes of evaluating whether nonlawyer engaged in deceptive trade practices under Consumer Protection Procedures Act when he misrepresented himself as advocate in labor area with skills equivalent to those of lawyer; DCRA made its own, independent findings about nonlawyer's conduct based on hearing testimony and documentary evidence. D.C. Code 1981, § 28-3904(a, b, d). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Once complaint is filed with Office of Consumer Protection, merchant must be given chance to explain the occurrence complained of by consumer and thorough investigation must be made. D.C. Code 1981, § 28-3905(b). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Superior Court is forum of first instance, in actions involving settlement agreements between Office of Consumer Protection, merchant and consumer, only for enforcement and collection of the agency's orders, and the agency's Section of Hearings is the proper initial forum for all other determinations. D.C. Code 1981, § 28-3905(g), (h)(1), (i)(3)(B). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Office of Consumer Protection, as plaintiff in action to enforce settlement contract, could not request that Superior Court adjudicate the merits of the underlying contract dispute between contractor and consumer, where settlement agreement contained denial of illegality on contractor's part and reservation of right to hearing before the agency on underlying claim. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Advertisements and labeling.

Advertisement on soft drink bottle indicating that consumers could save 25 cents on next purchase with coupon on back of label was truthful and did not violate District of Columbia Consumer Protection Act, even if coupon specified only limited number of products. D.C. Code 1981, § 28-3904(e, f, h). Martin v. Coca-Cola Co., 785 F. Supp. 3, 1992 U.S. Dist. LEXIS 1785 (1992).

Media exclusion from liability for content of advertising under District of Columbia Consumer Protection Procedures Act, which has effect of limiting liability for misleading advertising to merchants whose goods and services are advertised, was not rendered superfluous by ruling that disinterested third parties were outside coverage of such Act. D.C. Code 1978 Supp., Tit. 28 App.§§ 4(c)(2)(D), 5(h, i). Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Class action.

On appeal from dismissal of borrowers' purported class action claims against lender for alleged violations of District of Columbia Consumer Protection Procedures Act (DCCPPA), Court of Appeals would not consider any hypothetical claims of unnamed class members, as there was no certified class at time trial court

granted lender's motion to dismiss; trial court had granted borrowers' motion for extension of time to file for class certification until after trial court ruled on lender's motion to dismiss, and borrowers failed to challenge trial court's conduct in proceeding in such manner. Chamberlain v. Am. Honda Fin. Corp., 931 A.2d 1018, 2007 D.C. App. LEXIS 475 (2007).

Assertion by medical records company, on appeal of order denying class certification in action alleging company charged unconscionable prices for records in violation of the Consumer Protection Procedures Act (CPPA), that its pricing scheme was not uniform through the proposed class period, would not be addressed by Court of Appeals though such could have a bearing on whether class action certification requirements were satisfied, when company did not bring such information to the attention of the trial court. Julian Ford v. ChartOne, Inc., 908 A.2d 72, 2006 D.C. App. LEXIS 533 (2006).

Construction and application.

District of Columbia law applied in diversity action in which mortgagor residing in District asserted consumer protection claims against mortgagee based on loan transaction secured by property located in District, inasmuch as District of Columbia's interests in having its law applied was at least as strong as interests of Maryland, as state in which mortgagee's offices were located and loan payments were made, compelling application of District of Columbia law under its choice-of-law principles. D.C. Code 1981, § 28-3904(r). Williams v. First Gov't Mortg. & Investors Corp., 176 F.3d 497, 1999 U.S. App. LEXIS 5305 (C.A.D.C. 1999).

District of Columbia Consumer Protection Procedures Act (CPPA) is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers. Shaw v. Marriott Int'l, Inc., 474 F.Supp.2d 141, 2007 U.S. Dist. LEXIS 11761 (2007).

Contractor's recommendation of repairman who could perform home renovation work involved factual statement that was actionable as potential misrepresentation of fact under District of Columbia Consumer Protection Procedures Act (CPPA), rather than mere opinion, where contractor's recommendation was allegedly coupled with agreement to monitor repairman's work, and to obtain supplies and vendors through contractor's firm. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Enumeration of unlawful trade practices in District of Columbia Consumer Protection Procedures Act (CPPA) is not exclusive. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

District of Columbia Consumer Protection Procedures Act (CPPA) only supplies consumers with cause of action against merchants selling them goods or services, and therefore there must be consumer-merchant relationship in consumer transaction involving sale of goods or services for act to apply. Athridge v. Aetna Cas. & Sur. Co., 163 F.Supp.2d 38, 2001 U.S. Dist. LEXIS 21490 (2001), affirmed in part and reversed in part by, remanded by 351 F.3d 1166, 359 U.S. App. D.C. 22, 2003 U.S. App. LEXIS 24727 (2003).

District of Columbia Consumer Procedures and Protection Act (CPPA) applies to medical profession if plaintiff satisfies threshold requirements in CPPA, demonstrates nexus between claim at issue and entrepreneurial aspect of medical practice, and meets "clear and convincing" burden of proof standard. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Physician's alleged statement to patient regarding her eye problem that "[w]hat you have, I can fix" was not intentional misrepresentation made with entrepreneurial motives, as required for claim under District of Columbia Consumer Protection Procedures Act (CPPA), rather, such statement was conduct within "actual practice of medicine," which was not subject to CPPA. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

District of Columbia Consumer Protection Procedures Act (DCCPPA) applied to loan transaction secured by borrower's residence in District of Columbia, even though transaction was consummated in Maryland. D.C. Code 1981, § 28-3904. Wiggins v. Avco Fin. Servs., 62 F.Supp.2d 90, 1999 U.S. Dist. LEXIS 12120 (1999).

District of Columbia Consumer Protection Procedures Act (CPPA) does not create cause of action for aider-and-abettor liability. D.C. Code 1981, § 28-3904. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

District of Columbia consumer protection statute was not applicable in action by District resident against Virginia corporations for allegedly fraudulent and negligent lending practices; statute is not intended to apply to every commercial transaction involving District of Columbia resident, wherever and with whomever that transaction occurs. D.C. Code 1981, §§ 28-3901 to 28-3908. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

District of Columbia Consumer Protection Procedures Act [D.C. Code 1981, § 28-3904] applied to transaction involving use of real estate as collateral for personal debt consolidation loan. Lawson v. Nationwide Mortg. Corp.,

628 F. Supp. 804, 1986 U.S. Dist. LEXIS 29205 (1986).

The Consumer Protection Procedures Act (CPPA) is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers. Snowder v. District of Columbia, 949 A.2d 590, 2008 D.C. App. LEXIS 261 (2008).

While the Consumer Protection Procedures Act (CPPA) enumerates a number of specific unlawful trade practices, the enumeration is not exclusive. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

The consumer Protection Procedures Act's list of unlawful trade practices is not exclusive and includes trade practices made illegal by later-enacted statutes. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

The Consumer Protection Procedures Act applies to motor vehicle sales, and unlawful trade practices regarding such sales are prohibited by this section. Franklin Inv. Co. v. King, 114 WLR 1993 (Super. Ct. 1986).

Construction with other laws.

Conflict existed between Maryland and District of Columbia consumer protection statutes, as required for court to determine, under District of Columbia choice of law rules, which jurisdiction had most significant relationship to action brought by consumer, who rented moving truck, against moving company alleging that company falsely advertised and misrepresented quality of vehicles; consumer could bring representative action for injunctive relief under District of Columbia Consumer Protection Procedures Act (CPPA), but could not under Maryland Consumer Protection statute. Margolis v. U-Haul Int'l, Inc., 818 F.Supp.2d 91, 2011 U.S. Dist. LEXIS 117443 (2011), dismissed by 2011 U.S. App. LEXIS 26107 (D.C. Cir. Dec. 23, 2011).

Under District of Columbia choice of law rules, governmental interests weighed in favor of application of Maryland law, rather than District of Columbia law, to action brought by consumer, who rented moving truck, against moving company and related entity alleging that company falsely advertised and misrepresented quality of vehicles; although District of Columbia Consumer Protection Procedures Act (CPPA) was not limited in its application to consumers or companies who were residents of District and had been applied to non-District merchants, company was incorporated in Nevada with its principal place of business in Arizona, its related entity was incorporated in Maryland with principal place of business in Maryland, consumer was resident of Maryland when he saw allegedly deceptive advertisements in Maryland, made his reservation for truck and was injured, and only connection with District involved a party which no longer existed and was not in case. Margolis v. U-Haul Int'l, Inc., 818 F.Supp.2d 91, 2011 U.S. Dist. LEXIS 117443 (2011), dismissed by 2011 U.S. App. LEXIS 26107 (D.C. Cir. Dec. 23, 2011).

District of Columbia Consumer Protection Act (DCCPA) does not apply to commercial dealings outside the consumer sphere; the DCCPA only applies, therefore, where the transaction at issue is primarily for personal use. Antoine v. United States Bank N.A., 821 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 143925 (2010).

On motion for summary judgment on claim alleging violations of District of Columbia Consumer Protection Act (DCCPA), borrowers conceded argument that defendants engaged in false, deceptive, and misleading conduct when enforcing and collecting debt owed on mortgage loan, where borrowers failed to address defendants' responsive argument that loan was not consumer transaction within purview of DCCPA. Antoine v. United States Bank N.A., 821 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 143925 (2010).

Mortgagee's alleged violation of the District of Columbia Consumer Protection Procedures Act (CPPA) could not serve as underlying tort to support mortgagor's civil conspiracy claim against mortgagee, under District of Columbia law, as predicted by the District Court. Findlay v. Citimortgage, Inc., 813 F.Supp.2d 108, 2011 U.S. Dist. LEXIS 109051 (2011).

Mortgagor's allegation that he was unwittingly defrauded out of the title of his home precluded mortgagee's defense of unclean hands to mortgagor's claim that mortgagee violated the District of Columbia Consumer Protection Procedures Act (CPPA). Hughes v. Abell, 794 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 121622 (2010).

Transfer of apartment building by corporation to its subsidiary, followed by transfer of 99% of the stock of the subsidiary to new shareholder, was not an unfair trade practice under the Consumer Protection Procedures Act (CPPA), though it may have triggered tenants' right to purchase the building under the Rental Housing Conversion and Sale Act; the CPPA did not mention the Sales Act though the CPPA explicitly stated that violations of other statutes constituted a violation of the CPPA, Sales Act contained its own detailed provisions for implementation and enforcement, and the CPPA expressly forbade the Department of Consumer and Regulatory Affairs (DCRA) from applying the administrative remedies of the CPPA to landlord-tenant relations. Gomez v. Independence Mgmt. of Delaware, Inc., 967 A.2d 1276, 2009 D.C. App. LEXIS 56 (2009).

A price fixing violation of the Antitrust Act is also a violation of the Consumer Protection

Procedures Act. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

Consumer.

Borrower whose home loan was secured by deed of trust and loan servicer did not have consumer-merchant relationship, as required to support borrower's claim against servicer under the District of Columbia Consumer Protection Procedures Act (CPPA). Busby v. Capital One, N.A., 772 F.Supp.2d 268, 2011 U.S. Dist. LEXIS 32055 (2011), appeal dismissed by 2011 U.S. App. LEXIS 19386 (D.C. Cir. Sept. 19, 2011).

Business travelers, whose stays at owner's Russian hotels were undertaken for commercial purposes and not for their personal enjoyment or use, were not "consumers" within meaning of District of Columbia Consumer Protection Procedures Act (CPPA). Shaw v. Marriott Int'l, Inc., 570 F.Supp.2d 78, 2008 U.S. Dist. LEXIS 62498 (2008), affirmed in part and reversed in part by, remanded by 605 F.3d 1039, 390 U.S. App. D.C. 422, 2010 U.S. App. LEXIS 10969 (2010).

Nonprofit "think-tank" which developed policy initiatives with respect to defense and security policy, global challenges, and regional transformation, was not a "consumer" within meaning of District of Columbia Consumer Protection Procedures Act (CPPA), and therefore had no cause of action under statute arising from stays of its employees at owner's Russian hotels. Shaw v. Marriott Int'l, Inc., 570 F.Supp.2d 78, 2008 U.S. Dist. LEXIS 62498 (2008), affirmed in part and reversed in part by, remanded by 605 F.3d 1039, 390 U.S. App. D.C. 422, 2010 U.S. App. LEXIS 10969 (2010).

Under District of Columbia Consumer Procedures and Protection Act (CPPA), where physician was merchant, who supplied services that were subject matter of medical practice, physician's patient was "consumer," as she provided economic demand for physician's medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Self-employed author and scientist was not "consumer" within meaning of District of Columbia Consumer Protection and Procedures Act (CPPA), and thus federal agency, publishers of scientific journals, and broadcast corporation did not violate CPPA by rejecting unsolicited research proposal and manuscripts regarding theory for earthquake prediction, as claims did not arise from purchase, lease, or receipt of consumer goods or services from defendants. D.C. Code 1981, §§ 28-3901(a)(2), 28-3904. Slaby v. Fairbridge, 3 F.Supp.2d 22, 1998 U.S. Dist. LEXIS 4827 (1998).

Corporate owner of apartment complex that had available liquid assets in excess of $5 million was not a "consumer" within meaning of District of Columbia Consumer Protection Practices Act. D.C. Code 1981, §§ 28-3901 et seq., 28-3904. Clifton Terrace Assoc., Ltd. v. United Technologies Corp., 728 F. Supp. 24, 1990 U.S. Dist. LEXIS 322 (1990), affirmed in part and vacated in part by 929 F.2d 714, 289 U.S. App. D.C. 121, 1991 U.S. App. LEXIS 5392 (1991).

Taxicab operator was not a "consumer" within meaning of District of Columbia unfair trade practice statute, with respect to purchases of gasoline and supplies which taxi owners' association required to be purchased through the association. D.C. Code 1981, §§ 28-3901(a)(2), 28-3904. Mazanderan v. Independent Taxi Owners' Asso., 700 F. Supp. 588, 1988 U.S. Dist. LEXIS 14381 (1988).

Corporation engaged in interstate sale of long distance telephone services was not "consumer" within meaning of Consumer Protection Procedures Act, and thus could not maintain action against competitor under Act for allegedly engaging in unfair trade practices; Act supplies consumers with private cause of action against merchants and is not intended to supply merchants with private cause of action against other merchants. D.C. Code 1981, §§ 28-3901(a)(2, 4), 28-3905(k)(1, 2). Independent Communications Network, Inc. v. MCI Telecommunications Corp., 657 F. Supp. 785, 1987 U.S. Dist. LEXIS 2889 (1987).

Damages.

Mortgagor did not state that she had suffered damage as result of alleged misrepresentations or omissions of lender, as required for claim under District of Columbia Consumer Protection Procedures Act (DCCPPA), by misrepresenting that it would process her application for modification and provide her with assistance to determine if she was eligible to stay in her home, where mortgagor did not allege that she would have been eligible for loan modification and she did not allege that lender's purported failure to assist her caused her to submit late payments or incur any additional costs associated with her loans. Jackson v. ASA Holdings, LLC, 751 F.Supp.2d 91, 2010 U.S. Dist. LEXIS 118320 (2010).

There was no evidence that test takers, who were allegedly misled into paying for company's "inferior" law school standardized test preparation product, had been injured by the conduct of which they complained, or, if their careers had been less satisfying than they hoped, that causation could be found in the actions or omissions of company, as required to establish fraud, fraudulent misrepresentation, and a violation of District of Columbia Consumer Protection Procedures Act (CPPA), arising out of company's alleged failure to correct the mistaken belief that test takers were registering for and attending a competing course. Beck v. Test Masters Educ. Servs., 680 F.Supp.2d 212,

2010 U.S. Dist. LEXIS 6484 (2010), affirmed in part and reversed in part by, remanded by 407 Fed. Appx. 491, 2011 U.S. App. LEXIS 2035 (D.C. Cir. 2011).

Pro se plaintiffs bringing action against liability insurer alleging insurer violated the District of Columbia's Consumer Protection Procedures Act (CPPA) were not entitled to an award of attorneys' fees and punitive damages against insurer as a sanction "to punish [insurer] for its abuse"; insurer consistently acted in a professional manner, timely responding to the court's orders and taking all steps necessary to resolve the litigation. Cooper v. Farmers New Century Ins. Co., 607 F.Supp.2d 175, 2009 U.S. Dist. LEXIS 31902 (2009).

Punitive damages awards of $2 million against property purchaser, $1.1 million against company owned by purchaser, and $200,000 against purported money lender, in former homeowner's action for fraud and violation of Consumer Protection Procedures Act (CPPA), arising out of sale of home prior to foreclosure sale, were not excessive and did not violate due process; scheme to purchase home and lease it back to former homeowner by using confusing paperwork that was purposely mislabeled was reprehensible and caused more than economic injury, former homeowner was disabled, lender and purchaser had been involved in prior similar transactions, treble compensatory damages award of $180,000 was not substantial given loss in equity in home, punitive damages awards did not exceed 11 to 1 ratio with regard to compensatory damages award, lender had substantial net worth, and CPPA did not contain provision imposing civil fines for transaction. Modern Mgmt. Co. v. Wilson, 997 A.2d 37, 2010 D.C. App. LEXIS 283 (2010), writ of certiorari denied by 132 S. Ct. 111, 181 L. Ed. 2d 36, 2011 U.S. LEXIS 5544, 80 U.S.L.W. 3182 (U.S. 2011).

Failure to disclose information.

Test takers, who were allegedly misled into paying for company's "inferior" law school standardized test preparation product, were not injured by company's alleged conduct in not correcting takers' mistaken beliefs that they were registering for and attending a competing course, as required to establish fraud, fraudulent misrepresentation, and a violation of District of Columbia Consumer Protection Procedures Act (CPPA); two of the students improved their test scores after taking the course and both were admitted to law school thereafter, and the one student who took competing course only scored one point higher on test after doing so and chose not to apply for or attend law school at all. Beck v. Test Masters Educ. Servs., 680 F.Supp.2d 212, 2010 U.S. Dist. LEXIS 6484 (2010), affirmed in part and reversed in part by, remanded by 407 Fed. Appx. 491, 2011 U.S. App. LEXIS 2035 (D.C. Cir. 2011).

Husband of smoker who died from alleged smoking-related illnesses had viable claim under District of Columbia's (D.C.) deceptive trade practices statute against tobacco company based on allegation that it was aware of, but failed to disclose, both that nicotine was addictive and that defendant manipulated level of nicotine in its product; however, because plaintiff failed to give examples of statements that defendant actually made to public during relevant time frame, he would be given leave to amend complaint to cure that defect. D.C. Code 1981, § 28-3904 et seq. Witherspoon v. Philip Morris, Inc., 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Code used by gastroenterologist on billing form and diagnosis of diarrhea were good faith medical response to the patient's subjective complaints, not a misrepresentation or omission having a tendency to mislead, and, therefore, did not violate Consumer Protection Procedures Act (CPPA); patient did not specify appropriate code, and the gastroenterologist mentioned diarrhea in small space as one of several symptoms. Caulfield v. Stark, 893 A.2d 970, 2006 D.C. App. LEXIS 93 (2006).

Holder of deed of trust on borrower's residence did not violate District of Columbia Consumer Protection Procedures Act by allegedly failing to inform borrower that initial tender of $2,500 was necessary prerequisite to entering into repayment agreement and that such agreement was nonnegotiable; agreement signed by borrower plainly stated that borrower would "pay the total arrearage of $14,264.05, by making an initial down payment of $2,500.00" and that agreement was not binding on holder unless and until holder received initial $2,500 payment, borrower conceded that she was told prior to signing agreement that agreement was nonnegotiable, and agreement also contained integration clause that precluded borrower from relying on any oral statements that were inconsistent with agreement. Muldrow v. EMC Mortg. Corp., 444 Fed.Appx. 455, 2011 U.S. App. LEXIS 22140 (C.A.D.C. 2011).

Foreclosures.

Borrower's claim of wrongful foreclosure brought under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3904 (2001), was time barred pursuant to D.C. Code § 12-301 because the claim accrued when the lender initiated foreclosure proceedings on February 13, 2009, and the borrower filed suit on March 21, 2009, which was more than three years after the claim accrued. Koker v. Aurora Loan Servicing, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 497 (D.D.C. Jan. 3, 2013).

Where a borrower's claim of wrongful foreclosure brought under the D.C. Consumer Protec-

tion Procedures Act, D.C. Code § 28-3904 (2001), was time-barred pursuant to D.C. Code § 12-301, equitable estopped was inapplicable because the allegations of the complaint indicated that the borrower had all the facts necessary to bring her claim when the foreclosure proceedings were initiated. Koker v. Aurora Loan Servicing, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 497 (D.D.C. Jan. 3, 2013).

Where a borrower's claim of wrongful foreclosure brought under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3904 (2001), was time-barred pursuant to D.C. Code § 12-301, the discovery rule was inapplicable because the fact of the borrower's injury was readily determined since the injury was based on initiation of foreclosure proceedings and thus, the claim accrued when the injury actually occurred. Koker v. Aurora Loan Servicing, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 497 (D.D.C. Jan. 3, 2013).

Fraudulent representations.

Mortgagor's allegations supported his claim against mortgagee for violating the District of Columbia Consumer Protection Procedures Act (CPPA) by misrepresenting material facts when such failure tended to mislead; mortgagor alleged that mortgagee's representative told him not to worry about the loan being an adjustable rate mortgage because he should be able to refinance the loan before the rate changed in two years, and that he has not been able to refinance the loan. Hughes v. Abell, 794 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 121622 (2010).

Immigrant's complaint against insurance agent, alleging that he contracted to purchase assistance in obtaining green card and that agent presented herself to practice immigration matters, stated claim for unlawful trade practices under District of Columbia Consumer Protection Procedures Act. Jia Di Feng v. Lim, 786 F.Supp.2d 96, 2011 U.S. Dist. LEXIS 50733 (2011).

Immigrant's complaint, alleging that he contracted with insurance agent to purchase assistance in obtaining green card and that agent presented herself to practice immigration matters, failed to state claim for vicarious liability against insurance company for agent's alleged unlawful trade practices under District of Columbia Consumer Protection Procedures Act, absent any facts to suggest that agent was acting within scope of her purported employment with company. Jia Di Feng v. Lim, 786 F.Supp.2d 96, 2011 U.S. Dist. LEXIS 50733 (2011).

Purchasers of property from mortgage refinancing firm were not liable under District of Columbia Consumer Protection Procedures Act (DCCPPA) based on their role in allegedly fraudulent mortgage foreclosure rescue scheme, where purchasers did not make any specific intentional misrepresentation of material fact upon which victims of purported scheme detrimentally relied in deciding to sell their home. Chen v. Bell-Smith, 768 F.Supp.2d 121, 2011 U.S. Dist. LEXIS 22994 (2011).

Loan settlement company did not violate District of Columbia's Consumer Protection Procedures Act (CPPA) provisions prohibiting misrepresentation of material fact and failure to state material fact, precluding its liability in action of vendor who conveyed condominium to newly created limited liability company (LLC), of which she was sole shareholder, arising from settlement company's alleged fraudulent disguise of loan as commercial loan, when it was in fact personal residential loan, in order to charge higher interest rate under CPPA; settlement company had no role in originating loan, creating LLC, or preparing any loan documents other than HUD-1, and settlement company had no reason to know that loan was anything but commercial loan. Sloan v. Urban Title Servs., Inc., 689 F.Supp.2d 123, 2010 U.S. Dist. LEXIS 12593 (2010), dismissed by 702 F. Supp. 2d 1, 2010 U.S. Dist. LEXIS 34250 (D.D.C. 2010).

Mortgagors stated a claim against mortgagee for violation of the District of Columbia's Consumer Protection Procedures Act (DCCPPA), by alleging that mortgagee knew or should have known that their income listed on their loan application had been falsified and that appraised value of the home was fraudulently overstated, that their loan contained numerous unreasonable costs that mortgagee knew or should have known they could not afford, and that mortgagee took advantage of their age and disabilities in securing their signatures on loan documents. Carroll v. Fremont Inv. & Loan, 636 F.Supp.2d 41, 2009 U.S. Dist. LEXIS 61645 (2009).

Under District of Columbia law, contractor fraudulently misrepresented to residential homeowners that he had home improvement contractor license, even though contractor held valid Maryland license, where contractor attested in parties' contract that he was licensed as general contractor in District, homeowners would not have hired contractor if they had known he was not licensed, and contractor did not obtain or attempt to obtain insurance endorsement that would have permitted him to work in District until after he had finished work. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

National restaurant chain's statement that its food could be part of a healthy lifestyle was not negligent misrepresentation, notwithstanding that restaurant's food products contained trans fat, since the statement did not necessarily suggest that trans fats were healthy; nothing in the statement referred specifically to the

restaurant's items prepared with trans fats, and nothing suggested how frequently one should eat restaurant's food products in order to incorporate it into a healthy lifestyle. Hoyte v. Yum! Brands, Inc., 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

National restaurant chain's claims that its restaurants served the "best food", which plaintiff alleged was negligent misrepresentation given that food contained trans fat, was a non-measurable, bald statement of superiority that was non-actionable puffery. Hoyte v. Yum! Brands, Inc., 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

Hotel guests' suit against United States hotel owner, which alleged that owner's misrepresentations and omissions to its hotel guests regarding its pricing practices at its Moscow hotel violated District of Columbia Consumer Protection Procedures Act (CPPA), would not be dismissed on forum non conveniens grounds; even if Russia was an adequate alternative forum, hotel owner failed to demonstrate that the balancing of public and private interest factors weighed strongly enough in its favor to warrant dismissal. Shaw v. Marriott Int'l, Inc., 474 F.Supp.2d 141, 2007 U.S. Dist. LEXIS 11761 (2007).

Dry cleaning business's "same day service" sign was not a false statement that violated Consumer Protection Procedures Act (CPPA) because business did not provide same day service regardless of when a customer brought an item in for cleaning or because business's tickets automatically provided a pickup date three days after an item was dropped off, where same day service was provided if a customer brought an item to the business early enough in the day, and an earlier pickup date would be provided on a ticket if requested. Pearson v. Soo Chung, 961 A.2d 1067, 2008 D.C. App. LEXIS 486 (2008).

Defendant's conduct in gaining the confidence of homeowner by falsely advertising, in violation of Consumer Protection Procedures Act (CPPA), his foreclosure-avoidance services and thereby enabling defendant to gain her trust by a promise to save her home, with defendant thereafter gaining title to the home for a fraction of its value, warranted an award to homeowner's estate of treble damages under CPPA. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

Opinions or predictions of future events do not constitute representations of material fact upon which plaintiff successfully may place dispositive reliance. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Knowledge of falsity of representation or omission of material fact, as element of tort of fraudulent misrepresentation, may be satisfied by showing that statements were recklessly and positively made without knowledge of their truth. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

In action against bank for fraudulent misrepresentation wherein plaintiff at most demonstrated that she detrimentally relied without justification upon loan officer's suggestion that she contract with particular corporation to perform desired remodeling work and upon loan officer's expression of opinion that such corporation's performance would prove satisfactory, plaintiff's allegations fell short of establishing necessary elements of tort of fraudulent misrepresentation. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Insurance contracts and policies.

Medical insurance certificate and promotional materials would not deceive reasonable consumer into believing that certificate covered inpatient radiology and pathology services, and certificate and materials thus did not violate District of Columbia Consumer Protection Procedures Act (CPPA); although promotional materials promised "essential health benefits" and "[a]ffordable health insurance", materials referred repeatedly to enclosed brochure "for plan limitations and exclusions," brochure contained chart that stated that radiology and pathology benefits were outpatient only, and this limitation was repeated in the "WHAT IS COVERED" section of certificate. Whiting v. AARP, 637 F.3d 355, 2011 U.S. App. LEXIS 4485 (C.A.D.C. 2011).

District of Columbia Consumer Protection Procedures Act (CPPA) applied to claims by insured, who was resident of and received treatment in Arizona, that insurer and advocacy association for retired persons misrepresented extent of coverage provided by health insurance policy, where insurer and association transacted business in the District, and policy stated it was governed by District laws. Whiting v. AARP, 701 F.Supp.2d 21, 2010 U.S. Dist. LEXIS 29825 (2010), affirmed by 637 F.3d 355, 394 U.S. App. D.C. 421, 2011 U.S. App. LEXIS 4485 (2011).

Under District of Columbia law, insurer did not breach duty of good faith and fair dealing to loss payee as result of its failure to process claim under law firm's fidelity bond insurance policy, where policy permitted only firm to place claim or collect benefits under policy, and firm had not done so. Cambridge Holdings Group, Inc. v. Fed. Ins. Co., 357 F.Supp.2d 89, 2004 U.S. Dist. LEXIS 27009 (2004), appeal dismissed by 489 F.3d 1356, 376 U.S. App. D.C. 520, 2007 U.S. App. LEXIS 14360, 67 Fed. R. Serv. 3d (Callaghan) 1397 (2007).

Under District of Columbia law, all contracts contain implied duty of good faith and fair dealing, which means that neither party shall

do anything that will have effect of destroying or injuring right of other party to receive fruits of contract. Cambridge Holdings Group, Inc. v. Fed. Ins. Co., 357 F.Supp.2d 89, 2004 U.S. Dist. LEXIS 27009 (2004), appeal dismissed by 489 F.3d 1356, 376 U.S. App. D.C. 520, 2007 U.S. App. LEXIS 14360, 67 Fed. R. Serv. 3d (Callaghan) 1397 (2007).

There was no consumer-merchant relationship between automobile insurer and son of named insureds, as required to subject insurer to liability under the District of Columbia Consumer Protection Procedures Act (CPPA) for alleged misrepresentations it made to son relating to automobile accident son was in; the son never bought or attempted to buy anything from insurer, rather, his parents did. Athridge v. Aetna Cas. & Sur. Co., 163 F.Supp.2d 38, 2001 U.S. Dist. LEXIS 21490 (2001), affirmed in part and reversed in part by, remanded by 351 F.3d 1166, 359 U.S. App. D.C. 22, 2003 U.S. App. LEXIS 24727 (2003).

Alleged misrepresentations by automobile insurer to insureds' son, who was in automobile accident, did not take place incident to an exchange of goods or services for money, as required to subject insurer to liability under District of Columbia Consumer Protection Procedures Act (CPPA); alleged misrepresentations were uttered or concealed well after sale of insurance policy to parents when insurer was trying to establish in court that it had no responsibility to defend or indemnify son for accident. Athridge v. Aetna Cas. & Sur. Co., 163 F.Supp.2d 38, 2001 U.S. Dist. LEXIS 21490 (2001), affirmed in part and reversed in part by, remanded by 351 F.3d 1166, 359 U.S. App. D.C. 22, 2003 U.S. App. LEXIS 24727 (2003).

Insureds' son, who was in automobile accident, never suffered any actual damages because of automobile insurer's alleged misrepresentation or omissions when insurer was trying to establish that it had no duty to defend or indemnify son for accident, as required for claim under District of Columbia Consumer Protection Procedures Act (CPPA); son, an impecunious high school dropout, suffered no damages by virtue of any of misrepresentations or omissions, in that, he never paid damage award for accident, which was discharged in bankruptcy, and his parents paid for his attorney. Athridge v. Aetna Cas. & Sur. Co., 163 F.Supp.2d 38, 2001 U.S. Dist. LEXIS 21490 (2001), affirmed in part and reversed in part by, remanded by 351 F.3d 1166, 359 U.S. App. D.C. 22, 2003 U.S. App. LEXIS 24727 (2003).

Borrower failed to establish that disbursement was made for purchase of credit life insurance, for purposes of Truth in Lending Act (TILA) disclosure requirements, where insurance certificate did not contain name of beneficiary, no beneficiary was named on application, disclosure statement indicating that loan proceeds would be paid to "bank" did not establish that lender was beneficiary, since lender was not "bank," and, thus, it was not established that lender was beneficiary of life insurance policy. Truth in Lending Act, §§ 125, 130, 15 U.S.C. §§ 1635, 1640; 12 C.F.R. § 226.4. Williams v. First Gov't Mortg. & Investors Corp., 974 F. Supp. 17, 1997 U.S. Dist. LEXIS 11100 (1997).

Borrower failed to establish that purchase of life insurance in connection with his mortgage loan was involuntary, for purposes of the Truth in Lending Act, where borrower signed "optional life insurance disclosure statement" stating in bold letters that "insurance [was] not required to obtain credit," and borrower testified that he purchased insurance voluntarily, that he understood term of policy was two years, and that he knew he had 20 days to return policy if not satisfied. Truth in Lending Act, §§ 125, 130, 15 U.S.C. §§ 1635, 1640. Williams v. First Gov't Mortg. & Investors Corp., 974 F. Supp. 17, 1997 U.S. Dist. LEXIS 11100 (1997).

Numerosity requirement for class certification was satisfied in suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants; proposed class of represented insureds in the District of Columbia who made an uninsured motorist claim during the class period for bodily injury which insurer paid in part or in full numbered approximately 1,700 members. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Commonality requirement for class certification was satisfied by suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants; all members of the proposed class shared a common question of law whether the lack of disclosure concerning insurer's claims handling procedures constituted a material nondisclosure so as to violate the CPPA. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Typicality requirement for class certification was satisfied in suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants; circumstances of the processing of named plaintiff's claim did not create a defense unique to her case, and nature of named plaintiff's physical injury did not

render her claim atypical. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Named plaintiff who brought class action suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants was an adequate class representative, notwithstanding insurer's contention that plaintiff whose claim had been paid and who was seeking only delay damages or statutory penalty could not represent class members who might have claims not only for delayed payment, but also for underpayment. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Predominance requirement for class certification was satisfied by suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants, notwithstanding insurer's contention that innumerable "mini-trials" would be required for each class member, to determine causation, the validity of his or her underlying claim, the delay resulting from insurer's claims-handling procedures, and the amount of damages. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Superiority requirement for class certification was satisfied by suit alleging that automobile insurer violated the District of Columbia Consumer Protection Procedures Act (CPPA) by failing to disclose that it subjected uninsured motorist claimants represented by counsel to a more onerous claim processing procedure than unrepresented claimants; typical claims of class members were far too small for individual class members to maintain individual actions. Wells v. Allstate Ins. Co., 210 F.R.D. 1, 2002 U.S. Dist. LEXIS 19426 (2002).

Whether the insurance company is obligated to defend the insured turns on interpretation of both the contract terms and the allegations in the complaint. Stevens v. United Gen. Title Ins. Co., 801 A.2d 61, 2002 D.C. App. LEXIS 320 (2002).

If the allegations of the complaint state a cause of action within the coverage of the policy, the insurance company must defend; but if the complaint alleges a liability not within the coverage of the policy, the insurance company is not required to defend. Stevens v. United Gen. Title Ins. Co., 801 A.2d 61, 2002 D.C. App. LEXIS 320 (2002).

Courts ruling on the duty to defend must look to whether the allegations in the complaint state a cause of action within the policy's coverage and whether the allegations raise the possibility of coverage; they do not look solely to the literal wording of the complaint and thereby disregard claims that clearly are included within the alleged causes of action. Stevens v. United Gen. Title Ins. Co., 801 A.2d 61, 2002 D.C. App. LEXIS 320 (2002).

A law protecting consumers from arbitrary cancellation of their insurance policies was a consumer protection law, subject to remedies under the Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3901 to 28-3908, 35-1561. Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Plaintiff alleged that defendant insurers violated D.C. Code § 28-3904(u) based on the allegedly excessive premium for a policy obtained by defendant mortgagee, but subsection (u) applied only to representations that the subject of a transaction had been supplied in accordance with a previous representation when it had not, so the complaint failed to state a claim to relief that was plausible on its face. Cannon v. Wells Fargo Bank, N.A., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 27927 (D.D.C. Mar. 1, 2013).

Limitation of actions.

Dunning notice did not delay accrual of three-year District of Columbia statute of limitations on fraud claim, notwithstanding plaintiff's assertion that dunning notice represented the "second phase of the fraud," as the misrepresentation of the legal effect of the plaintiff's having signed a loan agreement; misrepresentation of law is not a basis for fraud, and notice was nothing more than a straightforward declaration by lender regarding his rights. D.C. Code 1981, § 12-301(8). Perkins v. Nash, 697 F. Supp. 527, 1988 U.S. Dist. LEXIS 14636 (1988).

Residual three-year statutory limitations period, for claims not otherwise specifically prescribed, rather than four-year limitations provision for breach of a sales contract under Uniform Commercial Code (UCC), applied to consumer's class action against cable company for unreasonably high late penalties, brought pursuant to Consumer Protection Procedures Act (CPPA). Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Merchant.

Attendee at closing was not commercial participant or merchant in sale of vendor's residential real property, and thus his actions were not regulated by District of Columbia Consumer Protection Procedures Act (DCCPPA); attendee did not receive payment for his role in contract of sale, did not make or enforce any of purportedly unconscionable terms in contract, did not

acquire equitable interest in property, and did not hold himself out as mortgage broker or credit protection merchant. Ali v. Mid-Atlantic Settlement Servs., 640 F.Supp.2d 1, 2009 U.S. Dist. LEXIS 61306 (2009), affirmed by 636 F.3d 622, 394 U.S. App. D.C. 325, 2011 U.S. App. LEXIS 3867, 78 Fed. R. Serv. 3d (Callaghan) 1188 (2011).

Physician was "merchant" under District of Columbia Consumer Procedures and Protection Act (CPPA) because he supplied services that were subject matter of trade practice, namely, services that were subject of medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Nonprofit accrediting organization would not be held primarily liable under the District of Columbia Consumer Protection Procedures Act (CPPA), for allegedly making false and misleading statements about vocational school, and thereby causing student to incur student loan debt to attend school, as it did not qualify as merchant or as supplier of goods and services. D.C. Code 1981, § 28-3904(a, b, d-f). Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Bank, employee of which recommended particular contractor for remodeling work, was not "merchant" within purview of the District of Columbia Consumer Protection Procedures Act so as to be subject to such Act for alleged representations of employee in enforcement of such Act at the administrative level. D.C. Code 1978 Supp., Tit. 28 App. §§ 2(a), 5. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Misleading representations.

Fact that nonprofit organization established to promote the interest of retired persons sent mailings relating to both its Medical Advantage Indemnity Insurance Plan (MAP Policy) and its Personal Health Insurance Plan (PHIP Policy) that included the words, "primary health insurance," did not establish that a reasonable consumer would have assumed that both policies were substantively similar, so as to support organization's members' District of Columbia Consumer Protection Procedures Act (CPPA) and unjust enrichment claims against the organization, arising from their subscription to the MAP Policy; by sending two separate mailings relating to two separate plans, a reasonable consumer would not have assumed that the plans were necessarily the same at all, and, if anything, having information readily available to compare policies, a consumer could have easily determined the limited benefits available through the MAP Policy as compared to the comprehensive PHIP Policy. Halpern v. AARP, 826 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 103041 (2010).

Tourist's allegations that he paid for a city tour with company that used two wheeled self-balancing personal transports, that, after safety training, he asked his tour guide about a missing key device on his transport, that the guide told him "it was not important," that this was misleading, and that the lack of key device caused his injury in a collision while on tour were sufficient to state a claim under the District of Columbia Consumer Protection Procedures Act (CPPA) against company. Halpern v. AARP, 826 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 103041 (2010).

While a notice was material because a significant number of unsophisticated consumers could find the information in the notice important in determining a course of action regarding their purchase of a condominium unit, the actual determination of whether the notice would be both material and misleading with respect to the unit owners who did not receive it, or who questioned whether they received it, was a question of fact for the jury and not a question of law for the court. Saucier v. Countrywide Home Loans, 64 A.3d 428, 2013 D.C. App. LEXIS 164 (2013).

Summary judgment in favor of a mortgage company as to the condominium unit owners' claims under D.C. Code § 28-3904(e) was proper since the unit owners failed to establish that the mortgage company and bank made an affirmative or implied misrepresentation, and hence, they could not prevail on their subsection (e) claim. Saucier v. Countrywide Home Loans, 64 A.3d 428, 2013 D.C. App. LEXIS 164 (2013).

Motion to dismiss.

Pro se plaintiffs bringing action against liability insurer alleging insurer violated the District of Columbia's Consumer Protection Procedures Act (CPPA) conceded insurer's motion to dismiss for failure to state a claim by failing to respond to insurer's arguments that one plaintiff's claim should be dismissed because claim was barred by the parties' release agreement, and that the remaining plaintiffs' claim should be dismissed for failure to state a claim under the CPPA; plaintiffs' opposition did not directly address any of insurer's arguments, stating only that "Plaintiffs submit to the court's discretion on the motion to dismiss." Cooper v. Farmers New Century Ins. Co., 607 F.Supp.2d 175, 2009 U.S. Dist. LEXIS 31902 (2009).

District court, in its discretion, would consider liability insurer's supplemental motion to dismiss, which, for the first time, raised argument that plaintiff's claim was barred by the parties' release agreement, in action alleging liability insurer violated the District of Columbia's Consumer Protection Procedures Act

(CPPA), where the supplemental briefing was specifically requested by the court and did not cause undue delay. Cooper v. Farmers New Century Ins. Co., 607 F.Supp.2d 175, 2009 U.S. Dist. LEXIS 31902 (2009).

Notice.

Borrower's signature on notices of right to cancel mortgage loan, acknowledging receipt of two copies of notice, gave rise to rebuttable presumption that notices were, in fact, delivered to him, for purposes of the Truth in Lending Act (TILA). Truth in Lending Act, § 125(c), 15 U.S.C. § 1635(c). Williams v. First Gov't Mortg. & Investors Corp., 974 F. Supp. 17, 1997 U.S. Dist. LEXIS 11100 (1997).

Homeowner could not recover from contractor and its owner on claims asserted under Consumer Protection Procedures Act in connection with failure of contractor to complete installation of heating and air conditioning system in home where contractor and owner did not receive, either before or during trial, timely notice that specific Act claims now raised as basis of verdict were being litigated. D.C. Code 1981, § 28-3904(n, x). Adams v. A.B. & A., Inc., 613 A.2d 858, 1992 D.C. App. LEXIS 118 (1992).

Obtaining of licenses.

Under District of Columbia law, unlicensed contractors are required to return all payments received irrespective of any work already completed. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Under District of Columbia law, receipt of payment by unlicensed contractor before completion of work under contract violates home improvement regulations and renders contract void and unenforceable, even on quasi-contractual basis. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Under District of Columbia law, fact that residential homeowners employed their own architect and engineer to obtain permits did not preclude homeowners from asserting claim against contractor for violating regulation requiring that contractors doing home improvement work, in order to accept payment before work was finished, were to be licensed as home improvement contractors. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Persons liable.

Tourist's allegations that company that offered city tour on two- wheeled self-balancing personal transports was licensed franchise by another company, which oversaw management and promotional activities, were sufficient to plead that licensing company was an independent entity that could be sued, as required for tourist's claims of negligence and violations of the District of Columbia Consumer Protection Procedures Act (CPPA) after he was injured in a collision. Mero v. City Segway Tours of Wash. DC, LLC, 826 F.Supp.2d 100, 2011 U.S. Dist. LEXIS 135975 (2011).

Contractor's recommendation of repairman who could perform home renovation work could subject contractor to potential liability under District of Columbia Consumer Protection Procedures Act (CPPA) as agent of a party to the transaction in question; statement was by person on supply side of consumer transaction, where contractor's recommendation was coupled with offer to have repairman perform work on behalf of contractor's firm and to obtain supplies through his firm. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Corporate officer could be held individually liable for violations of District of Columbia Consumer Protection Procedures Act (CPPA) in connection with lending transactions in which he was personally involved. Cooper v. First Gov't Mortg. & Investors Corp., 206 F.Supp.2d 33, 2002 U.S. Dist. LEXIS 12219 (2002).

Class of persons subject to suit under provision of District of Columbia Consumer Protection Procedures Act allowing suit to be brought against "person" in superior court necessarily is restricted by narrower reach of statute as outlined in its definitional section limiting purview of statute to consumer-merchant relationships. D.C. Code 1978 Supp., Tit. 28 App. §§ 2(a)(1, 3, 5), 5, 6(k)(1). Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

A telecommunication company's practice of rounding it's billing up to the next highest minute on advertisements that are sent to consumers and not disclosing the precise length of long distance calls on the bills qualify as "material facts," but there is no tendency to mislead, without which there can be no violation of the statute; reasonable consumers would not assume that each of their long distance calls ended precisely on the minute, and they therefore know that the carrier is either rounding up or rounding down. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

Pleadings.

D.C. Code § 28-3904(f) does not require a plaintiff to plead and to prove a duty to disclose information. Saucier v. Countrywide Home Loans, 64 A.3d 428, 2013 D.C. App. LEXIS 164 (2013).

Under D.C. Code § 28-3904(f), plaintiffs must show that the omitted information is material and has a tendency to mislead. Saucier v. Countrywide Home Loans, 64 A.3d 428, 2013 D.C. App. LEXIS 164 (2013).

Preemption.

Federal Truth in Lending Act (TILA) does not preempt District of Columbia Consumer Pro-

tection Procedures Act (CPPA), and TILA compliance does not immunize lenders from liability under CPPA. Truth in Lending Act, § 102 et seq., 15 U.S.C. § 1601 et seq.; D.C. Code 1981, § 28-3904(r). Williams v. First Gov't Mortg. & Investors Corp., 176 F.3d 497, 1999 U.S. App. LEXIS 5305 (C.A.D.C. 1999).

Congress did not intend Higher Education Act (HEA) to preempt state consumer defenses through either express or field preemption, in light of HEA's express preemption only of state disclosure laws, usury laws, statutes of limitations, and infancy defenses. Higher Education Act of 1965, §§ 428(d), 484A, as amended, 20 U.S.C. §§ 1078(d), 1091a; Garn-St. Germain Depository Institutions Act of 1982, § 701(b), 20 U.S.C. § 1099. Jackson v. Culinary Sch., 27 F.3d 573, 1994 U.S. App. LEXIS 15602 (C.A.D.C. 1994), vacated by, remanded by 515 U.S. 1139, 115 S. Ct. 2573, 132 L. Ed. 2d 824, 1995 U.S. LEXIS 4088, 63 U.S.L.W. 3889, 95 D.A.R. 7979 (1995).

Mortgagor's claim that mortgagee, note holder, bank holding company, and others violated the District of Columbia Consumer Protection Procedures Act (CPPA) by making misrepresentations in her loan documents was preempted by the Home Owners' Loan Act (HOLA) and regulation preempting state laws purporting to regulate credit activities of federal savings associations, where the claim, specifically linked to the loan documents, had a substantial effect on disclosures defendants were allowed to make under HOLA, as well as origination of their loans, loan-related fees, and terms of credit, amortization of loans, and deferral and capitalization of interest. Poindexter v. Wachovia Mortg. Corp., 851 F.Supp.2d 121, 2012 U.S. Dist. LEXIS 45144 (2012).

Consumers' Consumer Protection Procedures Act (CPPA) claims against cellular-telephone businesses were not, pursuant to conflict preemption, preempted by Federal Communications Commission (FCC) radio frequency (RF) radiation standard, as consumers, who alleged they were deceived in violation of the CPPA, did not necessarily have to establish that they were injured as a result of RF radiation from cell phones that complied with FCC standard in order to establish a violation of the CPPA, and defendants could be held liable for providing consumers with false and misleading information about cell phones without consumers having to prove they were exposed to unreasonably dangerous levels of radiation. Murray v. Motorola, Inc., 982 A.2d 764, 2009 D.C. App. LEXIS 547 (2009), amended by 2009 D.C. App. LEXIS 652 (D.C. Oct. 29, 2009).

Federal law preempted claims that Student Loan Marketing Association (Sallie Mae) violated District of Columbia's Consumer Protection Procedures Act (DCCPPA) by charging late fees with respect to periodic installments on which late fees had already been assessed. Washkoviak v. Sallie Mae, 849 A.2d 37, 2004 D.C. App. LEXIS 201 (2004), remanded by 900 A.2d 168, 2006 D.C. App. LEXIS 300 (D.C. 2006).

Federal law preempted claims that Student Loan Marketing Association (Sallie Mae) violated District of Columbia's Consumer Protection Procedures Act (DCCPPA) by failing to state material facts about accrual and collection of late fees and failing to disclose that principal balances of loans had been unlawfully inflated. Washkoviak v. Sallie Mae, 849 A.2d 37, 2004 D.C. App. LEXIS 201 (2004), remanded by 900 A.2d 168, 2006 D.C. App. LEXIS 300 (D.C. 2006).

Borrowers were entitled to amend their complaint to allege that federal law did not preempt claims that Student Loan Marketing Association (Sallie Mae) violated District of Columbia's Consumer Protection Procedures Act (DCCPPA) by making affirmative misrepresentations about accrual and collection of late fees. Washkoviak v. Sallie Mae, 849 A.2d 37, 2004 D.C. App. LEXIS 201 (2004), remanded by 900 A.2d 168, 2006 D.C. App. LEXIS 300 (D.C. 2006).

Purpose of law.

The purpose of the District of Columbia Consumer Protection Procedures Act (DCCPPA) is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out. Ihebereme v. Capital One, N.A., 730 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 80018 (2010).

The purposes of the District of Columbia's Consumer Protection Procedures Act (CPPA) are to assure that a just mechanism exists to remedy all improper trade practices and to promote, through effective enforcement, fair business practices throughout the community of the District of Columbia. Cooper v. Farmers New Century Ins. Co., 593 F.Supp.2d 14, 2008 U.S. Dist. LEXIS 104593 (2008).

The District of Columbia Consumer Protection Procedures Act, at least insofar as it is enforceable at the administrative level, was designed to police trade practices arising only out of consumer-merchant relationships. D.C. Code 1978 Supp., Tit. 28 App. §§ 1-10. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

The Council, in enacting District of Columbia Consumer Protection Procedures Act, did not seek to impose liability as guarantor upon any private individual or his employer who recommends goods or services of particular merchant to another party. D.C. Code 1978 Supp., Tit. 28 App. §§ 1-10. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Real estate transactions.

Under District of Columbia law, purchaser

stated claims for fraud and/or negligent misrepresentation against vendors by alleging that they either negligently or knowingly failed to inform her that single-family dwelling was converted into a multi-unit condominium building, that they falsely claimed that structural elements of the condominium were either built in compliance with District of Columbia housing code or were approved by a District of Columbia housing inspector, and that, as a result of vendors' misrepresentations, she purchased a condominium unit that was not as valuable as she believed it to be. Parr v. Mashaallah Ebrahimian, 774 F.Supp.2d 234, 2011 U.S. Dist. LEXIS 34492 (2011).

Genuine issues of material fact as to whether transaction in which homeowners sold property to mortgage refinancing firm, which then transferred it to "credit buyers," constituted credit arrangement, rather than sale, and thus made credit buyers "merchants," and whether credit buyers knew that owners would not receive substantial benefits from their purported credit-buying services precluded summary judgment on owners' claim against credit buyers under District of Columbia Consumer Protection Procedures Act (DCCPPA) provision barring unconscionable terms or provisions of sales. Chen v. Bell-Smith, 768 F.Supp.2d 121, 2011 U.S. Dist. LEXIS 22994 (2011).

Section of District of Columbia Consumer Protection Procedures Act (CPPA), declaring it an unlawful trade practice for a person to make or enforce unconscionable terms or provisions of sales or leases, applies to real estate finance transactions. Hughes v. Abell, 634 F.Supp.2d 110, 2009 U.S. Dist. LEXIS 62495 (2009).

Bank's alleged misrepresentations to mortgagor as to use of loan proceeds was not unlawful trade practice under District of Columbia Consumer Protection Procedures Act, which did not apply to real estate transactions at time of transaction in question. D.C. Code 1981, § 28-3904. Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 1994 Bankr. LEXIS 1497 (1994).

Evidence established that defendant advertised or offered foreclosure-avoidance services to homeowner without intent to sell them as advertised or offered, in violation of Consumer Protection Procedures Act (CPPA); when asked at trial to identify each visit he made to the home, defendant stated that he visited the home several times for the purpose of negotiating the purchase from homeowner, and defendant eventually purchased the home for substantially less than the price at which he resold it to a third party. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

Homeowner who mortgaged her home as security for a loan purchased "consumer credit" from lender within meaning of Consumer Protection Procedures Act (CPPA) section declaring it an unlawful trade practice for a person to make or enforce unconscionable terms or provisions of sales or leases. D.C. Code 1981, §§ 28-3901(a)(2, 3, 7), 28-3904(r). DeBerry v. First Gov't Mortg. & Investors Corp., 743 A.2d 699, 1999 D.C. App. LEXIS 307 (1999).

Section of Consumer Protection Procedures Act (CPPA) declaring it an unlawful trade practice for a person to make or enforce unconscionable terms or provisions of sales or leases applies to real estate mortgage finance transactions. D.C. Code 1981, § 28-3904(r). DeBerry v. First Gov't Mortg. & Investors Corp., 743 A.2d 699, 1999 D.C. App. LEXIS 307 (1999).

Plaintiff borrower's real estate transaction with defendant lenders did not fall under the D.C. Consumer Protections Act, D.C. Code § 28-3904, or D.C. usury laws, D.C. Code § 28-3312, as she purchased the property for investment purposes rather than for personal, household, or family use as required by D.C. Code § 28-3301. Bakeir v. Capital City Mortg. Corp., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 28745 (D.D.C. Mar. 4, 2013).

Reliance on representations.

Mortgagor stated claim under District of Columbia Consumer Protection Procedures Act (DCCPPA) on allegations that lender misrepresented private mortgage insurance premium; even if sale had ended when parties signed deed of trust and promissory note, alleged material misrepresentation predated conclusion of sale. Ihebereme v. Capital One, N.A., 730 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 80018 (2010).

Advocacy association for retired persons and insurer's statements in marketing materials, including that health insurance policy was an alternative to major medical insurance and was a "good option for individuals who are looking for an alternative or otherwise lack access to major medical insurance" or for those who need a "bridge between now and when they become eligible for Medicare benefits," would not have misled a reasonable consumer that policy constituted comprehensive, major medical health insurance, as required for insured's misrepresentation claim under District of Columbia Consumer Protection Procedures Act (CPPA); same marketing materials stated policy was not a major medical policy, and that it was a limited plan. Whiting v. AARP, 701 F.Supp.2d 21, 2010 U.S. Dist. LEXIS 29825 (2010), affirmed by 637 F.3d 355, 394 U.S. App. D.C. 421, 2011 U.S. App. LEXIS 4485 (2011).

Mortgage broker and lender did not violate District of Columbia's Consumer Protection Procedures Act (CPPA) by representing that mortgage loan transaction secured by borrower's principal residence had characteristics which it did not have, even though they failed to take reasonable steps to ascertain true pur-

pose of loan and to verify nature of property securing loan, given absence of showing that broker and lender actually knew that loan had to be processed as consumer credit transaction, rather than commercial credit transaction. Dawson v. Thomas (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

Evidence supported trial court's finding that homeowner, who received mailed notice from defendant's company advising her of company's foreclosure-avoidance services, with accompanying notice announcing defendant's partnership as potential buyer of homes, relied on notice advising her of defendant's foreclosure-avoidance services, in action under Consumer Protection Procedures Act (CPPA) alleging defendant advertised or offered foreclosure-avoidance services to homeowner without intent to sell them as advertised or offered; defendant initially assisted homeowner in filing pro se bankruptcy petition which would enable her to work out payment plan with mortgage company but defendant later allowed dismissal of petition with prejudice, making homeowner vulnerable to foreclosure, and homeowner had no intention of selling her home and was unaware she had sold it to defendant's partnership. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

A merchant-consumer relationship can exist, as required for claim under Consumer Protection Procedures Act (CPPA), if defendant advertised or offered his services to plaintiff without the intent to sell them as advertised or offered, though defendant did not enter into formal contractual relationship with plaintiff and did not receive money for services. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

Real estate agent's recommendation of a home inspection company and home inspector to home purchasers, because she had used the inspector "a few times," he had done a "great job," and he was particularly suited for first-time home purchasers, did not violate the Consumer Protection Procedures Act (CCPA); CPPA was intended to regulate the conduct of merchants or goods suppliers, and CPPA did not impose liability as a guarantor upon any private individual or his employer who recommended the goods or services of a particular merchant to another. Carleton v. Winter, 901 A.2d 174, 2006 D.C. App. LEXIS 428 (2006).

Representations by bank employee that contractor which employee recommended would perform remodeling work satisfactorily were not type of representations on which borrower was entitled to place dispositive reliance where borrower had adequate opportunity to conduct independent investigation into contractor's reputation and to obtain references from past customers of contractor. Howard v. Riggs Nat'l Bank, 432 A.2d 701, 1981 D.C. App. LEXIS 298 (1981).

Remedies of consumer.

Amount of damages to be awarded for violation of District of Columbia Consumer Protection Procedures Act (CPPA) section prohibiting making loan knowing that borrower would not be able to repay it or taking advantage of borrower's inability to protect his interests turns not on whether borrower had better options or whether terms of loan made by defendant-lender met industry standards, but, rather, damages are to be based on money lost by borrower as result of lender's unlawful acts. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Damage award to borrower of $8,400 for home refinancing lender's violation of District of Columbia Consumer Protection Procedures Act (CPPA) section prohibiting making loan knowing that borrower could not repay it or taking advantage of borrower's inability to protect his interests was supported by evidence that borrower collected over $7,500 in fees and expenses, and payments for mortgage refinancing loan were $100 per month more than borrower's original mortgage payments. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

To recover damages under District of Columbia Consumer Protection Procedures Act (CPPA), there must be showing that consumer suffered actual damages because of misrepresentation or omission claimed to violate the Act. Athridge v. Aetna Cas. & Sur. Co., 163 F.Supp.2d 38, 2001 U.S. Dist. LEXIS 21490 (2001), affirmed in part and reversed in part by, remanded by 351 F.3d 1166, 359 U.S. App. D.C. 22, 2003 U.S. App. LEXIS 24727 (2003).

Remedies available under the Consumer Protection Procedures Act (CPPA) are broader than those under the No-Fault Motor Vehicle Insurance Act, in that under the No-Fault Act if it is determined that a policy was improperly cancelled the insurer is required to pay all the claims for which it would be liable under the policy, while under the CPPA, an administrative law judge may not only grant the relief available from the insurance administration, but may also issue a cease and desist order, award contract damages and restitution, impose costs, and grant preventive relief against future violations. D.C. Code 1981, §§ 28-3905(g), 35-2109(d)(1), (i)(3), (k). Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Selling compact discs (CDs) was a "trade practice," under the Consumer Protection Procedures Act, and, thus, alleged price fixing of

CDs was an improper trade practice under Act, for which consumer had a right to bring an action against CD producers and distributors. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

Plaintiffs' claims concerning a telecommunication company's unfair trade practices, fraud, negligence, breach of contract, and unjust enrichment, all based on District of Columbia statutory and common law, were dismissed for failing to state a claim for which relief can be granted in light of the federal filed tariff doctrine. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

Rescission rights.

Truth in Lending Act (TILA) establishes right of rescission for any loan transaction in which borrower's principal dwelling is used as security. Truth in Lending Act, § 125(a), 15 U.S.C. § 1635(a). Williams v. First Gov't Mortg. & Investors Corp., 974 F. Supp. 17, 1997 U.S. Dist. LEXIS 11100 (1997).

Borrower failed to establish that he did not receive copies of closing documents, including notice of right to rescind mortgage loan, at least three days prior to rescission expiration date on the notice as required by the Truth in Lending Act (TILA). Truth in Lending Act, § 125(a), 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23. Williams v. First Gov't Mortg. & Investors Corp., 974 F. Supp. 17, 1997 U.S. Dist. LEXIS 11100 (1997).

Office of Consumer Protection was not entitled to rescission of underlying porch extension contract between contractor and consumer in agency's action for enforcement of consent decree, particularly where there were issues of material fact as to contract performance, even though contractor admitted in his answer that he did not have license to perform work and that he received advance payments from consumer, in violation of licensing law [D.C. Code §§ 47-2842, 47-2844]. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

In action by consumer to enforce settlement agreement, "consumer redress" which trial court may order might include the costs of the enforcement action, but award of rescission of underlying consumer contract may be part of trial court's order only in action to enforce final order of the Section of Hearings of the Officer of Consumer Protection. D.C. Code 1981, § 28-3905(i)(3)(B). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Review.

Customer who brought common law fraud and Consumer Protection Procedures Act (CPPA) action against dry cleaning business and its owners properly appealed trial court order denying his motion for a jury trial, though notice of appeal did not specifically make reference to such order, where notice of appeal stated that he was appealing the trial court's final order and orders merged therein. Pearson v. Soo Chung, 961 A.2d 1067, 2008 D.C. App. LEXIS 486 (2008).

Assertion by medical records company, on appeal of order denying class certification in action alleging company charged unconscionable prices for records in violation of the Consumer Protection Procedures Act (CPPA), that its pricing scheme was not uniform through the proposed class period, would not be addressed by Court of Appeals though such could have a bearing on whether class action certification requirements were satisfied, when company did not bring such information to the attention of the trial court. Julian Ford v. ChartOne, Inc., 908 A.2d 72, 2006 D.C. App. LEXIS 533 (2006).

Standing.

Court dismissed customers' suit alleging a bank violated the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 et seq., by transferring their calls and providing their personal and financial information to foreign call centers without their consent; the customers lacked standing to bring claims under the CPPA because they did not sufficiently allege an actual or imminent injury that was neither conjectural nor hypothetical. Floyd v. Bank of Am. Corp., — WLR —, 2012 D.C. Super. LEXIS 8 (Apr. 26, 2012).

Condominium association established that it suffered an injury-in-fact through the testimony of its corporate designee as to the amount the association paid for a new roof, and through the confirming statement of the appraisal expert that the association paid approximately $60,000 to replace the roof where the funds used to pay for the roof replacement came from fees paid to the condominium association by unit owners; thus, the sum paid represented a concrete, actual injury. Saucier v. Countrywide Home Loans, 64 A.3d 428, 2013 D.C. App. LEXIS 164 (2013).

Student loans.

Secretary of Education's mere admission of existence of leniency policy concerning collection on particular class of guaranteed student loans was not concession on critical issue of enforceability of policy by third parties. Jackson v. Culinary Sch., 27 F.3d 573, 1994 U.S. App. LEXIS 15602 (C.A.D.C. 1994), vacated by, remanded by 515 U.S. 1139, 115 S. Ct. 2573, 132 L. Ed. 2d 824, 1995 U.S. LEXIS 4088, 63 U.S.L.W. 3889, 95 D.A.R. 7979 (1995).

Statements of Department of Education's policy, concerning restraint in enforcing guaranteed student loans if lender and school had "origination relationship" in which lender had delegated to school substantial functions normally performed by lender in making loans, did

not create legally enforceable right of students to assert any defenses they had against school in enforcement action by Secretary of Education, absent express intention for Department to be bound by policy, and in light of Secretary's refusal to adopt proposed uniform federal rule codifying policy. Jackson v. Culinary Sch., 27 F.3d 573, 1994 U.S. App. LEXIS 15602 (C.A.D.C. 1994), vacated by, remanded by 515 U.S. 1139, 115 S. Ct. 2573, 132 L. Ed. 2d 824, 1995 U.S. LEXIS 4088, 63 U.S.L.W. 3889, 95 D.A.R. 7979 (1995).

Failure of guaranteed student loan (GSL) to comply with Federal Trade Commission (FTC) holder rule, requiring notice that holder would be subject to claim and defenses consumer might assert against seller, did not render GSL unconscionable under District of Columbia law. D.C. Code 1981, § 28-3904(r); Federal Trade Commission Act, § 1 et seq., 15 U.S.C. § 41 et seq. Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Provision of District of Columbia commercial code making it unfair trade practice to sell consumer goods in condition or manner not consistent with that warranted by operation or requirement of federal law did not apply to guaranteed student loan (GSL) contract, which involved sale of services, not goods. D.C. Code 1981, § 28-3904(x). Armstrong v. Accrediting Council for Continuing Educ. & Training, 832 F. Supp. 419, 1993 U.S. Dist. LEXIS 12455 (1993), remanded by 84 F.3d 1452, 318 U.S. App. D.C. 78, 1996 U.S. App. LEXIS 41824 (1996).

Omission of FTC Holder Notice, which is a federally required notice of claims and defenses, from promissory notes on student loans did not make loan contract "unconscionable" within meaning of District of Columbia's statute which makes unlawful any efforts to make or enforce unconscionable terms or provisions of sales or leases; facts that promissory notes were standardized legal forms and that students had no knowledge that omission of FTC Holder Notice might affect their rights under the contract did not make loan contracts "unconscionable." D.C. Code 1981, § 28-3904(r). Jackson v. Culinary School of Washington, 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (1993), affirmed by, remanded by 27 F.3d 573, 307 U.S. App. D.C. 123, 1994 U.S. App. LEXIS 15602 (1994).

Omission of FTC Holder Notice from promissory notes on guaranteed student loans did not violate District of Columbia statute making it unlawful to sell consumer goods in a condition or manner not consistent with that warranted by operation or requirement of federal law because statute only covers sales of goods, and not services; loan contract had to be construed as service contract because contract was predominantly for cooking classes, rather than for provision of books and cooking utensils. D.C. Code 1981, § 28-3904(x). Jackson v. Culinary School of Washington, 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (1993), affirmed by, remanded by 27 F.3d 573, 307 U.S. App. D.C. 123, 1994 U.S. App. LEXIS 15602 (1994).

Federal law did not preempt guaranteed student loan recipients from rescinding student loan contracts under District of Columbia law due to failure to include the Federal Trade Commission notice of defenses clause in the guaranteed student loan promissory note; Higher Education Act and its legislative history did not suggest an intent to close off access to state law remedies due to fear of nonmeritorious defenses to avoid loan repayment. D.C. Code 1981, § 28-3904; Higher Education Act of 1965, § 401 et seq., as amended, 20 U.S.C. § 1070 et seq. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Guaranteed student loan recipients alleged a violation of the District of Columbia Consumer Protection Procedures Act, for failure to include notice of defenses clause, against student loan guaranty agencies which were assignees of seller/school which was extending consumer credit. D.C. Code 1981, § 28-3904(x). Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

While trial court could take judicial notice of federal statute authorizing reorganization of Student Loan Marketing Association (Sallie Mae), the statute did not provide basis for trial court to conclude that Sallie Mae ceased to operate in any manner in District of Columbia before implementation of policies which, according to plaintiff borrowers, allegedly violated District of Columbia Consumer Protection Procedures Act (DCCPPA), which conclusion was basis for trial court's ruling, on Sallie Mae's motion to dismiss for failure to state a claim, that Wisconsin law rather than District of Columbia law applied to the dispute regarding Sallie Mae's collection and disclosure of late fees; it was neither apparent from statutory text, nor self-evident, at what point in time Sallie Mae ceased to operate in District of Columbia, or even that the reorganization ever occurred. Washkoviak v. Sallie Mae, 900 A.2d 168, 2006 D.C. App. LEXIS 300 (2006).

Trial court's consideration of plaintiff borrowers' promissory notes, which defendant Student Loan Marketing Association (Sallie Mae) attached to its motion to dismiss, for failure to state a claim, plaintiffs' amended complaint

alleging violations of District of Columbia Consumer Protection Procedures Act (DCCPPA), did not convert the motion into a motion for summary judgment, so that trial court, after providing notice to plaintiffs, could consider factual matters outside of the complaint, where plaintiffs themselves referred to the promissory notes in their original complaint; trial court could consider documents incorporated in the complaint, such as the promissory notes, on a motion to dismiss for failure to state a claim. Washkoviak v. Sallie Mae, 900 A.2d 168, 2006 D.C. App. LEXIS 300 (2006).

Summary judgment.

Allegations by mortgagor that she had a sixth grade education and had total monthly income of $853 from social security disability benefits, that the mortgagee took advantage of her situation and her lack of sophistication in refinancing her mortgage loan, with a monthly mortgage payment of $2061, and that the refinancing worked to the mortgagor's substantial detriment, stated claim against mortgagee for violation of the District of Columbia Consumer Protection Procedures Act (CPPA). Findlay v. Citimortgage, Inc., 813 F.Supp.2d 108, 2011 U.S. Dist. LEXIS 109051 (2011).

Mortgagor's allegations that mortgagee's loan had a monthly payment of approximately 46% of his monthly income, that mortgagee had no information that mortgagor's income would increase, and that mortgage was at an adjustable rate supported his claim against mortgagee of unconscionability under District of Columbia Consumer Protection Procedures Act (CPPA) by providing financing on which there was no reasonable probability of payment in full. Hughes v. Abell, 794 F.Supp.2d 1, 2010 U.S. Dist. LEXIS 121622 (2010).

Genuine issue of material fact, as to contractor's specific statements in recommending repairman, and whether he inferred that repairman was licensed builder, and thus, whether contractor made representations regarding quality of repairman's services, precluded summary judgment on claim against contractor under District of Columbia Consumer Protection Procedures Act (CPPA). Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Genuine issue of material fact as to whether assignee had played direct role in lender's mortgage loan transaction with borrower by promoting, underwriting and ultimately funding loans precluded summary judgment in borrower's action against assignee for violations of District of Columbia Consumer Protection Procedures Act (CPPA). Cooper v. First Gov't Mortg. & Investors Corp., 238 F.Supp.2d 50, 2002 U.S. Dist. LEXIS 21821 (2002).

Whether settlement attorney fraudulently misrepresented terms of borrower's loans presented factual question precluding summary judgment in legal malpractice action, even if interest rate charged was legal; borrower could have been fraudulently induced to enter into otherwise legal contract. Nelson v. Nationwide Mortg. Corp., 659 F. Supp. 611, 1987 U.S. Dist. LEXIS 3833 (1987).

Unconscionable rates.

Allegations that financing provided by mortgagee required mortgagor to make payment of excessive share of his income, that his monthly payment amounted to approximately 46% of his monthly income, and that although current interest rate was minimum allowed by mortgagee's terms, rate could increase in future and could result in future monthly payments of more than half of mortgagor's income was sufficient to state that mortgagee provided financing on which "there was no reasonable probability of payment in full," as required for claim that mortgagee's financing practices were unconscionable under District of Columbia's Consumer Protection Procedures Act (CPPA). Hughes v. Abell, 634 F.Supp.2d 110, 2009 U.S. Dist. LEXIS 62495 (2009).

Medical record company's liability for unconscionable pricing under Consumer Protection Procedures Act (CPPA) would not have to be determined separately with respect to each proposed class member due to variations in medical problems and treatment, and thus such determination did not defeat typicality and adequacy-of-representation prerequisites for class certification and predominance and superiority requirements for certification of class on basis of predominance of common questions, in action against company by patient who alleged that company charged unconscionably high fees when he sought copies of his medical records; proposed class members had no choice but to use company to obtain copies, company charged uniform prices, and, to evaluate claim of unconscionable pricing, relevant cost figure was company's average costs and relevant price figure was prices charged under competitive market conditions rather than prices charged on a case-by-case basis. Julian Ford v. ChartOne, Inc., 908 A.2d 72, 2006 D.C. App. LEXIS 533 (2006).

Consumers could invoke the Consumer Protection Procedures Act (CPPA) to challenge cable company's increase in late fee from $2.43 to $5.00 as an unlawful trade practice in violation of common law rule against punitive liquated damages clauses. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Fact that consumers could have avoided cable company's late penalties by paying on time did not preclude consumers from establishing consequential damages in class action brought pursuant to Consumer Protection Procedures

Act (CPPA) for unreasonable penalties; once consumers were delinquent, they were obligated to pay late fee to retain their cable service, such that company caused them actual injury by overcharging them. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Consumers in class action against cable company for unreasonably high late penalties, brought pursuant to Consumer Protection Procedures Act (CPPA), were not entitled to punitive damages, where company acknowledged to administrative agency responsible for regulating cable television services that amount of fee was not cost-based, but instead was designed to deter delinquencies, which was a legitimate business goal even if company overstepped the bounds in pursuing it. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Owners of complex in which cooperative apartment building was located and manager of parking facility in complex did not charge unconscionable rates for parking spaces in violation unfair trade practices provision of Consumer Protection Procedures Act, when they evicted apartment residents from parking spaces following residents' filing of lawsuit against them and charged residents daily parking rate amounting to monthly rate of $420 to $434, with no guarantee of availability, instead of the $170 a month unreserved rate. D.C. Code 1981, § 28-3904(r). Lund v. Watergate Investors Ltd. Pshp., 728 A.2d 77, 1999 D.C. App. LEXIS 77 (1999).

Unfair advantage.

Mortgagor adequately alleged a claim under unconscionability provision of District of Columbia Consumer Protection Procedures Act where she alleged that, after closing on mortgage loan, she had to pay over half of her monthly income to mortgage costs" and that in making the loans defendants took unfair advantage of her age, limited education, limited ability to comprehend the nature of the loans, limited economic resources and lack of business sophistication. Johnson v. Long Beach Mortg. Loan Trust 2001-4, 451 F.Supp.2d 16, 2006 U.S. Dist. LEXIS 54264 (2001).

Mortgage broker and lender did not intend to exploit borrower's lack of sophistication in extending mortgage loan to her, and thus did not violate District of Columbia's Consumer Protection Procedures Act (CPPA) by taking advantage of borrower's inability to protect her interests due to her lack of sophistication; instead, broker and lender were preying on borrower's precarious financial circumstances and imminent foreclosure sale of her home. Dawson v. Thomas (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

Evidence of former homeowner's medical condition was admissible as directly relevant to her Consumer Protection Procedures Act (CPPA) action against purported money lender, property purchaser, and company owned by purchaser, arising out of sale of home prior to foreclosure sale; former homeowner alleged that purported lender and purchaser took advantage of her inability to protect her interests due to her medical condition. Modern Mgmt. Co. v. Wilson, 997 A.2d 37, 2010 D.C. App. LEXIS 283 (2010), writ of certiorari denied by 132 S. Ct. 111, 181 L. Ed. 2d 36, 2011 U.S. LEXIS 5544, 80 U.S.L.W. 3182 (U.S. 2011).

Warranties.

Dry cleaning business's "satisfaction guaranteed" sign was not an unconditional and unlimited warranty of satisfaction as determined solely by the customer, and instead representation was properly considered in terms of how a reasonable customer would view and understand the representation, for purposes of common law fraud and Consumer Protection Procedures Act (CPPA) action customer asserted against business and its owners after business allegedly lost customer's pants. Pearson v. Soo Chung, 961 A.2d 1067, 2008 D.C. App. LEXIS 486 (2008).

§ 28-3905. Complaint procedures.

(a) A case is begun by filing with the Department a complaint plainly describing a trade practice and stating the complainant's (and, if different, the consumer's) name and address, the name and address (if known) of the respondent, and such other information as the Director may require. The complaint must be in or reduced by the Director to writing. The filing of a complaint with the Department shall toll the periods for limitation of time for bringing an action as set out in section 12-301 until the complaint has been resolved through an administrative order, consent decree, or dismissal in accordance with this section or until an opportunity to arbitrate has been provided in Chapter 5 of Title 50.

(b)(1) Except as provided in paragraph (2) of this subsection, the Director shall investigate each such complaint and determine:

(A) What trade practice actually occurred; and

(B) Whether the trade practice which occurred violates any statute, regulation, rule of common law, or other law of the District of Columbia.

(2) The Director may, in his or her discretion, decline to prosecute certain cases as necessary to manage the Department's caseload and control program costs.

(b-1) In carrying out an investigation and determination pursuant to subsection (b) of this section, the Director shall consult the respondent and such other available sources of information, and make such other efforts, as are appropriate and necessary to carry out such duties.

(c) If at any time the Director finds that the trade practice complained of may, in whole or in part, be a violation of law other than a law of the District of Columbia or a law within the jurisdiction of the Department, the Director may in writing so inform the complainant, respondent and officials of the District, the United States, or other jurisdiction, who would properly enforce such law.

(d) The director shall determine that there are, or are not, reasonable grounds to believe that a trade practice, in violation of a law of the District of Columbia within the jurisdiction of the Department, has occurred in any part or all of the case. The Director may find that there are not such reasonable grounds for any of the following reasons:

(1) any violation of law which may have occurred is of a law not of the District of Columbia or not within the jurisdiction of the Department, or occurred more than three years prior to the filing of the complaint;

(2) in case paragraph (1) of this subsection does not apply, no trade practice occurred in violation of any law of the District;

(3) the respondent cannot be identified or located, or would not be subject to the personal jurisdiction of a District of Columbia court;

(4) the complainant, to the Director's knowledge, no longer seeks redress in the case;

(5) the complainant and respondent, to the Director's knowledge, have themselves reached an agreement which settles the case; or

(6) the complainant can no longer be located.

(d-1) The Director may dismiss any part or all of a case to which one or more of the reasons stated in subsection (d) of this section apply. The Director shall inform all parties in writing of the determination, and, if any part or all of the case is dismissed, shall specify which of the reasons in this subsection applies to which part of the case, and such other detail as is necessary to explain the dismissal.

(e) The Director may attempt to settle, in accordance with subsection (h) of this section, each case for which reasonable grounds are found in accordance with subsection (d-1) of this section. After the Director's determination as to whether the complaint is within the Department's jurisdiction, in accordance with subsection (d-1) of this section, the Director shall:

(1) effect a consent decree;

(2) dismiss the case in accordance with subsection (h)(2) of this section;

(3) through the Chief of the Office of Compliance present to the Office of Adjudication, with copies to all parties, a brief and plain statement of each trade practice that occurred in violation of District law, the law the trade practice violates, and the relief sought from the Office of Adjudication for violation; or

(4) notify all parties of another action taken, with the reasons therefor stated in detail and supported by fact. Reasons may include:

(A) any reason listed in subsections (d)(1) through (d)(6) of this section; and

(B) that the presentation of a charge to the Office of Adjudication would not serve the purposes of this chapter.

(5) Repealed.

(f) When the case is transmitted to the Office of Adjudication, the Chief of the Office of Compliance shall sign, and serve the respondent, the Department's summons to answer or appear before the Office of Adjudication. Not less than 15 nor more than 90 days after such transmittal, the case shall be heard. The case shall proceed under section 10 of the District of Columbia Administrative Procedure Act (section 2-509). The Office of Adjudication may, without delaying its hearing or decision, attempt to settle the case pursuant to subsection (h) of this section, and has discretion to permit any stipulation or consent decree the parties agree to. The Director shall be a party on behalf of the complainant. Applications to intervene shall be decided as may be proper or required by law or rule. Reasonable discovery shall be freely allowed. Any finding or decision may be modified or set aside, in whole or part, before a notice of appeal is filed in the case, or the time to so file has run out.

(g) If, after hearing the evidence, the Office of Adjudication decides a trade practice occurred in which the respondent violated a law of the District of Columbia within the jurisdiction of the Department, such Office of Adjudication shall issue an order which:

(1) shall require the respondent to cease and desist from such conduct;

(2) shall, if such Office of Adjudication also decides that the consumer has been injured by the trade practice, order redress through contract damages, restitution for money, time, property or other value received from the consumer by the respondent, or through rescission, reformation, repair, replacement, or other just method;

(3) shall state the number of trade practices the respondent performed in violation of law;

(4) shall, absent good cause found by the Office of Adjudication, require the respondent to pay the Department its costs for investigation, negotiation, and hearing;

(5) may include such other findings, stipulations, conditions, directives, and remedies including punitive damages, treble damages, or reasonable attorney's fees, as are reasonable and necessary to identify, correct, or prevent the conduct which violated District law; and

(6) may be based, in whole or part, upon a violation of a law establishing or regulating a type of business, occupational or professional license or permit,

and may refer the case for further proceedings to an appropriate board or commission, but may not suspend or revoke a license or permit if there is a board or commission which oversees the specific type of license or permit.

(h)(1) At any time after reasonable grounds are found in accordance with subsection (d) of this section, the respondent, the Department (represented by (i) the Director prior to transmittal to the Office of Adjudication and after an order issued pursuant to subsection (f) of this section has been appealed, and (ii) the Office of Adjudication after transmittal to the Office of Adjudication and prior to such appeal), and the complainant, may agree to settle all or part of the case by a written consent decree which may:

(A) include any provision described in subsection (g)(2) through (6) of this section;

(B) not contain an assertion that the respondent has violated a law;

(C) contain an assurance that the respondent will refrain from a trade practice;

(D) bar the Department from further action in the case, or a part thereof; or

(E) contain such other provisions or considerations as the parties agree to.

(2) The representative of the Department shall administer the settlement proceedings, and may utilize the good offices of the Advisory Committee on Consumer Protection. All settlement proceedings shall be informal and include all interested parties and such representatives as the parties may choose to represent them. Such proceedings shall be private, and nothing said or done, except a consent decree, shall be made public by the Department, any party, or the Advisory Committee, unless the parties agree thereto in writing. The representative of the Department may call settlement conferences. For persistent and unreasonable failure by the complainant to attend such conferences or to take part in other settlement proceedings, the Director, prior to transmittal to the Office of Adjudication, may dismiss the case.

(3) A consent decree described in paragraph (1) of this subsection may be modified by agreement of the Department, complainant and respondent.

(i)(1) An aggrieved party may appeal to the District of Columbia Court of Appeals after:

(A) the Office of Adjudication decides a case pursuant to subsection (f) of this section;

(B) all parts of a case have been dismissed by operation of subsection (d) or (e) of this section; or

(C) the Director dismisses an entire case in accordance with subsection (h)(2) of this section.

(1A) Such appeals shall be conducted in accordance with the procedures and standards of section 11 of the District of Columbia Administrative Procedure Act (section 2-510), and take into account the procedural duties placed upon the Department in this section and all actions taken by the Department in the case.

(2) An aggrieved party may appeal any ruling of the Office of Adjudication under subsection (j) of this section to the Superior Court of the District of Columbia.

(3)(A) Any person found to have executed a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department:

(i) shall be liable to the Department for a civil penalty of not exceeding $1000.00 for each violation enumerated in an order pursuant to subsection (g)(3) of this section; and

(ii) may be assessed and made liable to the Department for a civil penalty of not exceeding $1000.00 for each violation or failure to adhere to a provision, of an order described in subsection (f), (g), or (j) of this section or a consent decree described in subsection (h) of this section.

(B) The Department, the complainant, or the respondent may sue in the Superior Court of the District of Columbia for a remedy, enforcement, or assessment or collection of a civil penalty, when any violation, or failure to adhere to a provision of a consent decree described in subsection (h) of this section, or an order described in subsection (f), (g), or (j) of this section, has occurred. The Department shall sue in that Court for assessment of a civil penalty when an order described in subsection (g) of this section has been issued and become final. A failure by the Department or any person to file suit or prosecute under this subparagraph in regard to any provision or violation of a provision of any consent decree or order, shall not constitute a waiver of such provision or any right under such provision. The Court shall levy the appropriate civil penalties, and may order, if supported by evidence, temporary, preliminary, or permanent injunctions, damages, treble damages, reasonable attorney's fees, consumer redress, or other remedy. The Court may set aside the final order if the Court determines that the Department of Consumer and Regulatory Affairs lacked jurisdiction over the respondent or that the complaint was frivolous. If, after considering an application to set aside an order of the Department of Consumer and Regulatory Affairs, the Court determines that the application was frivolous or that the Department of Consumer and Regulatory Affairs lacked jurisdiction, the Court shall award reasonable attorney's fees.

(C) Application to the Court to enforce an order shall be made at no cost to the District of Columbia or the complainant.

(4) The Corporation Counsel shall represent the Department in all proceedings described in this subsection.

(j) If, at any time before notice of appeal from a decision made according to subsection (f) of this section is filed or the time to so file has run out, the Director believes that legal action is necessary to preserve the subject matter of the case, to prevent further injury to any party, or to enable the Department ultimately to order a full and fair remedy in the case, the Chief of the Office of Compliance shall present the matter to the Office of Adjudication, which may issue a cease and desist order to take effect immediately, or grant such other relief as will assure a just adjudication of the case, in accordance with such beliefs of the Director which are substantiated by evidence. The Office of Adjudication's ruling may be appealed to court within 7 days of notice thereof on the Director, respondent, and complainant.

(k)(1)(A) A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

(B) An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(C) A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(D)(i) Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

(ii) An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

(A) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(B) Reasonable attorney's fees;

(C) Punitive damages;

(D) An injunction against the use of the unlawful trade practice;

(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(F) Any other relief which the court determines proper.

(3) Any written decision made pursuant to subsection (f) of this section is admissible as prima facie evidence of the facts stated therein.

(4) If a merchant files in any court a suit seeking to collect a debt arising out of a trade practice from which has also arisen a complaint filed with the Department by the defendant in the suit either before or after the suit was filed, the court shall dismiss the suit without prejudice, or remand it to the Department.

(5) An action brought by a person under this subsection against a nonprofit organization shall not be based on membership in such organization, membership services, training or credentialing activities, sale of publications of the nonprofit organization, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase or sale of consumer goods or services in the ordinary course of business.

(l) The Director and Office of Adjudication may use any power granted to the Department in section 28-3903, as each reasonably deems will aid in carrying

out the functions assigned to each in this section. Each, while holding the primary responsibility of the Department for decision in a certain case, may join such case with others then before the Department. No case may be disposed of in a manner not expressly authorized in this section. Every complaint case filed with the Department and within its jurisdiction shall be decided in accordance with the procedures and sanctions of this section, notwithstanding that a given trade practice, at issue in the case, may be governed in whole or in part by another law which has different enforcement procedures and sanctions.

(m)(1) Whenever requested, the Department will make available to the complainant and respondent an explanation, and any other information helpful in understanding, the provisions of any consent decree to which the Department agrees, and any order or decision which the Department makes.

(2) The Director shall maintain a public index for all the cases on which the Department has made a final action or a consent decree, organized by:

(A) name of complainant;

(B) name of respondent;

(C) industry of the merchant involved;

(D) nature of the violation of District law alleged or found to exist (for example, subsection of section 28-3904 involved, or section of a licensing law involved);

(E) final disposition.

(n) There shall be established a Consumer Protection Education Fund ("Fund"). All monies awarded to or paid to the Department by operation of this section, including final judgements, consent decrees, or settlements reduced to final judgements, shall be paid into the Fund in order to further the purpose of this chapter as enumerated in § 28-3901.

(o) Every complaint case that is before the Department in accordance with this section shall proceed in confidence, except for hearings and meetings before the Office of Adjudication, until the Department makes a final action or a consent decree.

(p) The Director may file a complaint in accordance with subsection (a) of this section, on behalf of one or more consumers or as complainant, based on evidence and information gathered by the Department in carrying out this chapter. Persons not parties to but directly or indirectly intended as beneficiaries of an order described in subsection (f), (g), or (j) of this section, or a consent decree described in subsection (h) of this section, arising out of a complaint filed by the Director, may enforce such order or decree in the manner provided in subsection (i)(3)(B) of this section.

(q) At any hearing pursuant to subsection (f) or (j) of this section, a witness has the right to be advised by counsel present at such hearing. In any process under this section, the complainant and respondent may have legal or other counsel for representation and advice.

(r) All cases for which complaints were filed before March 5, 1981, may be presented to and heard by the Office of Adjudication notwithstanding the time limits previously provided in section 28-3905(d), 28-3905(e), and 28-3905(f) for the investigation and transmittal of cases to the Office of Adjudication, and for the hearing of cases by the Office of Adjudication.

(July 22, 1976, D.C. Law 1-76, § 6, 23 DCR 1185; June 11, 1977, D.C. Law 2-8, § 4(b), 24 DCR 726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 5, 1981, D.C. Law 3-159, §§ 2(b), (c), 3, 27 DCR 5147; Mar. 8, 1991, D.C. Law 8-234, § 2(f), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(f), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(y), 44 DCR 1271; Apr. 29, 1998, D.C. Law 12-86, § 1301(c), 45 DCR 1172; Oct. 19, 2000, D.C. Law 13-172, § 1402(d), 47 DCR 6308; Oct. 20, 2005, D.C. Law 16-33, § 2032(d), 52 DCR 7503; June 12, 2007, D.C. Law 17-4,§ 2(b), 54 DCR 4085; Apr. 23, 2013, D.C. Law 19-282, § 2(b)(3), 60 DCR 2132.)

Cross references. — Hearing aid dealers and consumers, office of consumer protection, powers and duties, see § 28-4002.

Section references. — This section is referenced in § 28-3818, § 28-3901, § 28-3902, § 28-3903, § 28-3906, and § 28-4002.

Prior Codifications. — 1981 Ed., § 28-3905.

1973 Ed., T. 28, Appx., § 6.

Effect of amendments. — D.C. Law 13-172 added the introductory sentence to subsec. (k)(2) pertaining to the penalties being cumulative and additional and rewrote subsec. (k)(1).

D.C. Law 16-33 rewrote subsec. (b), which had read:

"(b) The Director shall investigate each such complaint and determine:

"(1) what trade practice actually occurred, and

"(2) whether the trade practice which occurred violates any statute, regulation, rule of common law, or other law, of the District of Columbia."

D.C. Law 17-4 added subsec. (k)(5).

The 2013 amendment by D.C. Law 19-282 rewrote (k)(1) and (k)(2).

Emergency legislation. — For temporary (90-day) amendment of section, see § 1402(d) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) amendment of section, see § 1402(d) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

For temporary (90 day) amendment of section, see § 2032(d) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 2-8. — For legislative history of D.C. Law 2-8, see Historical and Statutory Notes following § 28-3903.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-159. — For legislative history of D.C. Law 3-159, see Historical and Statutory Notes following § 28-3902.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 10-68. — For legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 12-86. — For legislative history of D.C. Law 12-86, see Historical and Statutory Notes following § 28-3902.

Legislative history of Law 13-172. — For Law 13-172, see notes following § 28-3901.

Legislative history of Law 16-33. — For Law 16-33, see notes following § 28-3901.

Legislative history of Law 17-4. — For Law 17-4, see notes under § 28-3905.

Legislative history of Law 19-282. — See note to § 28-3901.

CASE NOTES

ANALYSIS

Administrative proceedings.

By failing to present them to Department of Consumer and Regulatory Affairs (DCRA), individual who was charged with Consumer Protection Procedures Act violations for rendering legal advice as nonlawyer failed to preserve for appeal constitutional and statutory issues. D.C. Code 1981, § 28-3904. Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Department of Consumer and Regulatory Affairs (DCRA) could use Court of Appeals' analysis in prior unauthorized practice of law action respecting nonlawyer as basis for defining practice of law for purposes of evaluating whether nonlawyer engaged in deceptive trade practices under Consumer Protection Procedures Act when he misrepresented himself as advocate in labor area with skills equivalent to those of lawyer; DCRA made its own, independent findings about nonlawyer's conduct based on hearing testimony and documentary evidence. D.C. Code 1981, § 28-3904(a, b, d). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Once complaint is filed with Office of Consumer Protection, merchant must be given chance to explain the occurrence complained of by consumer and thorough investigation must be made. D.C. Code 1981, § 28-3905(b). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Subsection (k)(4) is not merely the procedural mechanism for resolving disputes; it is asserted only after a merchant has filed suit to collect a debt against the consumer and since it entitles the consumer to have the suit removed from the court, either by dismissal or remand, it constitutes a defense to the merchant's suit. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

Arbitration.

Consumer's allegation in his complaint that he signed a credit agreement at jewelry store was binding upon him, despite his later assertion that he did not sign the agreement, and therefore consumer was bound by arbitration agreement in the application in his action against bank and store, alleging violations of the Truth in Lending Act (TILA), Fair Credit Reporting Act (FCRA) and District of Columbia Consumer Procedures Protection Act; arbitration clause applied to any claim of any kind, including disputes as to whether a particular claim must be arbitrated. Watson v. Gold N Diamonds, Inc., 736 F.Supp.2d 266, 2010 U.S. Dist. LEXIS 95644 (2010).

Attorney fees.

Borrower, who prevailed on his District of Columbia Consumer Protection Procedures Act (CPPA) claim against lender, but did not prevail on his fraud and Truth in Lending Act (TILA) claims, could recover attorney fees only for work related to claim on which he prevailed, and fees awarded on that claim had to be reasonable in relation to success achieved. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Borrower's unsuccessful Truth in Lending Act (TILA) and fraud claims against lender were sufficiently related to borrower's successful District of Columbia Consumer Protection Procedures Act (CPPA) and unconscionability claims so as to warrant inclusion of time spent on TILA and fraud claims in award of attorney fees under CPPA, even though successful claims were based on borrower's inability to understand transaction or to repay loan, while unsuccessful claims were based on accuracy and completeness of lender's disclosures and representations; all claims involved common core of facts and related legal theories, so unsuccessful claims were not distinctly different in all respects from successful claims. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Attorney fee award of $199,340 against home refinancing lender for violation of District of Columbia Consumer Protection Procedures Act (CPPA) was reasonable, even though it was disproportionate to borrower's CPPA damages award of $25,200; given public policy interests served by CPPA, court would decline to read rule of proportionality into statute, as such rule would make it difficult, if not impossible, for individuals with meritorious claims but relatively small potential damages to obtain redress from courts. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

The Court of Appeals customarily defers to the district court's judgment regarding the calculation of an award of attorney fees under the District of Columbia Consumer Protection Procedures Act (CPPA), because an appellate court

is not well situated to assess the course of litigation and the quality of counsel; by contrast, the district court closely monitors the litigation on a day-to-day basis, presiding at numerous motions, discovery disputes, and chambers conferences, as well as at the pretrial conference and trial. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Ill-positioned to second guess the district court's calculation of an award of attorney fees under the District of Columbia Consumer Protection Procedures Act (CPPA), the Court of Appeals needs only verify that the district court provided a concise but clear explanation of its reasons for the fee award. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Plaintiffs who succeeded in settling their claim that wireless communication service provider's former officers violated District of Columbia Consumer Protection and Procedures Act (DCCPPA) through provider's fraudulent consumer rebate practices could not recover attorney fees associated with their efforts to mediate dispute with provider and other parties prior to filing of amended complaint naming officers, where those efforts failed to produce settlement, and their focus was upon provider and plaintiffs' class action claims. In re InPhonic, Inc., 674 F.Supp.2d 273, 2009 U.S. Dist. LEXIS 118345 (2009).

Hourly rate of $379.22 was reasonable in calculating attorney fee award under District of Columbia Consumer Protection and Procedures Act (DCCPPA). In re InPhonic, Inc., 674 F.Supp.2d 273, 2009 U.S. Dist. LEXIS 118345 (2009).

Plaintiffs who obtained settlement of their consumer fraud claims against provider of wireless communication services were "successful" in their litigation, and thus were entitled to award of attorney fees and costs under District of Columbia Consumer Protection and Procedures Act (DCCPPA). In re InPhonic, Inc., 674 F.Supp.2d 273, 2009 U.S. Dist. LEXIS 118345 (2009).

Attorneys' fees recoverable under private attorney general provision of District of Columbia Consumer Protection Procedures Act (CPPA) had to be apportioned among all of plaintiffs when considering whether amount in controversy requirement of diversity jurisdiction statute had been satisfied on removal, even assuming action could be retained in federal court where satisfaction of amount in controversy requirement depended solely upon award of attorneys' fees. Breakman v. AOL, LLC, 545 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 31365 (2008).

Defendant's conjecture regarding possible amount of attorneys' fees was inadequate to satisfy amount in controversy requirement of diversity jurisdiction statute on removal although statute under which claim had been brought did allow for recovery of reasonable attorney fees. Breakman v. AOL, LLC, 545 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 31365 (2008).

In action raising common-law claims as well as fee-generating claims under D.C. Consumer Protection Procedural Act and Truth in Lending Act, award of attorneys' fees to plaintiff was proper, even though fee-generating claims were not reached, where plaintiff had prevailed on her common-law claims, fee-generating claims arose from same operative facts as nonfee claims and concerned same issues, and fee-generating claims were substantial. Truth in Lending Act, § 102 et seq., 15 U.S.C. § 1601 et seq.; D.C. Code 1978 Supp., Tit. 28 App. § 1 et seq. Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

In determining reasonable award of attorneys' fees to prevailing plaintiff in consumer protection action, court would initially determine lodestar award, which was reasonable number of hours spent on case times reasonable rate for various persons who worked on case, and then adjust lodestar up or down after examining and weighing Johnson criteria, most important being contingent nature of fee and quality of representation. Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

In determining award of reasonable attorneys' fees to prevailing plaintiff in consumer protection action, request for award to cover costs of secretarial overtime incurred would be denied. Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

Reasonable hourly rate of compensation, for purpose of assessment of reasonable attorneys' fees against defendant in consumer protection action, was that prevailing in community for similar work. Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

Adjustments to lodestar attorneys' fee award in consumer protection action are based primarily on contingent nature of fee and quality of representation. Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

Lodestar attorneys' fee figure to be awarded successful plaintiff in consumer protection action would be increased by 10% where some of legal views were complex and novel and time to brief them was short and payment of any fee depended on success of litigation, but existing lodestar figure well-compensated attorneys for their efforts, and one attorney had been paid at hourly rate of $75 despite fact that he had only been practicing for two and one-half years.

Greene v. Gibralter Mortg. Inv. Corp., 529 F. Supp. 186, 1981 U.S. Dist. LEXIS 16400 (1981).

Award for attorney fees based on successful claim alleging violation of Consumer Protection Procedures Act (CPPA) was supported by record; trial court approached issue of attorney fees in a careful manner, basing the award on what would have been a reasonable amount of time to spend on the case, and trial court applied the Laffey Matrix to find the appropriate hourly rate, resulting in a $4,500 award for the CPPA claim. Brandywine Apts., LLC v. McCaster, 964 A.2d 162, 2009 D.C. App. LEXIS 10 (2009).

Proof of borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note would entitle borrowers to submit proof that those actions caused them to incur legal expenses and fees in connection with lender's subsequent attempted foreclosure. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Administrative law judge did not have inherent equitable authority to award victorious merchant attorney's fees and punitive damages in administrative action brought by Department of Consumer and Regulatory Affairs alleging violations of Consumer Protection Procedures Act; imposition of attorney fees or punitive damages as remedy and sanction after decision on merits without statutory or regulatory authorization and in spite of statutory language barring unspecified relief would have far exceeded scope of ALJ's limited power to regulate procedures and events within hearing process itself. D.C. Code 1981, §§ 28-3903, 28-3905(l). Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1992 D.C. App. LEXIS 1 (1992).

Purchasers of defective heating and cooling system were not entitled to award of attorneys' fees under the Consumer Protection Act incurred in appeal from award in favor of purchasers in action alleging breach of contract and violation of Act; trial court erred in computing amount of damages. D.C. Code 1981, § 28-3905(k)(1)(B). Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Plaintiff who recovered damages in excess of $415,000 for defendant's violations of Consumer Protection Procedures Act (CPPA) was entitled to award of reasonable attorney fee under CPPA of $196,000, which represented a 25% reduction in requested fees to take into account not insignificant time spent on legal arguments on which plaintiff was not successful and time spent on other defendants. Jackson v. Byrd, 133 WLR 715 (Super. Ct. 2004).

Burden of proof.

Under District of Columbia law, residential homeowners were not required to submit accounting to court before attorney fees could be awarded in their action against contractor under Consumer Protection Procedures Act for violating regulation requiring contractors doing home improvement work to be licensed. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Under District of Columbia law, plaintiffs seeking punitive damages under Consumer Protection Procedures Act must be able to prove outrageous conduct that is malicious, wanton, reckless, or in willful disregard for another's rights. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

To qualify for an award of restitution under the theory of unjust enrichment in the District of Columbia, plaintiffs must show that they conferred a benefit upon defendants under circumstances in which it would be unjust or inequitable for defendants to retain the benefit. Health Care Serv. Corp. v. Mylan Labs, Inc. (In re Lorazepam & Clorasepate Antitrust Litig.), 295 F.Supp.2d 30, 2003 U.S. Dist. LEXIS 23803 (2003).

To state a general claim for unjust enrichment in the District of Columbia, plaintiffs must establish that: (1) they conferred a legally cognizable benefit upon the defendant; (2) defendant possessed an appreciation or knowledge of the benefit; and (3) defendant accepted or retained the benefit under inequitable circumstances. Health Care Serv. Corp. v. Mylan Labs, Inc. (In re Lorazepam & Clorasepate Antitrust Litig.), 295 F.Supp.2d 30, 2003 U.S. Dist. LEXIS 23803 (2003).

For District of Columbia Consumer Procedures and Protection Act (CPPA) violation based on intentional misrepresentation, plaintiff must demonstrate required nexus between conduct and entrepreneurial aspect of physician's practice by satisfying common-law standard of clear and convincing evidence. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

For the plaintiff to recover on a quasi-contractual claim, he must show that the defendant was unjustly enriched at his expense and that the circumstances were such that in good conscience the defendant should make restitution. News World Communs., Inc. v. Thompsen, 878 A.2d 1218, 2005 D.C. App. LEXIS 380 (2005).

Class actions.

Where each individual District of Columbia consumer could have brought his own claim against Internet service provider (ISP), for its unlawful trade practices in violation of District of Columbia Consumer Protection Procedures Act (CPPA) in not disclosing material facts regarding pricing plans to its current and past members, claims were separate and distinct, and thus any expected recovery of punitive

damages had to be apportioned to each consumer and could not be aggregated on removal to satisfy amount in controversy requirement under diversity jurisdiction statute. Breakman v. AOL, LLC, 545 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 31365 (2008).

Actual and statutory damages could not be aggregated on removal to establish diversity jurisdiction in representative action under District of Columbia Consumer Protection Procedures Act (CPPA) alleging that Internet service provider (ISP) engaged in unlawful trade practices by failing to disclose material facts regarding pricing plans to its current and past members. Breakman v. AOL, LLC, 545 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 31365 (2008).

Representative action removed from Superior Court of District of Columbia, alleging that Internet service provider (ISP) engaged in unlawful trade practices by failing to disclose material facts regarding pricing plans to its current and past members, was authorized by District of Columbia Consumer Protection Procedures Act (CPPA) and was separate and distinct procedural vehicle from class action, and thus Class Action Fairness Act (CAFA) did not apply and action had to be remanded. Breakman v. AOL, LLC, 545 F.Supp.2d 96, 2008 U.S. Dist. LEXIS 31365 (2008).

Questions regarding whether patient bringing action and other potential class members obtained their medical records for consumer purposes, as required for a claim under the Consumer Protection Procedures Act (CPPA), did not defeat commonality, typicality and adequacy prerequisites for certification of a class, in action against medical records company by patient who alleged that company charged unconscionably high fees in violation of the CPPA when he sought copies of medical records for use in his personal injury lawsuit, as patient had a consumer purpose when he purchased his records from the company, and it was unlikely that other class members obtained their medical records for reasons that could be characterized as other than personal or familial. Julian Ford v. ChartOne, Inc., 908 A.2d 72, 2006 D.C. App. LEXIS 533 (2006).

Compromise and settlement.

Homeowners' failure to deliver clear title to property effected unilateral breach of settlement agreement which had been reached concerning homeowners' claims against mortgage company and other individuals stemming from refinancing of property, and thus nonbreaching parties were released from their corresponding promises under settlement agreement to provide homeowners with refinancing; parties to settlement agreement did not enter into contract on mistaken assumption that there was no lien against property, but rather took care to allocate risk of clear title to homeowners. Gaines v. Continental Mortg. & Inv. Corp., 865 F.2d 375, 1989 U.S. App. LEXIS 270 (C.A.D.C. 1989).

Plaintiffs who succeeded in settling their claim that wireless communication service provider's former officers violated District of Columbia Consumer Protection and Procedures Act (DCCPPA) through provider's fraudulent consumer rebate practices could not recover attorney fees associated solely with class certification issues, where complaint alleged existence of class, but none was ever certified. In re InPhonic, Inc., 674 F.Supp.2d 273, 2009 U.S. Dist. LEXIS 118345 (2009).

Office of Consumer Protection, as plaintiff in action to enforce settlement contract, could not request that Superior Court adjudicate the merits of the underlying contract dispute between contractor and consumer, where settlement agreement contained denial of illegality on contractor's part and reservation of right to hearing before the agency on underlying claim. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Construction and application.

Physician's alleged statement to patient regarding her eye problem that "[w]hat you have, I can fix" was not intentional misrepresentation made with entrepreneurial motives, as required for claim under District of Columbia Consumer Protection Procedures Act (CPPA), rather, such statement was conduct within "actual practice of medicine," which was not subject to CPPA. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Amendment to Consumer Protection Procedures Act (CPPA), permitting actions for "damages for personal injury of a tortious nature," does not apply retroactively. Parker v. Martin, 905 A.2d 756, 2006 D.C. App. LEXIS 488 (2006).

Tenants' misrepresentation claims against landlord, management company, and company's principals could not be pursued under the Consumer Protection Procedures Act, where claims sought damages for personal injury of a tortious nature, and arose in the context of landlord-tenant relations. Childs v. Purll, 882 A.2d 227, 2005 D.C. App. LEXIS 470 (2005).

Trade practices that violate other laws, including the common law, also fall within enforcement provisions of the Consumer Protection Procedures Act (CPPA). Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Consumer Protection Procedures Act applies to nonlawyers who purport to practice law. D.C. Code 1981, §§ 28-3901 et seq., 28-3903(c)(2)(C). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari

denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

The District of Columbia Consumer Protection Procedures Act establishes the Department of Consumer and Regulatory Affairs as the consumer protection agency of the D.C. Government and sets up procedures for the agency to investigate and remedy consumer complaints; it enumerates a broad array of "unfair trade practices" and provides mechanisms for consumers to pursue both administrative and judicial remedies. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

This act is not designed to protect contractors but consumers, and the administrative remedies are for their benefit. Feinstone v. Potomac Group, Inc., 122 WLR 233 (Super. Ct. 1993).

A contractor has no right to initiate proceedings under this act and no standing to invoke this act on its own behalf. Feinstone v. Potomac Group, Inc., 122 WLR 233 (Super. Ct. 1993).

Consumer.

Under District of Columbia Consumer Procedures and Protection Act (CPPA), where physician was merchant, who supplied services that were subject matter of medical practice, physician's patient was "consumer," as she provided economic demand for physician's medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Corporation engaged in interstate sale of long distance telephone services was not "consumer" within meaning of Consumer Protection Procedures Act, and thus could not maintain action against competitor under Act for allegedly engaging in unfair trade practices; Act supplies consumers with private cause of action against merchants and is not intended to supply merchants with private cause of action against other merchants. D.C. Code 1981, §§ 28-3901(a)(2, 4), 28-3905(k)(1, 2). Independent Communications Network, Inc. v. MCI Telecommunications Corp., 657 F. Supp. 785, 1987 U.S. Dist. LEXIS 2889 (1987).

Consumer transactions.

Psychologists' association and its lobbying arm were exempt from psychologists' consumer protection action, under District of Columbia's Consumer Protection Procedures Act (CPPA), arising out of association's alleged misrepresentations that special assessment paid by psychologists to association for use by lobbying arm was required for membership in association, as psychologists' claims were based on membership in association and membership services. In re APA Assessment Fee Litigation, 2012 WL 1940224 (2012).

Plaintiff failed to allege actual or threatened injury-in-fact from consuming food containing trans fat purchased from national restaurant chain, as required to have standing to bring claim against restaurant chain pursuant to District of Columbia Consumer Protection Procedures Act (DCCPPA) for allegedly failing to disclose presence of trans fat in its food products. Hoyte v. Yum! Brands, Inc., 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

It is not use to which purchaser ultimately puts goods or services, but rather nature of purchaser that determines nature of transaction for purposes of Consumer Protection Procedures Act; if purchaser is regularly engaged in business of buying goods or service in question for later resale to another in distribution chain or retail to general public, then transaction in course of that business is not within Act but, on the other hand, if purchaser is not engaged in regular business of purchasing this type of goods or service and reselling it, then transaction will usually fall within the Act. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Auction sale of antique blanket chest was "consumer transaction" subject to Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Transactions along distribution chain that do not involve ultimate retail customer are not consumer transactions that Consumer Protection Procedures Act seeks to reach; rather, it is ultimate retail transaction between final distributor and individual member of consuming public that Act covers. D.C. Code 1981, § 28-3901(a)(2, 3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Damages.

— Emotional damages.

Proof of borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note would permit borrowers to recover for any emotional harm that may have occurred as result of lender's actions. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Emotional distress damages are not permissible on claim for negligent misrepresentation. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Upon proof of intentional misrepresentation, plaintiff may recover emotional damages that are natural and proximate result of defendant's conduct, even if tort was committed in contractual contract. Osbourne v. Capital City Mort-

gage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

— In general.

Unlike the District of Columbia Consumer Protection Procedures Act (DCCPPA), actual damages are not required for standing under the Fair Debt Collection Practices Act (FDCPA). Muldrow v. EMC Mortg. Corp., 766 F.Supp.2d 230, 2011 U.S. Dist. LEXIS 20379 (2011), affirmed by 444 Fed. Appx. 455, 2011 U.S. App. LEXIS 22140 (D.C. Cir. 2011).

Jury improperly awarded prospective tenant $2,500 in statutory damages under Consumer Protection Procedures Act (CPPA), for defendant apartment complex's refusal to rent apartment, where CPPA capped damages at $1,500, and there was no evidence indicating award was for treble damages. Brandywine Apts., LLC v. McCaster, 964 A.2d 162, 2009 D.C. App. LEXIS 10 (2009).

Under former version of Consumer Protection Procedures Act (CPPA), patient could not recover damages for personal injury from gastroenterologist's alleged misrepresentations about attempt to secure health insurer's authorization of colonoscopy and about diagnosis of diarrhea before another physician discovered colon cancer; the claims attacked actual performance of medical service and would be more appropriately addressed in the context of a medical malpractice claim. Caulfield v. Stark, 893 A.2d 970, 2006 D.C. App. LEXIS 93 (2006).

Consumers' damages, in class action against cable company for unreasonably high late penalties brought pursuant to Consumer Protection Procedures Act (CPPA), were the unjustified excess portion of fees added when company increased fees from $2.43 to $5.00, rather than total amount of late fees collected, and thus only the overcharge was subject to trebling; company was entitled to collect actual damages for late payments in amount to $2.43 per payment, presumably on the unchallenged premise that consumers contractually obligated themselves to pay a reasonable charge to reimburse company for its collection costs if they failed to pay on time. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Fact that consumers could have avoided cable company's late penalties by paying on time did not preclude consumers from establishing consequential damages in class action brought pursuant to Consumer Protection Procedures Act (CPPA) for unreasonable penalties; once consumers were delinquent, they were obligated to pay late fee to retain their cable service, such that company caused them actual injury by overcharging them. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Once first lender sold note to second lender and released deed of trust securing note, borrowers did not suffer compensable injury based on continuing cloud on their title or possibility of foreclosure on their property, as required for standing to sue first lender for misrepresentation and failure to release trust; threatened foreclosure by second lender, allegedly caused by first lender's actions, was not present possibility, and borrowers were not injured by first lender's failure to release deed of trust because third lender, with which borrowers had reached refinancing agreement, would have succeeded to first lender's trust position. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Although Interest Rate Ceiling Amendment Act was ambiguous on its face as to whether proof of damages was required for misrepresentation claim, use of conjunctive phrase "actual and punitive damages" meant that proof of actual damages was condition of "any other relief," including punitive damages. D.C. Code 1981, § 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Even if buyer of power stapler through Internet auction service had an actionable claim against seller under Consumer Protection Act (CPA), superior court, in exercise of its discretion, would award nothing to buyer on claim for statutory damages, where buyer was awarded his actual damages under "benefit of bargain" claim, as result of seller's default. Nicely v. Jones, 132 WLR 2101 (Super. Ct. 2004).

Paragraph (1) of subsection (k) does not mandate treble damage recovery, it merely allows such recovery. Baccus v. Franklin Inv. Co., 114 WLR 745 (Super. Ct. 1986).

— Punitive damages.

Once it was established that borrower had suffered damage in home loan refinancing transaction, District of Columbia Consumer Protection Procedures Act (CPPA) authorized district court to treble damages against lender without further findings. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Under District of Columbia law, residential homeowners were not entitled to punitive damages in their action against contractor under Consumer Protection Procedures Act for violating regulation requiring contractors doing home improvement work to be licensed, even though contractor fraudulently misrepresented that he was licensed home improvement contractor in District. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Under District of Columbia law, there was clear and convincing evidence that lender and its principal acted with malice when they en-

gaged in predatory loan scheme whereby they fraudulently took title to borrower's house and re-sold it without her knowledge, and thus award of punitive damages in amount of $100,000 was warranted pursuant to Consumer Protection Procedures Act (CPPA), where lender and its principal were aware that borrower was in vulnerable position because she was unemployed and in danger of losing her house, and led her to believe that they would assist her in avoiding foreclosure, but instead obtained title to her residence for fraction of its value, re-sold it without her knowledge, and extracted significant equity from it. Griffith v. Barnes, 560 F.Supp.2d 29, 2008 U.S. Dist. LEXIS 45058 (2008).

Under District of Columbia law, punitive damages for alleged breach of contract to renovate homes were not available against contractor who recommended, allegedly vouched for, and agreed to supervise repairman who performed work, absent evidence that contractor acted with intent to deceive and thus that he committed fraud or another willful tort. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Punitive damages are generally not recoverable in the District of Columbia for breach of contract, but in certain narrowly defined circumstances, where breach of contract merges with, and assumes the character of, a wilful tort, punitive damages may be assessed. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Under District of Columbia law, to succeed on a claim for punitive damages arising from an intentional tort, the plaintiff must establish that the tortious act was committed with an evil motive, actual malice, deliberate violence or oppression or for outrageous conduct in willful disregard for another's rights. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Under District of Columbia law, punitive damages are normally available only in actions arising from intentional torts. Calvetti v. Antcliff, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

To obtain an award of "punitive damages," the plaintiff must prove egregious conduct and the requisite mental state by clear and convincing evidence. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

"Punitive damages" are a form of punishment. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

"Punitive damages" are to be awarded only in cases of outrageous or egregious wrongdoing where the defendant has acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

In the absence of gross fraud or comparable wrongdoing, proof of even intentional misrepresentation may not suffice to justify "punitive damages." Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

When treble damages are awarded for remedial purposes, they are not a substitute for punitive damages and the heightened proof requirements for punitive damages do not apply. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

When the award of multiple damages is intended to serve penal purposes, it is a substitute for punitive damages, and the same or similar proof requirements usually must be satisfied. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Statutory provisions for double or treble damages often do serve the same penal purposes as punitive damages. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Consumers in class action against cable company for unreasonably high late penalties, brought pursuant to Consumer Protection Procedures Act (CPPA), were not entitled to punitive damages, where company acknowledged to administrative agency responsible for regulating cable television services that amount of fee was not cost-based, but instead was designed to deter delinquencies, which was a legitimate business goal even if company overstepped the bounds in pursuing it. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Once it is established that a consumer has suffered any damage, the Consumer Protection Procedures Act (CPPA) authorizes courts to treble damages without further findings; purpose of treble damages under the CPPA is remedial rather than punitive, such that plaintiffs are entitled to an award of treble damages without the showing of egregious conduct and malice required for punitive damages. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Administrative law judge did not have statutory authority to award victorious merchant attorney fees and punitive damages in administrative action brought by Department of Consumer and Regulatory Affairs alleging violations of Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3903, 28-3903(c)(1), (c)(2)(E), 28-3905, 28-3905(g)(5), (i)(3)(B), (l). Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1992 D.C. App. LEXIS 1 (1992).

Trial court's finding that heating contractor was guilty of continuing failure to admit to its

mistake in design and installation of heating and cooling system and of unwillingness to rectify situation was sufficient to support award of punitive damages under the Consumer Protection Act. D.C. Code 1981,§ 28-3905(k)(1)(C). Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Assuming buyer of power stapler through Internet auction service had an actionable claim against seller under Consumer Protection Act (CPA), his recovery of less than $50 on a single purchase that legally involved only himself precluded award of punitive damages. Nicely v. Jones, 132 WLR 2101 (Super. Ct. 2004).

Treble and punitive damages are considered mutually exclusive remedies, and prohibited as simultaneous recoveries arising out of the same conduct on constitutional grounds, because such a double recovery of a penalty offends notions of due process. Baccus v. Franklin Inv. Co., 114 WLR 745 (Super. Ct. 1986).

Where a plaintiff has already received a substantial punitive damage award under subsection (k)(1)(C), authorized to accommodate the same interests which treble damage provisions traditionally serve, a court is justified as a matter of its discretion in concluding that trebling of compensatory damages is unnecessary and unwarranted. Baccus v. Franklin Inv. Co., 114 WLR 745 (Super. Ct. 1986).

— Treble damages, damages.

Under District of Columbia law, homeowners asserting claim against contractor under Consumer Protection Procedures Act for violating regulation requiring contractors doing home improvement work to be licensed could recover three times actual damages they suffered as result of contractor's conduct, rather than three times total amount they paid to contractor. Djourabchi v. Self, 571 F.Supp.2d 41, 2008 U.S. Dist. LEXIS 57445 (2008).

Purported money lender, property purchaser, and company owned by purchaser were entitled to pro rata setoff of $40,000 from treble compensatory damages award of $180,000, which was awarded to former homeowner under the Consumer Protection Procedures Act (CPPA) in her action arising out of sale of home prior to foreclosure sale, representing settlement between former homeowner and law firm involved in transaction; law firm's involvement in sale of home was extrinsic to former homeowner's CPPA claims. Modern Mgmt. Co. v. Wilson, 997 A.2d 37, 2010 D.C. App. LEXIS 283 (2010), writ of certiorari denied by 132 S. Ct. 111, 181 L. Ed. 2d 36, 2011 U.S. LEXIS 5544, 80 U.S.L.W. 3182 (U.S. 2011).

Evidence.

There was no evidence that lender's alleged failure to advise borrower that terms of repayment agreement were not negotiable or that borrower would have to make $2500 good faith down payment before agreement became effective, in violation of District of Columbia Consumer Protection Procedures Act (DCCPPA), caused borrower to miss payments, which led to her alleged damages in form of late fees, collection costs and interest. Muldrow v. EMC Mortg. Corp., 766 F.Supp.2d 230, 2011 U.S. Dist. LEXIS 20379 (2011), affirmed by 444 Fed. Appx. 455, 2011 U.S. App. LEXIS 22140 (D.C. Cir. 2011).

Evidence supported finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provisions governing unlawful trade practices, despite fact that client understood that nonlawyer was not licensed lawyer; nonlawyer misrepresented himself as advocate in labor area with skills equivalent to those of lawyer, calling himself "administrative advocate." D.C. Code 1981, § 28-3904(a, b, d). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Substantial evidence did not support finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act unlawful trade practices provision prohibiting misrepresenting as to material fact which has tendency to mislead when nonlawyer accepted partial payment from client for services he did not render; even if nonlawyer implicitly misrepresented that he performed services for the payment, there was no discernible tendency to mislead, as client dismissed nonlawyer before he had opportunity to perform any service. D.C. Code 1981, § 28-3904(e). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

No substantial evidence supported finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provision, prohibiting representing that subject of transaction has been supplied in accordance with previous representation when it has not, by refusing to refund client's fee payment after client dismissed nonlawyer despite lawyer's agreement to refund; nonlawyer did not represent that he was entitled to payment as compensation for services or as damages for breach of contract. D.C. Code 1981, § 28-3904(u). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari

denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Substantial evidence did not support finding of Department of Consumer and Regulatory Affairs (DCRA) that nonlawyer violated Consumer Protection Procedures Act provision, prohibiting failing to supply to consumer copy of service contract, by failing to provide written contract to client who had retained nonlawyer respecting labor-related dispute; nonlawyer had promised to give client contract after filing fees had been paid and initial paper work had been completed, but client dismissed nonlawyer before he could complete initial paper work. D.C. Code 1981, § 28-3904(q). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Judicial proceedings.

Under District of Columbia choice-of-law principles, District of Columbia law, rather than California law, applied to psychologists' consumer protection claims against psychologists' association and its lobbying arm, based on allegations that association misrepresented that special assessment paid by psychologists to association for use by lobbying arm was required for membership in association, as both jurisdictions had interest in applying their own laws to facts of case, and District of Columbia was forum jurisdiction. In re APA Assessment Fee Litigation, 2012 WL 1940224 (2012).

In action brought by mortgagor against mortgagee alleging that mortgagee's financing practices in refinancing mortgage violated District of Columbia Consumer Protection Procedures Act (CPPA), dismissal of mortgagor's claim seeking to quiet title, under District of Columbia law, against mortgagee on grounds that mortgagee obtained its security interest in property through unconscionable terms would be premature, since quiet title count depended upon outcome of mortgagor's pending claim alleging violation of CPPA. Hughes v. Abell, 634 F.Supp.2d 110, 2009 U.S. Dist. LEXIS 62495 (2009).

Patients who were prescribed medication for chronic pain relief, but who personally suffered no ill effects or lack of efficacy, did not have standing under a fraud on the market theory to bring claims under the District of Columbia Consumer Protection Procedures Act (CPPA). Williams v. Purdue Pharma Co., 297 F.Supp.2d 171, 2003 U.S. Dist. LEXIS 23369 (2003), dismissed by 2004 U.S. App. LEXIS 12718 (D.C. Cir. June 23, 2004).

Borrowers alleged sufficient injury to maintain misrepresentation claim against lender under Consumer Protection Procedures Act and under Interest Rate Ceiling Amendment Act, based on borrowers' claim that lender intentionally misrepresented pay-off amount on loan secured by deed of trust and improperly failed to release trust to another lender and cancel note, thereby causing economic and emotional damages. D.C. Code 1981, §§ 28-3904, 28-3312. Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1995 D.C. App. LEXIS 230 (1995).

Counterclaim by purchasers of cooling and heating system, which asserted that heating contractor violated Consumer Protection Act, was sufficient to put contractor on notice that it was subject to all penalties provided for by Act, including punitive damages. D.C. Code 1981, § 28-3905(k)(1)(B); Civil Rule 8. Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams, 580 A.2d 583, 1990 D.C. App. LEXIS 270 (1990).

Superior Court is forum of first instance, in actions involving settlement agreements between Office of Consumer Protection, merchant and consumer, only for enforcement and collection of the agency's orders, and the agency's Section of Hearings is the proper initial forum for all other determinations. D.C. Code 1981, § 28-3905(g), (h)(1), (i)(3)(B). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

Jurisdiction.

Mortgagee failed to establish that value of consumer's putative disgorgement claim, even if aggregable, exceeded $75,000, and thus remand for lack of diversity jurisdiction was warranted in action alleging mortgagee had engaged in unfair and deceptive trade practices in violation of District of Columbia Consumer Protection Procedures Act (CPPA); mortgagee's assertion that it had received revenues in excess of $65,000 from transactions with District residents was unsupported and based on unsworn averment by mortgagee's counsel, and consumer's putative mass disgorgement claim could not be combined with his individual CPPA claims. Mostofi v. Network Capital Funding Corp., 798 F.Supp.2d 52, 2011 U.S. Dist. LEXIS 76704 (2011).

Aggregating consumers' claims was not proper, for purposes of satisfying amount in controversy requirement for diversity jurisdiction in non-profit consumer group's removed action against cereal manufacturer, alleging that manufacturer made false representations, in violation of District of Columbia's Consumer Protection Procedures Act (CPPA); non-profit's claim for damages was not a common, undivided claim which would lend itself to aggregation, but rather, damages were payable to the consumers. Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Jurisdictional amount requirement was not satisfied in class action under District of Columbia Consumer Protection Procedures Act, and therefore suit was not subject to removal; class representative's claim could not be aggregated with those of other class members to satisfy jurisdictional amount requirement since suit sought damages for individual consumers, not disgorgement, and did not seek to establish a joint or common right in a common fund. Reigner v. Ingersoll-Rand Co., 461 F.Supp.2d 1, 2004 U.S. Dist. LEXIS 30303 (2004).

Patient's claim against physician, alleging that physician misrepresented material facts about cataract surgery, constituting an unlawful trade practice under the District of Columbia Consumer Procedures and Protection Act (CPPA), did not lie in tort for personal injury, as would limit district court's jurisdiction and available remedies over claim to jurisdiction of Department of Consumer and Regulatory Affairs. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Limitation of actions.

Plaintiff's knowledge of wrongdoing on part of one defendant does not cause accrual of plaintiff's action against another, unknown defendant responsible for same harm, unless two defendants were closely connected, such as in superior-subordinate relationship; whether that relationship is sufficiently close to cause accrual should generally be considered as question of fact that may be imputed to plaintiff by same standard of reasonable diligence under circumstances, but, in some circumstances, relationship of defendants, together with other facts, may establish as matter of law that reasonable plaintiff with knowledge of misconduct of one would have conducted investigation as to other. Diamond v. Davis, 680 A.2d 364, 1996 D.C. App. LEXIS 310 (1996).

Merchant.

Attendee at closing was not commercial participant or merchant in sale of vendor's residential real property, and thus his actions were not regulated by District of Columbia Consumer Protection Procedures Act (DCCPPA); attendee did not receive payment for his role in contract of sale, did not make or enforce any of purportedly unconscionable terms in contract, did not acquire equitable interest in property, and did not hold himself out as mortgage broker or credit protection merchant. Ali v. Mid-Atlantic Settlement Servs., 640 F.Supp.2d 1, 2009 U.S. Dist. LEXIS 61306 (2009), affirmed by 636 F.3d 622, 394 U.S. App. D.C. 325, 2011 U.S. App. LEXIS 3867, 78 Fed. R. Serv. 3d (Callaghan) 1188 (2011).

Physician was "merchant" under District of Columbia Consumer Procedures and Protection Act (CPPA) because he supplied services that were subject matter of trade practice, namely, services that were subject of medical practice. Dorn v. McTigue, 157 F.Supp.2d 37, 2001 U.S. Dist. LEXIS 11076 (2001).

Auctioneer was "merchant" as defined in Consumer Protection Procedures Act. D.C. Code 1981, § 28-3901(a)(3). Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1989 D.C. App. LEXIS 149 (1989).

Plaintiff who supplied consumer credit to defendants could properly be considered a "merchant" under the terms of this section. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

This section requires that assignees of consumers' retail installment contracts are subject to treatment as "merchants," whether or not they actually sold the products involved in a consumer complaint. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

Preemption.

Consumers' Consumer Protection Procedures Act (CPPA) claims against cellular-telephone businesses were not, pursuant to conflict preemption, preempted by Federal Communications Commission (FCC) radio frequency (RF) radiation standard, as consumers, who alleged they were deceived in violation of the CPPA, did not necessarily have to establish that they were injured as a result of RF radiation from cell phones that complied with FCC standard in order to establish a violation of the CPPA, and defendants could be held liable for providing consumers with false and misleading information about cell phones without consumers having to prove they were exposed to unreasonably dangerous levels of radiation. Murray v. Motorola, Inc., 982 A.2d 764, 2009 D.C. App. LEXIS 547 (2009), amended by 2009 D.C. App. LEXIS 652 (D.C. Oct. 29, 2009).

Remedies.

District of Columbia Consumer Protection Procedures Act (CPPA) authorized award of both attorney fees and treble damages. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 2000 U.S. App. LEXIS 18294 (C.A.D.C. 2000).

Defendant's malicious conduct in gaining the confidence of homeowner, a frail, elderly, and vulnerable widow, by falsely advertising, in violation of Consumer Protection Procedures Act (CPPA), his foreclosure-avoidance services and thereby enabling defendant to gain her trust by a promise to save her home, after which he orchestrated a scheme to gain title to the home for a fraction of its value, warranted an award of punitive damages to homeowner's estate, separate from award of treble damages under CPPA. Byrd v. Jackson, 902 A.2d 778, 2006 D.C. App. LEXIS 362 (2006).

Remedies available under the Consumer Protection Procedures Act (CPPA) are broader than those under the No-Fault Motor Vehicle Insurance Act, in that under the No-Fault Act if it is determined that a policy was improperly cancelled the insurer is required to pay all the claims for which it would be liable under the policy, while under the CPPA, an administrative law judge may not only grant the relief available from the insurance administration, but may also issue a cease and desist order, award contract damages and restitution, impose costs, and grant preventive relief against future violations. D.C. Code 1981, §§ 28-3905(g), 35-2109(d)(1), (i)(3), (k). Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs, 566 A.2d 462, 1989 D.C. App. LEXIS 209 (1989).

Office of Consumer Protection was not entitled to rescission of underlying porch extension contract between contractor and consumer in agency's action for enforcement of consent decree, particularly where there were issues of material fact as to contract performance, even though contractor admitted in his answer that he did not have license to perform work and that he received advance payments from consumer, in violation of licensing law [D.C. Code §§ 47-2842, 47-2844]. D.C. Code 1981, § 28-3905. Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

In action by consumer to enforce settlement agreement, "consumer redress" which trial court may order might include the costs of the enforcement action, but award of rescission of underlying consumer contract may be part of trial court's order only in action to enforce final order of the Section of Hearings of the Officer of Consumer Protection. D.C. Code 1981, § 28-3905(i)(3)(B). Baker v. District of Columbia, 494 A.2d 1299, 1985 D.C. App. LEXIS 420 (1985).

The Office of Consumer Protection, or its successor, the Department of Consumer and Regulatory Affairs, is not limited to enforcement of a consent decree as its sole remedy but may be awarded damages. District of Columbia v. Baker, 112 WLR 509 (Super. Ct. 1984).

Right of action.

Indirect purchasers of generic anti-anxiety drugs stated claim for unjust enrichment in District of Columbia against companies involved in production of lorazepam and clorazepate, on allegations that companies worked in concert to increase prices of drugs, purchasers, and not their members, were forced to absorb those price increases, companies were unjustly enriched through payments made by purchasers to their members for drugs which conferred economic benefit upon companies in the nature of windfall profits which significantly increased companies' revenue and net earnings, and benefit that companies received was easily cognizable. Health Care Serv. Corp. v. Mylan Labs, Inc. (In re Lorazepam & Clorasepate Antitrust Litig.), 295 F.Supp.2d 30, 2003 U.S. Dist. LEXIS 23803 (2003).

Consumer, who brought action against telephone companies under the Consumer Protection Procedures Act (CPPA) for not reporting and turning over the unused value of prepaid calling cards to the District of Columbia, alleged in his complaint an injury-in-fact to himself, as required in order to establish standing and survive a motion to dismiss for lack of standing, where consumer alleged he had purchased and used prepaid calling cards in the District, that telephone companies failed to report and pay to the District the unused value of his prepaid calling cards, that companies' representations that the prepayments equaled the purchase price of the cards were misrepresentations in violation of the CPPA, that he brought the action for the interests of himself and the general public, and that he was entitled to injunctive relief. Grayson v. AT&T Corp., 15 A.3d 219, 2011 D.C. App. LEXIS 22 (2011).

Consumer, who brought action against telephone companies under the Consumer Protection Procedures Act (CPPA) for not reporting and turning over the unused value of prepaid calling cards to the District of Columbia, failed to state a claim for which relief could be granted, where consumer's complaint did not identify a representation by the companies that constituted a representation that the calling cards had benefits that they did not have, and did not identify a material fact which tended to mislead consumers. Grayson v. AT&T Corp., 15 A.3d 219, 2011 D.C. App. LEXIS 22 (2011).

Consumer retail credit regulations providing any consumer who suffers any damage as a result of unlawful trade practice with various types of relief has as condition precedent to suit that consumer suffer damage; statutory right to relief does not extend to consumer who has suffered no injury. D.C. Code 1981, § 28-3905(k)(1). Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 1991 D.C. App. LEXIS 37 (1991).

Plaintiffs' claims concerning a telecommunication company's unfair trade practices, fraud, negligence, breach of contract, and unjust enrichment, all based on District of Columbia statutory and common law, were dismissed for failing to state a claim for which relief can be granted in light of the federal filed tariff doctrine. Bootel v. MCI Telecommunications Corp., 125 WLR 97 (Super. Ct. 1997).

Standing.

Consumer of products in the District of Columbia, alleging an unlawful trade practice, had Article III standing to bring action alleging beverage maker's use of high fructose corn syrup in its purportedly "all natural" beverages

violated District of Columbia Consumer Protection Procedures Act (CPPA). Silvious v. Snapple Bev. Corp., 793 F.Supp.2d 414, 2011 U.S. Dist. LEXIS 68170 (2011).

There was no evidence that lender's alleged failure to advise borrower that terms of repayment agreement were not negotiable or that borrower would have to make $2500 good faith down payment before agreement became effective, in violation of District of Columbia Consumer Protection Procedures Act (DCCPPA), caused borrower to miss payments, which led to her alleged damages in form of late fees, collection costs and interest. Muldrow v. EMC Mortg. Corp., 766 F.Supp.2d 230, 2011 U.S. Dist. LEXIS 20379 (2011), affirmed by 444 Fed. Appx. 455, 2011 U.S. App. LEXIS 22140 (D.C. Cir. 2011).

Non-profit consumer group did not suffer injury-in-fact in its own right, as required for Article III standing, in action against cereal manufacturer alleging trade practice violations under District of Columbia's Consumer Protection Procedures Act (CPPA); manufacturer's conduct had allegedly injured the public, rather than the non-profit itself, and conduct simply gave non-profit opportunity to carry out its mission. Nat'l Consumers League v. General Mills, Inc., 680 F.Supp.2d 132, 2010 U.S. Dist. LEXIS 3307 (2010), appeal denied by 2010 U.S. App. LEXIS 13195 (D.C. Cir. June 25, 2010).

Trade practice.

Performance of legal services is "trade practice" under Consumer Protection Procedures Act. D.C. Code 1981, §§ 28-3901 et seq., 28-3903(c)(2)(C). Banks v. District of Columbia Dep't of Consumer & Regulatory Affairs, 634 A.2d 433, 1993 D.C. App. LEXIS 302 (1993), writ of certiorari denied by 513 U.S. 820, 115 S. Ct. 81, 130 L. Ed. 2d 34, 1994 U.S. LEXIS 5582, 63 U.S.L.W. 3258 (1994).

Selling compact discs (CDs) was a "trade practice," under the Consumer Protection Procedures Act, and, thus, alleged price fixing of CDs was an improper trade practice under Act, for which consumer had a right to bring an action against CD producers and distributors. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

Section does not require that the trade practice be committed by the same merchant who filed the suit to collect the debt. Chrysler First Fin. Servs. Corp. v. Fuller, 116 WLR 537 (Super. Ct. 1988).

§ 28-3906. Consumer education and information.

(a) The Office of Consumer Protection is established within the Department. The Office of Consumer Protection shall:

(1) Inform the public and the business community of existing laws, regulations, and guidelines concerning consumer rights and standards of fair treatment;

(2) Coordinate consumer education programs with, and use consumer education programs to help carry out, the consumer protection programs of the Department, including enforcement options through the Department and the Office of the Attorney General and before the courts;

(2A) Develop a consumer education program to educate consumers about the appropriateness of video and computer games for certain age groups, which may include information on video and computer game rating systems and the manner in which parental controls can enhance the ability of parents to regulate their children's access to video and computer games;

(3) Handle publicity for the Department concerning cases under § 28-3905 when the Director requests;

(4) Aid the Director in the formulation of consumer protection plans and recommend legislation and regulations related to consumer education;

(5) Cooperate with consumer-related agencies, groups, and individuals in the District of Columbia metropolitan area to improve consumer education efforts; and

(6) Perform the functions of the Department under § 28-3903(7) and (8) [§ 28-3903(a)(7) and (8)].

(b) The Chief of the Office of Consumer Protection shall be appointed by the Director.

(c) In fiscal year 2006, the Office of Consumer Protection shall focus on investigation and mediation in the areas of auto repair and home improvement.

(July 22, 1976, D.C. Law 1-76, § 7, 23 DCR 1185; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 8, 1991, D.C. Law 8-234,§ 2(g), 38 DCR 296; Oct. 20, 2005, D.C. Law 16-33, § 2032(e), 52 DCR 7503; Mar. 6, 2007, D.C. Law 16-218, § 2, 53 DCR 10209.)

Section references. — This section is referenced in § 28-3901.

Prior Codifications. — 1981 Ed., § 28-3906.

1973 Ed., T. 28, Appx., § 7.

Effect of amendments. — D.C. Law 16-33, rewrote section, which had read:

"(a) The Office of Consumer Education and Information shall:

"(1) inform the public and the business community of existing laws, regulations and guidelines concerning consumer rights and standards of fair treatment;

"(2) coordinate consumer education programs with, and use consumer education programs to help carry out, the consumer protection programs of the Office;

"(3) handle publicity for the Office Department concerning cases under section 28-3905, when the Director requests;

"(4) aid the Director in the formulation of consumer protection plans and recommend legislation and regulations related to consumer education;

"(5) cooperate with consumer-related agencies, groups and individuals in the D.C. area to improve consumer education efforts.

"(b) The Chief of the Office of Consumer Education and Information shall be appointed by the Director."

D.C. Law 16-218, in subsec. (a), added par. (2A).

Emergency legislation. — For temporary (90 day) amendment of section, see § 2032(e) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 8-234. — For legislative history of D.C. Law 8-234, see Historical and Statutory Notes following § 28-3909.

Legislative history of Law 16-33. — For Law 16-33, see notes following § 28-3901.

Legislative history of Law 16-218. — Law 16-218, the "Consumer Education on Video and Computer Games for Minors Act of 2006", was introduced in Council and assigned Bill No. 16-125, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 14, 2006, and December 5, 2006, respectively. Signed by the Mayor on December 19 2006, it was assigned Act No. 16-547 and transmitted to both Houses of Congress for its review. D.C. Law 16-218 became effective on March 6, 2007.

Editor's notes. — The bracketed language has been inserted in (a)(3) to correct an error in D.C. Law 8-234.

§ 28-3907. Advisory Committee on Consumer Protection.

(a) There shall be an Advisory Committee on Consumer Protection consisting of 11 members appointed by the Mayor for three-year terms. The nongovernmental members, immediately prior to the effective date of this chapter, of the Advisory Committee on Consumer Affairs established in Organization Order No. 40 (C.O. 73-225; October 3, 1973), shall carry out their terms. No District Government employees shall be members. Four members shall be District merchants. Seven members shall be persons with demonstrated and current records of activity on behalf of consumers.

(b) The Committee shall:

(1) recommend priorities in, and, at the Committee's discretion, carry out

investigations and research, which concern broad, developing, or frequently encountered consumer problems;

(2) assist the Director as the Director may request;

(3) monitor the performance and organization of the Office, by quantitative and qualitative methods, and make recommendations and criticisms, based thereon; and

(4) cooperate with consumer-related agencies, groups, and individuals in the District and in the metropolitan area to improve city-wide and area-wide consumer protection and education efforts.

(c) The Committee shall elect one of its members as Chairperson and another as Vice-Chairperson, each to serve at the pleasure of the Committee, and such other officers and subcommittees as it determines.

(d) The Office shall provide staff support for the Advisory Committee. Appropriate expenses incurred by the Committee as a whole, or by individual members, may be paid when authorized by the Director.

(e) The Committee shall meet on call by the Chairperson as frequently as required to perform its duties, but no less than once each month, and it shall submit an annual report to the Mayor, Council, and the public.

(f) The Committee shall hold public hearings as deemed necessary.

(July 22, 1976, D.C. Law 1-76, § 8, 23 DCR 1185; Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Apr. 9, 1997, D.C. Law 11-255, § 27(z), 44 DCR 1271.)

Section references. — This section is referenced in § 28-3901.

Prior Codifications. — 1981 Ed., § 28-3907.

1973 Ed., T. 28, Appx., § 8.

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-3901.

§ 28-3908. Severability.

If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of this chapter, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected.

(July 22, 1976, D.C. Law 1-76, § 9, 23 DCR 1185; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900.)

Prior Codifications. — 1981 Ed., § 28-3908.

1973 Ed., T. 28, Appx., § 9.

Legislative history of Law 1-76. — For legislative history of D.C. Law 1-76, see Historical and Statutory Notes following § 28-3901.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-3901.

§ 28-3909. Restraining prohibited acts.

(a) Notwithstanding any provision of law to the contrary, if the Corporation Counsel has reason to believe that any person is using or intends to use any

method, act, or practice in violation of section 28-3803, 28-3805, 28-3807, 28-3810, 28-3811, 28-3812, 28-3814, 28-3817, 28-3818, 28-3819, or 28-3904, and if it is in the public interest, the Corporation Counsel, in the name of the District of Columbia, may petition the Superior Court of the District of Columbia to issue a temporary or permanent injunction against the use of the method, act, or practice. In any action under this section, the Corporation Counsel shall not be required to prove damages and the injunction shall be issued without bond. The Corporation Counsel may recover restitution for property lost or damages suffered by consumers as a consequence of the unlawful act or practice.

(b) In addition, in an action under this section, the Corporation Counsel may recover a civil penalty of not more than $1,000 for each violation, the costs of the action, and reasonable attorney's fees.

(c) The Corporation Counsel may also:

(1) represent the interests of consumers before administrative and regulatory agencies and legislative bodies;

(2) assist, advise, and cooperate with private, local, and federal agencies and officials to protect and promote the interests of consumers;

(3) assist, develop, and conduct programs of consumer education and information through public hearings, meetings, publications, or other materials prepared for distribution to consumers;

(4) undertake activities to encourage local business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion, and sale of consumer goods and services and in the extension of consumer credit;

(5) perform other functions and duties which are consistent with the purposes or provisions of this chapter, and with the Corporation's Counsel's role as *parens patriae*, which may be necessary or appropriate to protect and promote the welfare of consumers;

(6) negotiate and enter into agreements for compliance by merchants with the provisions of this chapter; or

(7) publicize its own actions taken in the interests of consumers.

(Mar. 8, 1991, D.C. Law 8-234, § 2(h), 38 DCR 296; Oct. 19, 2000, D.C. Law 13-172, § 1402(e), 47 DCR 6308.)

Section references. — This section is referenced in § 28-3910 and § 28-5003.

Prior Codifications. — 1981 Ed., § 28-3909.

Effect of amendments. — D.C. Law 13-172 designated the existing text as subsec. (a), deleted from the second sentence thereof "on behalf of any identifiable person," preceding "may recover restitution", and added subsecs. (b) and (c).

Emergency legislation. — For temporary (90-day) amendment of section, see § 1402(e) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) amendment of section, see § 1402(e) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

Legislative history of Law 8-234. — Law 8-234, the "District of Columbia Consumer Protection Procedures Act Amendment Act of 1990," was introduced in Council and assigned Bill No. 8-111, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-317 and transmitted to both Houses of Congress for its review.

Legislative history of Law 13-172. — For Law 13-172, see notes following § 28-3901.

§ 28-3910. Investigatory powers of Corporation Counsel.

In the course of an investigation to determine whether to seek relief under section 28-3909, the Corporation Counsel may subpoena witnesses, administer oaths, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents. Information obtained under this section is not admissible in a later criminal proceeding against the person who provides the evidence.

(Oct. 19, 2000, D.C. Law 13-172, § 1402(f), 47 DCR 6308.)

Emergency legislation. — For temporary (90-day) addition of section, see § 1402(f) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) addition of section, see § 1402(f) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

Legislative history of Law 13-172. — For Law 13-172, see notes following § 28-3901.

§ 28-3911. District of Columbia Consumer Protection Fund. [Repealed].

Repealed.

(Oct. 19, 2000, D.C. Law 13-172, § 1402(f), 47 DCR 6308; Mar. 8, 2007, D.C. Law 16-237, § 2(d), 54 DCR 393; Sept. 18, 2007, D.C. Law 17-20, § 3023, 54 DCR 7052; Jan. 23, 2008, D.C. Law 17-68, § 2, 54 DCR 11648; Mar. 3, 2010, D.C. Law 18-111, § 3002, 57 DCR 181; Sept. 14, 2011, D.C. Law 19-21, § 9003(a), 58 DCR 6226.)

Temporary Amendment of Section. — For temporary (225 day) amendment of section, see § 2 of the District of Columbia Consumer Protection Fund Temporary Amendment Act of 2007 (D.C. Law 17-34, October 18, 2007, law notification 54 DCR 10704).

Emergency legislation. — For temporary (90-day) addition of section, see § 1402(f) of the Fiscal Year 2001 Budget Support Emergency Act of 2000 (D.C. Act 13-376, July 24, 2000, 47 DCR 6574).

For temporary (90 day) addition of section, see § 1402(f) of the Fiscal Year 2001 Budget Support Congressional Review Emergency Act of 2000 (D.C. Act 13-438, October 20, 2000, 47 DCR 8740).

For temporary (90 day) addition of section, see § 2(b) of Residential Water Lead Level Test Emergency Act of 2004 (D.C. Act 15-436, May 25, 2004, 51 DCR 5953).

For temporary (90 day) amendment of section, see § 2 of District of Columbia Consumer Protection Fund Emergency Amendment Act of 2007 (D.C. Act 17-64, June 28, 2007, 54 DCR 7046).

For temporary (90 day) amendment of section, see § 3023 of Fiscal Year 2008 Budget Support Emergency Act of 2007 (D.C. Act 17-74, July 25, 2007, 54 DCR 7549).

For temporary (90 day) amendment of section, see § 2 of District of Columbia Consumer Protection Fund Congressional Review Emergency Act of 2007 (D.C. Act 17-138, October 17, 2007, 54 DCR 10729).

For temporary (90 day) amendment of section, see § 3002 of Fiscal Year 2010 Budget Support Second Emergency Act of 2009 (D.C. Act 18-207, October 15, 2009, 56 DCR 8234).

For temporary (90 day) amendment of section, see § 3002 of Fiscal Year Budget Support Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-260, January 4, 2010, 57 DCR 345).

Legislative history of Law 13-172. — For Law 13-172, see notes following § 28-3901.

Legislative history of Law 16-237. — For Law 16-237, see notes following § 28-3851.

Legislative history of Law 17-20. — Law 17-20, the "Fiscal Year 2008 Budget Support Act of 2007", was introduced in Council and

assigned Bill No. 17-148 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 15, 2007, and June 5, 2007, respectively. Signed by the Mayor on June 28, 2007, it was assigned Act No. 17-63 and transmitted to both Houses of Congress for its review. D.C. Law 17-20 became effective on September 18, 2007.

Legislative history of Law 17-68. — Law 17-68, the "District of Columbia Consumer Protection Fund Act of 2007", was introduced in Council and assigned Bill No. 17-214 which was referred to the Committee on Public Safety and Judiciary. The Bill was adopted on first and second readings on October 23, 2007, and November 6, 2007, respectively. Signed by the Mayor on November 19, 2007, it was assigned Act No. 17-180 and transmitted to both Houses of Congress for its review. D.C. Law 17-68 became effective on January 23, 2008.

Legislative history of Law 18-111. — Law 18-111, the "Fiscal Year 2010 Budget Support Act of 2009", was introduced in Council and assigned Bill No. 18-203, which was referred to the Committee on the Whole. The bill was adopted on first and second readings on May 12, 2009, and September 22, 2009, respectively. Signed by the Mayor on December 18, 2009, it was assigned Act No. 18-255 and transmitted to both Houses of Congress for its review. D.C. Law 18-111 became effective on March 3, 2010.

Legislative history of Law 19-21. — Law 19-21, the "Fiscal Year 2012 Budget Support Act of 2011", was introduced in Council and assigned Bill No. 19-203, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 25, 2011, and June 14, 2011, respectively. Signed by the Mayor on July 22, 2011, it was assigned Act No. 19-98 and transmitted to both Houses of Congress for its review. D.C. Law 19-21 became effective on September 14, 2011.

Short title. — Short title: Section 3001 of D.C. Law 18-111 provided that subtitle A of title III of the act may be cited as the "Consumer Protection Funds Act of 2009".

Editor's notes. — Section 9052(b) of D.C. Law 19-21 purported to amended this section which was repealed by section 9003(a) of Law 19-21.

§ 28-3912. Submissions to the Council.

The Department shall, in coordination with the Office of the Attorney General, submit 2 plans to the Council:

(1) A detailed plan for fiscal year 2006 on the steps that the Department shall take in providing consumer protection education in the District, including the dissemination of information regarding legal options through the Department and before the Office of the Attorney General and the Courts, to be submitted by September 1, 2005; and

(2) A plan to fully implement this subchapter in fiscal year 2007, including any recommended amendments to this subchapter, to be submitted by February 1, 2006, in anticipation of the fiscal year 2007 budget.

(Oct. 20, 2005, D.C. Law 16-33, § 2032(f), 52 DCR 7503.)

Emergency legislation. — For temporary (90 day) addition, see § 2032(f) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 16-33. — For Law 16-33, see notes following § 28-3901.

§ 28-3913. Rules.

The Mayor may issue rules necessary to carry out this chapter. Rules proposed pursuant to this section shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 45-day review period, the proposed rules shall be deemed disapproved.

(Oct. 20, 2005, D.C. Law 16-33, § 2032(f), 52 DCR 7503.)

Emergency legislation. — For temporary (90 day) addition, see § 2032(f) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 16-33. — For Law 16-33, see notes following § 28-3901.

Chapter 40. Hearing Aid Dealers and Consumers.

§ 28-4001. Definitions.

As used in this chapter, the term —

(1) "audiologist" means any person who has at least a master's degree in audiology and meets the requirements of the American Speech-Language-Hearing Association Certificate of clinical competence or the equivalent in the determination of the Board of Medicine. The title "audiologist" shall not be used singly or in combination with other words unless the person using the title holds the appropriate certification from the American Speech-Language-Hearing Association.

(2) "fitting and selling of hearing aids" means those practices used for the purpose of making selection, adaptation or sale of hearing aids.

(3) "hearing aid" means any wearable instrument or device designed or offered for the purpose of aiding or compensating for impaired human hearing and any parts, attachments, or accessories of that wearable instrument, excluding batteries, cords or earmolds.

(4) "hearing test evaluation" means a written statement, based on testing conducted by an audiologist, otolaryngologist, or a medical technician directly supervised by an otolaryngologist. The statement shall include the following information:

(A) the ear or ears to be fitted;
(B) the type of earmold;
(C) the gain (amplification) of the hearing aid;
(D) the minimum and maximum power output of a hearing aid;
(E) the frequency response of the hearing aid;
(F) the results of pure tone and speech audiometry; and
(G) the date of the hearing test.

This shall not prevent an audiologist or otolaryngologist from recommending a specific make and model of hearing aid.

(5) "medical clearance" means a written statement based upon a medical examination by an otolaryngologist, that concludes that the patient may benefit from a hearing aid and that there are no medical conditions to contraindicate the use of a hearing aid. The statement must include the date of the medical examination.

(6) "Office" means the Office of Consumer Protection of the District of Columbia.

(7) "otolaryngologist" means a physician licensed in the District of Columbia who specializes in medical problems of the ear, nose, and throat.

(8) "person" means any individual, partnership, association, organization, or corporation.

(9) "registrant" means a hearing aid dispenser, audiologist, or otolaryngologist who engages in the practice of fitting and selling hearing aids and who has registered pursuant to section § 28-4003.

(10) "sell" or "sale" means any transfer of title or of the right of use by sale, conditional sales contract, lease, bailment, hire-purchase, or any other means, excluding wholesale transactions of dealers and distributors.

(11) "telephone option" means an option available on hearing aids which enables the wearer to hear the electrical signal on the telephone line rather than the acoustic signal produced by the telephone.

(12) "used hearing aid" means a hearing aid which has been worn for any period of time by a buyer or potential buyer.

(13) "hearing aid dispenser" means a person who is at least 18 years of age, has a high school diploma or the equivalent, and has received a certificate of competence from the National Hearing Aid Society or another recognized national organization approved by the Department of Consumer and Regulatory Affairs.

(Oct. 26, 1977, D.C. Law 2-33, § 2, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900; Dec. 10, 1987, D.C. Law 7-46,§ 2(a), 34 DCR 6847; Apr. 9, 1997, D.C. Law 11-255, § 27(aa), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-4001.

1973 Ed., T. 28, Appx., § 52.

Legislative history of Law 2-33. — Law 2-33, the "Hearing Aid Dealers and Consumer Act of 1977," was introduced in Council and assigned Bill No. 2-39, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on July 12, 1977 and July 26, 1977, respectively. Signed by the Mayor on August 17, 1977, it was assigned Act No. 2-79 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-85. — Law 3-85, the "Enacted Titles Numbering and Amendment Act of 1980," was introduced in Council and assigned Bill No. 3-296, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 20, 1980 and June 3, 1980, respectively. Signed by the Mayor on June 20, 1980, it was assigned Act No. 3-202 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-46. — Law 7-46, the "Hearing Aid Dealers and Consumers Act of 1977 Amendment Act of 1987," was introduced in Council and assigned Bill No. 7-51, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on July 14, 1987, and September 29, 1987, respectively. Signed by the Mayor on October 16, 1987, it was assigned Act No. 7-79 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

§ 28-4002. Powers and duties of the Office of Consumer Protection.

The Office shall:

(1) issue and renew certificates of registration to engage in the business of fitting and selling of hearing aids, as provided in section 28-4003; and

(2) implement and enforce the provisions of this chapter by utilizing the powers, procedures and sanctions of the Office, as provided for in sections

28-3903 and 28-3905 of the "District of Columbia Consumer Protection Procedures Act", approved July 22, 1976 (D.C. Law 1-76) [D.C. Official Code, §§ 28-3903 and 28-3905] and the regulations of the Office.

(Oct. 26, 1977, D.C. Law 2-33, § 3, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900.)

Prior Codifications. — 1981 Ed., § 28-4002.

1973 Ed., T. 28, Appx., § 53.

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

§ 28-4003. Registration.

(a) It is unlawful for a person to engage in the practice of fitting and selling of hearing aids without having first obtained a certificate of registration from the Office under the provisions of this chapter.

(b) Nothing in this chapter shall prohibit a corporation, partnership, trust, association, or other like organization maintaining an established business address in the District of Columbia from engaging in the business of fitting and selling of, or offering for sale, hearing aids at retail without a certificate of registration; provided, that any and all such fitting and selling of hearing aids is conducted by individuals who are registered pursuant to section 28-4003. Such corporations, partnerships, trusts, associations, or other like organizations shall file annually with the Office a list of all individuals holding valid certificates of registration who are directly or indirectly employed by them.

(c) Each person desiring to obtain a Certificate of Registration from the Office to engage in the practice of fitting and selling of hearing aids shall make an application to the Office. The application shall be made upon a form and in such manner as the Office shall provide. It shall set forth:

(1) the name and business address of the applicant:

(A) if an individual, the name under which he or she intends to conduct business;

(B) if a partnership, the name and business address of each member thereof and the name under which the business is to be conducted; or

(C) if a corporation, the name of the corporation and the name and business address of each of the officers of the corporation.

Any applicant who intends to conduct business under a fictitious name shall file with the application a copy of the registration of that fictitious name;

(2) the place or places, including the complete address or addresses, where the business is to be conducted; and

(3) such further information as the Office may prescribe.

(d) The Office shall act upon an application for a certificate of registration within thirty (30) days after receiving the application. Each application shall be accompanied by an application fee, which shall in no event be refunded. If an application is approved by the Office, upon payment of a registration fee, the applicant shall be granted a certificate of registration to be valid for a period determined by the Mayor of the District of Columbia. The certificate

shall be conspicuously posted in the place of business of the registrant. In the case of loss, mutilation, or destruction of a certificate, the Office shall issue a duplicate certificate, upon proof of facts and payment of a fee.

(e) If a registrant maintains more than one place of business within the District, he or she shall apply for and procure a duplicate certificate for each place of business. If a registrant has a change of address of place of business, he or she shall notify the Office within fifteen (15) days of such change.

(f) Certificates expire on the date determined by the Mayor of the District of Columbia. An unexpired certificate may be renewed by applying to the Office on the form prescribed by the Office and the payment of a renewal fee. Late applications for registration or renewal shall be an additional amount. The Office shall act on an application for renewal within thirty (30) days after receiving the application.

(g) The Office shall not prevent an applicant for a certificate of registration from fitting and selling of hearing aids pending a determination of the initial application within six (6) months after the effective date of this chapter.

(h) Repealed.

(i) The Mayor of the District of Columbia is authorized to fix and change from time to time the period for which any certificate of registration authorized under this chapter may be issued. The Mayor of the District of Columbia is authorized to set and change from time to time the amount of any fees provided for in sections 28-4003(d) and 28-4003(f).

(j) Certificates of registration issued under this section shall be issued as an Inspected Sales and Services endorsement to a basic business license under the basic business license system as set forth in subchapter I-A of Chapter 28 of Title 47.

(Oct. 26, 1977, D.C. Law 2-33, § 4, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900; Dec. 10, 1987, D.C. Law 7-46,§ 2(b), 34 DCR 6847; Apr. 20, 1999, D.C. Law 12-261, § 2003(u), 46 DCR 3142; Oct. 28, 2003, D.C. Law 15-38, § 3(s),)

Section references. — This section is referenced in § 28-4001 and § 28-4002.

Prior Codifications. — 1981 Ed., § 28-4003.

1973 Ed., T. 28, Appx., § 54.

Effect of amendments. — D.C. Law 15-38, in subsec. (j), substituted "an Inspected Sales and Services endorsement to a basic business license under the basic" for "a Class A Inspected Sales and Services endorsement to a master business license under the master".

Emergency legislation. — For temporary (90 day) amendment of section, see § 3(s) of Streamlining Regulation Emergency Act of 2003 (D.C. Act 15-145, August 11, 2003, 50 DCR 6896).

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 7-46. — For legislative history of D.C. Law 7-46, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 12-261. — Law 12-261, the "Second Omnibus Regulatory Reform Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-845, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 31, 1998, it was assigned Act No. 12-615 and transmitted to both Houses of Congress for its review. D.C. Law 12-261 became effective on April 20, 1999.

Legislative history of Law 15-38. — Law 15-38, the "Streamlining Regulation Act of 2003", was introduced in Council and assigned

Bill No. 15-19, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 3, 2003, and July 8, 2003, respectively. Signed by the Mayor on August 11, 2003, it was assigned Act No. 15-146 and transmitted to both Houses of Congress for its review. D.C. Law 15-38 became effective on October 28, 2003.

§ 28-4004. Special provisions.

(a) No registrant shall fit, offer for sale, or sell a hearing aid to a person unless, within the preceding three (3) months, the person has received a medical clearance after an examination by an otolaryngologist and a hearing test evaluation.

(b) No registrant shall sell a hearing aid not conforming to the hearing test evaluation required without prior consultation and written approval from the signer of the hearing test evaluation.

(c) Sections 28-4004(a) and 28-4004(b) do not apply to —

(1) the purchase of an identical hearing aid within two (2) years of the date that the purchaser receives the original aid; and

(2) the purchase of parts, attachments or accessories of the telephone designed to aid the hearing-impaired.

(d) If a prospective hearing aid user has a bona fide religious belief which precludes him or her from having a medical examination as required in section 28-4004(a), the prospective hearing aid user may waive the medical examination requirement; provided, that the prospective hearing aid user signs the following statement, printed in ten (10)-point type:

> "My religious beliefs require that I waive the medical examination and the hearing aid evaluation required by the 'Hearing Aid Dealer and Consumers Act of 1977' for the purchase of a hearing aid. I voluntarily waive the medical examination, notwithstanding the fact that I have been advised by
>
> ____
>
> HEARING AID DISPENSER'S NAME
>
> that my best health interest would be served if I had a medical evaluation by a physician who is an ear specialist."

No registrant shall seek to induce a prospective hearing aid user to execute such a waiver.

(e) Repealed.

(f) No hearing aid shall be sold to any person unless accompanied by a thirty (30) day money-back written guarantee providing that if the customer returns the hearing aid within thirty (30) days in the same condition as when purchased the customer shall be entitled to the return of the cost of the hearing aid and accessories as itemized on the bill provided pursuant to section 28-4005(a), but in no case shall the hearing aid dealer be permitted to retain a service charge greater than five percent (5%) of the cost of the hearing aid and accessories and the cost of the earmold.

(g) No registrant or agent thereof shall visit the home or shall telephone any potential buyer for the purpose of inducing a sale of a hearing aid without having obtained, prior to the visit, the express written consent of the buyer to

that visit. Any consent shall clearly and conspicuously state that the buyer is aware that the seller may attempt to sell a hearing aid during the visit.

(Oct. 26, 1977, D.C. Law 2-33, § 5, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900; Dec. 10, 1987, D.C. Law 7-46,§ 2(c), 34 DCR 6847.)

Section references. — This section is referenced in § 28-4005.

Prior Codifications. — 1981 Ed., § 28-4004.

1973 Ed., T. 28, Appx., § 55.

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 7-46. — For legislative history of D.C. Law 7-46, see Historical and Statutory Notes following § 28-4001.

§ 28-4005. Minimal procedures.

(a) Each hearing aid sale shall be accompanied by a receipt that includes:

(1) the name, address, and signature of the purchaser;

(2) the date of consummation of the sale;

(3) the name and address of the regular place of business, the number of the certificate of registration, and the signature of the registrant;

(4) the make, model, serial number, and purchase price of the hearing aid;

(5) a statement as to whether the hearing aid is "new" or "used";

(6) the complete terms of the sale, including:

(A) an itemization of the total purchase price, including but not limited to the cost of the hearing aid, the earmold, any batteries or other accessories, and any service costs; and

(B) a clear and precise statement of the terms of the trial period and the terms of any guarantee or warranty, including disclosures made pursuant to section 28-4006(a)(3)(H);

(7) the title and address of the Office, with a statement that complaints which arise with respect to the transaction may be submitted to the Office;

(8) the original of the written recommendation;

(9) the following statements in ten (10)-point type or larger:

(A) "This hearing aid will not restore normal hearing nor will it prevent further hearing loss";

(B) "No hearing aid may be sold to you without a prior medical examination"; and

(C) "A return visit to a physician who is an ear specialist or audiologist after the purchase of this aid will help you in best adapting to it"; and

(10) if the hearing aid sold has a telephone option, a statement that the telephone option will not work on all telephones and a statement indicating the types of telephones upon which it will work.

(b) Each registrant shall keep records for every customer to whom he or she renders services or sells a hearing aid, including:

(1) a copy of the receipt as specified in subsection (a) of this section;

(2) a record of services provided;

(3) any correspondence to or from the customer; and

(4) any waiver forms, as provided under section 28-4004(d). Such records shall be preserved for seven (7) years after the date of the transaction.

(c) Each registrant shall post conspicuously in large print at his or her place(s) of business and make available for inspection at any sale a retail price list showing all hearing aid models for sale.

(Oct. 26, 1977, D.C. Law 2-33, § 6, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900; Apr. 9, 1997, D.C. Law 11-255,§ 27(bb), 44 DCR 1271.)

Section references. — This section is referenced in § 28-4004.

Prior Codifications. — 1981 Ed., § 28-4005.

1973 Ed., T. 28, Appx., § 56.

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-4001.

§ 28-4006. Grounds for revocation and suspension.

(a) In addition to those practices prohibited under section 28-3904, the Office may deny the application for a certificate of registration or may suspend or revoke the certificate of registration of any hearing aid dealer issued pursuant to this chapter or may refuse to issue a renewal if it has been determined by the Office or a court of competent jurisdiction that such registrant has:

(1) made a material false statement or concealed a material fact in connection with an application for a certificate;

(2) had a certificate of registration issued under this chapter revoked or suspended previously;

(3) been guilty of fraud or fraudulent practices or has practiced dishonest or misleading advertising, including but not limited to:

(A) advertising a particular model, type, or kind of hearing aid when the offer is not a bona fide effort to sell the product so offered as advertised;

(B) advertising that a hearing aid is a new invention or involves a new mechanical, engineering, or scientific concept or principle in hearing aid capability;

(C) advertising that a hearing aid will be beneficial to persons with hearing loss, regardless of the type of hearing loss;

(D) advertising that a hearing aid will enable persons with a hearing loss to consistently distinguish and understand speech sounds in noisy situations;

(E) representing that the services or advice of a person licensed to practice medicine or of a person licensed as an audiologist will be used or made available in the selection, fitting, adjustment, maintenance, or repair of hearing aids when that is not true;

(F) using or incorporating in any title or designation the words “doctor”, “clinic”, “clinical audiologist”, “hearing aid audiologist”, or any other term unless legally qualified to use the term, abbreviation, or symbol;

(G) wearing any costume, which would tend to give a false impression that one is being treated medically or tested by an audiologist;

(H) representing, advertising, or implying that the hearing aid or repair is guaranteed, without a clear and concise disclosure of the identity of the guarantor, the nature and extent of the guarantee and any condition or limitations imposed;

(I) stating or implying that the use of any hearing aid will restore hearing to a normal level, preserve hearing, prevent or retard progression of a hearing impairment, save a person from deafness, or any other false or misleading medically or audiologically unsupportable claims regarding the efficacy or benefits of a hearing aid;

(J) representing or implying that a hearing aid is or will be "custom made", "made to order", "prescription made", or in any other sense especially fabricated for an individual person when such is not the case; and

(K) representing that a hearing aid has a telephone option, unless it is clearly and conspicuously disclosed that the telephone option will not work on all types of telephones;

(4) been grossly negligent in the fitting, selling, or repairing of any hearing aid;

(5) failed to comply with any other provision of this chapter or any rules or regulations promulgated hereunder; and

(6) directly or indirectly giving, offering to give, permitting or causing to be given, money or anything of value to any person who advises another in a professional capacity, as an inducement to influence such person, to have such person influence others, to purchase or contract to purchase any product sold or offered for sale by the registrant, or to influence any person to refrain from dealing in the products of competitors.

(b) For the purposes of paragraphs (3), (4), (5), and (6) of subsection (a) of this section, the actions of any employee of a hearing aid dealer shall be attributed to and deemed to be actions of such hearing aid dealer.

(c) Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this chapter, or any rules or regulations issued under the authority of this chapter, pursuant to Chapter 18 of Title 2. Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2.

(Oct. 26, 1977, D.C. Law 2-33, § 7, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900; Dec. 10, 1987, D.C. Law 7-46,§ 2(d), 34 DCR 6847; Mar. 8, 1991, D.C. Law 8-237, § 19, 38 DCR 314; Apr. 9, 1997, D.C. Law 11-255, § 27(cc), 44)

Section references. — This section is referenced in § 28-4005.

Prior Codifications. — 1981 Ed., § 28-4006.

1973 Ed., T. 28, Appx., § 57.

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 7-46. — For legislative history of D.C. Law 7-46, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 8-237. — Law 8-237, the "Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 Technical and Clarifying Amendments Act of

1990," was introduced in Council and assigned Bill No. 8-203, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-320 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-4001.

§ 28-4007. Severability.

The provisions of this chapter are severable, and if any provision, sentence, clause, section or part is held illegal, invalid, unconstitutional or inapplicable to any person or circumstances, such holding shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts of this chapter or its application to other persons or circumstances. It is hereby declared to be the legislative intent that this chapter would have been adopted if such illegal, invalid, inapplicable, or unconstitutional provision, sentence, clause, section, or part had not been included herein and if the person or circumstances to which the chapter or any part is inapplicable had been specifically exempted.

(Oct. 26, 1977, D.C. Law 2-33, § 8, 24 DCR 3726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(b), (e), 27 DCR 2900.)

Prior Codifications. — 1981 Ed., § 28-4007.

1973 Ed., T. 28, Appx., § 58.

Legislative history of Law 2-33. — For legislative history of D.C. Law 2-33, see Historical and Statutory Notes following § 28-4001.

Legislative history of Law 3-85. — For legislative history of D.C. Law 3-85, see Historical and Statutory Notes following § 28-4001.

CHAPTER 40A. ASSISTIVE TECHNOLOGY DEVICE WARRANTY.

§ 28-4031. Definitions.

For the purposes of this chapter, the term:

(1) "Assistive device dealer" means an individual or entity that is in the business of selling assistive technology devices, including a manufacturer who sells assistive technology devices directly to consumers.

(2) "Assistive device lessor" means an individual or entity that leases an assistive technology device to a consumer, or who holds the lessor's rights, under a written lease.

(3)(A) "Assistive technology device" means:

(i) An item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used or designed to be used to increase, maintain, or improve a functional capability of an individual with a disability; and

(ii) Each component of the assistive technology device system that is itself ordinarily an assistive technology device.

(B) The term "assistive technology device" includes:

(i) Wheelchairs and scooters of any kind, and other aids that enhance the mobility or positioning of an individual, such as motorization, motorized positioning features, and the switches and controls for motorized features;

(ii) Hearing aids, telephone communication devices for the deaf, and other assistive listening devices;

(iii) Computer equipment and reading devices with voice output, optical scanners, talking software, Braille printers, and other aids and devices that provide access to text;

(iv) Computer equipment with voice output, artificial larynges, voice amplification devices, and other alternative and augmentative communication devices;

(v) Voice recognition computer equipment, software and hardware accommodations, switches, and other forms of alternative access to computers;

(vi) Environmental control units; and

(vii) Simple mechanical aids that enhance the functional capabilities of an individual with disabilities.

(4) "Authorized dealer" means any seller of an assistive technology device that:

(A) Has, within a specified geographic area, an exclusive distribution arrangement with any person or entity that manufactures or assembles an assistive technology device; or

(B) Is designated by the individual or entity that manufactures or assembles the assistive technology device to repair or accept for repair the assistive technology device.

(5) "Collateral costs" means the following expenses incurred by a consumer:

(A) Medical expenses for the treatment of a physical injury caused by a nonconformity in an assistive technology device;

(B) The cost to rent a substitute assistive technology device during the time repairs are attempted for an assistive technology device or mobility aid that has a nonconformity and during the time preceding receipt of a replacement when repairs have been unsuccessful;

(C) The cost of shipping an assistive technology device that has a nonconformity to a manufacturer, lessor, or authorized dealer for repair or replacement; and

(D) The documented costs of long-distance telephone calls and facsimile transmissions used to contact the manufacturer, lessor, or authorized dealer for the purpose of effecting a repair or replacement of an assistive technology device that has a nonconformity.

(6) "Consumer" means:

(A) The purchaser of an assistive technology device, if the device was purchased from an authorized dealer or manufacturer for purposes other than resale;

(B) A person to whom the device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the device;

(C) A person who may enforce the warranty; or

(D) A person who leases a device from an assistive device lessor under a written lease.

(7) "Manufacturer" means an individual or entity that manufactures or assembles devices, and agents of that person or company, including an authorized dealer, an importer, distributor, factory branch, distributor branch, and any warrantors of the manufacturer's device. The term "manufacturer" shall not include a professional who fabricates, without charge, a device for use in the course of treatment.

(8) "Nonconformity" means a condition or defect that significantly impairs the use, value, function, or safety of a device or any of its components, but shall not include a condition or defect of the device that is the result of:

(A) Abuse, misuse, or neglect by a consumer;

(B) Modifications or alterations not authorized by the manufacturer; or

(C) Failure to follow any manufacturer's written service and maintenance guidelines furnished at the time of purchase.

(9)(A) "Reasonable attempt to repair" means that:

(i) Within one year after the date of the 1st delivery of the device:

(I) The same nonconformity has been subject to repair 3 or more times by the manufacturer, assistive device lessor, or any assistive device dealer authorized by the manufacturer to repair the assistive technology device, and the nonconformity continues to exist and interfere with the assistive technology device's operation; or

(ii) The assistive technology device is out of service, with no fungible loaner available, for a cumulative total of at least 30 days, exclusive of any

necessary time in shipment, due to repair by the manufacturer, assistive device lessor, or any assistive device dealer authorized by the manufacturer to repair the assistive technology device, all of which is due to warranty nonconformities.

(B) The term "reasonable attempt to repair" shall not include repairs:

(i) Unable to be performed because of conditions beyond the control of the manufacturer, or its agents or authorized dealers, such as invasion, strike, fire, and natural disasters.

(ii) Related to the routine fittings and adjustments to hearing aids.

(Oct. 26, 2010, D.C. Law 18-241, § 2, 57 DCR 7550; Sept. 26, 2012, D.C. Law 19-171, § 83(c), 59 DCR 6190.)

Effect of amendments. — The 2012 amendment by D.C. Law 19-171 made a technical correction to D.C. Law 18-241 which did not affect this section as codified; and substituted "this chapter" for "this act" wherever it appears.

Legislative history of Law 18-241. — Law 18-241, the "Assistive Technology Device Warranty Act of 2010", was introduced in Council and assigned Bill No. 18-527, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 29, 2010, and July 13, 2010, respectively. Signed by the Mayor on July 30, 2010, it was assigned Act No. 18-492 and transmitted to both Houses of Congress for its review. D.C. Law 18-241 became effective on October 26, 2010.

Legislative history of Law 19-171. — Law 19-171, the "Technical Amendments Act of 2012," was introduced in Council and assigned Bill No. 19-397. The Bill was adopted on first and second readings on Mar. 20, 2012, and Apr. 17, 2012, respectively. Signed by the Mayor on May 23, 2012, it was assigned Act No. 19-376 and transmitted to Congress for its review. D.C. Law 19-171 became effective on September 26, 2012.

§ 28-4032. Implied warranty; responsibility for repair; return or replacement; certain actions deemed void.

(a) Notwithstanding any other provision of law or express warranty furnished by the manufacturer, the manufacturer shall be deemed to have warranted that for a period of one year from date of 1st delivery to the consumer the assistive technology device, when used as intended, will be free from any nonconformity. Any nonconformity shall be repaired, including parts and labor, by the manufacturer or its agent without cost to the consumer.

(b) If, after a reasonable attempt to repair, the nonconformity is not repaired, the assistive device dealer, assistive device lessor, or manufacturer shall, within 30 days after a consumer's request:

(1) Refund to the consumer all collateral costs; and

(2)(A) Accept return of the nonconforming assistive technology device and replace the nonconforming assistive technology device with one of comparable value, function, and usefulness; or

(B) Refund the full purchase price to the consumer.

(c) A manufacturer or dealer exclusion or limitation of the implied warranties or consumer remedies prescribed by this section shall be void.

(d) A purported waiver of rights to legal action by a consumer within an assistive technology device purchase agreement or assistive technology device lease agreement shall be void.

(Oct. 26, 2010, D.C. Law 18-241, § 3, 57 DCR 7550; Sept. 26, 2012, D.C. Law 19-171, § 83(d), 59 DCR 6190.)

Effect of amendments. — The 2012 amendment by D.C. Law 19-171 made a technical correction to D.C. Law 18-241 which did not affect this section as codified.

Legislative history of Law 18-241. — For history of Law 18-241, see notes under § 28-4031.

Legislative history of Law 19-171. — See note to § 28-4031.

§ 28-4033. Returned devices; subsequent sale or lease; disclosure.

An assistive technology device returned due to nonconformity under the provisions of this chapter shall not be sold or leased unless full disclosure in writing of the reason for the return is made to any prospective consumer.

(Oct. 26, 2010, D.C. Law 18-241, § 4, 57 DCR 7550; Sept. 26, 2012, D.C. Law 19-171, §§ 83(c), 83(e), 59 DCR 6190.)

Effect of amendments. — The 2012 amendment by D.C. Law 19-171 made a technical correction to D.C. Law 18-241 which did not affect this section as codified; and substituted "this chapter" for "this act."

Legislative history of Law 18-241. — For history of Law 18-241, see notes under § 28-4031.

Legislative history of Law 19-171. — See note to § 28-4031.

§ 28-4034. Legal action.

(a) In addition to any other remedies otherwise available to a consumer, a consumer who suffers loss as a result of any violation of this chapter may bring an action to recover damages. The court shall award a consumer who prevails in an action twice the amount of any pecuniary loss, costs, reasonable attorneys' fees, and any equitable relief that the court determines is appropriate.

(b) The remedies under this chapter shall be cumulative and not exclusive and shall be in addition to any other legal or equitable remedies otherwise available to the consumer.

(Oct. 26, 2010, D.C. Law 18-241, § 5, 57 DCR 7550; Sept. 26, 2012, D.C. Law 19-171, §§ 83(c), 83(f), 59 DCR 6190.)

Effect of amendments. — The 2012 amendment by D.C. Law 19-171 made a technical correction to D.C. Law 18-241 which did not affect this section as codified; and substituted "this chapter" for "this act" wherever it appears.

Legislative history of Law 18-241. — For history of Law 18-241, see notes under § 28-4031.

Legislative history of Law 19-171. — Law 19-171, the "Technical Amendments Act of 2012," was introduced in Council and assigned Bill No. 19-397. The Bill was adopted on first and second readings on Mar. 20, 2012, and Apr. 17, 2012, respectively. Signed by the Mayor on May 23, 2012, it was assigned Act No. 19-376 and transmitted to Congress for its review. D.C. Law 19-171 became effective on Sept. 26, 2012.

Chapter 41. Natural Disaster Consumer Protection.

§ 28-4101. Definitions.

For the purposes of this chapter, the term:

(1) "Natural disaster" means the actual or imminent consequence of any disaster, catastrophe, or emergency, including fire, other than a fire caused by human error or arson, flood, earthquake, storm, or other serious act of nature, which threatens the health, safety, or welfare of persons or causes damage to property in the District of Columbia.

(2) "Normal average retail price" means:

(A) In the case of services, not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area during the 90-day period that preceded an emergency that resulted from a natural disaster, if an emergency is declared pursuant to § 28-4102(b); or

(B) In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period that immediately preceded an emergency that resulted from a natural disaster, if an emergency has been declared pursuant to § 28-4102(b).

(3) "Person" means a corporation, firm, agency, company, association, organization, partnership, society, joint stock company, or an individual.

(Mar. 20, 1992, D.C. Law 9-80, § 2, 39 DCR 675; Feb. 5, 1994, D.C. Law 10-68, § 27(g), 40 DCR 6311; May 16, 1995, D.C. Law 10-255, § 23, 41 DCR 5193.)

Prior Codifications. — 1981 Ed., § 28-4101.

Legislative history of Law 9-80. — Law 9-80, the "Natural Disaster Consumer Protection Act of 1992," was introduced in Council and assigned Bill No. 9-78, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 3, 1991, and January 7, 1992, respectively. Signed by the Mayor on January 28, 1992, it was assigned Act No. 9-137 and transmitted to both Houses of Congress for its review. D.C. Law 9-80 became effective on March 20, 1992.

Legislative history of Law 10-68. — Law 10-68, the "Technical Amendments Act of 1993," was introduced in Council and assigned Bill No. 10-166, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 29, 1993, and July 13, 1993, respectively. Signed by the Mayor on August 23, 1993, it was assigned Act No. 10-107 and transmitted to both Houses of Congress for its review. D.C. Law 10-68 became effective on February 5, 1994.

Legislative history of Law 10-255. — Law 10-255, the "Technical Amendments Act of 1994," was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

§ 28-4102. Overcharging.

(a) It shall be unlawful for any person to charge more than the normal average retail price for any merchandise or service sold during an emergency

that resulted from a natural disaster, if an emergency has been declared pursuant to subsection (b) of this section.

(b)(1) Within 48 hours of a natural disaster, the Mayor may declare, for not more than 30 calendar days, a state of emergency for the purposes of this act. The Mayor shall prepare an emergency declaration that shall include a description of the existence, nature, extent, and duration of the emergency.

(2) Upon the issuance of a declaration of an emergency or as soon as practicable given the nature of the emergency, the Mayor shall publish a copy of the emergency declaration in the District of Columbia Register and in 2 daily newspapers of general circulation.

(Mar. 20, 1992, D.C. Law 9-80, § 2, 39 DCR 675.)

Section references. — This section is referenced in § 28-4101 and § 28-4103.

Prior Codifications. — 1981 Ed., § 28-4102.

Legislative history of Law 9-80. — For legislative history of D.C. Law 9-80, see Historical and Statutory Notes following § 28-4101.

References in text. — "This act", referred to in subsec. (b)(1), is D.C. Law 9-80.

§ 28-4103. Penalties.

(a)(1) A person who violates § 28-4102(a) shall be subject to a fine of not more than $1,000.

(2) The Mayor may revoke, suspend, or limit the license, permit, or certificate of occupancy of a person who violates § 28-4102(a).

(b) A violation of § 28-4102(a) shall be a civil infraction for the purposes of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; § 2-1801.01 et seq.) ("Civil Infractions Act"). Civil fines, penalties, and fees may be imposed as sanctions for any infraction, pursuant to Chapter 18 of Title 2. Adjudication of any infraction shall be pursuant to Chapter 18 of Title 2.

(Mar. 20, 1992, D.C. Law 9-80, § 2, 39 DCR 675; Feb. 5, 1994, D.C. Law 10-68, § 27(h), 40 DCR 6311.)

Prior Codifications. — 1981 Ed., § 28-4103.

Legislative history of Law 9-80. — For legislative history of D.C. Law 9-80, see Historical and Statutory Notes following § 28-4101.

Legislative history of Law 10-68. — For legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 28-4101.

Chapter 42. Radon Contractor Proficiency.

§ 28-4201. Proficiency requirement.

(a) No person or company shall conduct or offer to conduct any radon screening, testing, or mitigation in the District for a fee unless that person has been listed as proficient by the United States Environmental Protection Agency to offer radon screening, testing, or mitigation services.

(b) The Mayor shall maintain, revise as necessary, and make available to the public a list of persons or companies who have been listed as proficient by the United States Environmental Protection Agency to offer screening, testing, or mitigation for radon.

(Mar. 13, 1993, D.C. Law 9-183, § 2(b), 39 DCR 8206.)

Prior Codifications. — 1981 Ed., § 28-4201.

Legislative history of Law 9-183. — Law 9-183, the "Radon Contractor Proficiency Act of 1992," was introduced in Council and assigned Bill No. 9-69, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on July 7, 1992, and October 6, 1992, respectively. Signed by the Mayor on November 2, 1992, it was assigned Act No. 9-303 and transmitted to both Houses of Congress for its review. D.C. Law 9-183 became effective on March 13, 1993.

§ 28-4202. Rulemaking.

(a) The Mayor may issue proposed rules establishing radon screening, testing, or mitigation programs in the District that are in compliance with any recommendations or guidelines published by the United States Environmental Protection Agency. The proposed rules shall be submitted to the Council for a 45-day review period, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules by resolution within the 45-day period, the proposed rules shall be deemed approved. Nothing in this section shall affect any requirements imposed upon the Mayor by subchapter I of Chapter 5 of Title 2.

(b) The Mayor may issue emergency rules, without prior Council approval, which shall be effective for not more than 120 days.

(Mar. 13, 1993, D.C. Law 9-183, § 2(b), 39 DCR 8206.)

Prior Codifications. — 1981 Ed., § 28-4202.

Legislative history of Law 9-183. — For legislative history of D.C. Law 9-183, see Historical and Statutory Notes following § 28-4201.

§ 28-4203. Penalty.

A civil fine, penalty, or fee may be imposed as a sanction for an infraction of the provisions of this act [chapter], or any rule promulgated pursuant to this act, in accordance with Chapter 18 of Title 2.

(Mar. 13, 1993, D.C. Law 9-183, § 2(b), 39 DCR 8206.)

Prior Codifications. — 1981 Ed., § 28-4203.

Legislative history of Law 9-183. — For legislative history of D.C. Law 9-183, see Historical and Statutory Notes following § 28-4201.

Chapter 45. Restraints of Trade.

§ 28-4501. Definition and purpose.

(a) As used in this chapter, the term "person" includes an individual, corporation, business trust, partnership, business association, or any other legal entity.

(b) The purpose of this chapter is to promote the unhampered freedom of commerce and industry throughout the District of Columbia by prohibiting restraints of trade and monopolistic practices.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4501.

Legislative history of Law 3-169. — Law 3-169, the "District of Columbia Antitrust Act of 1980," was introduced in Council and assigned Bill No. 3-107, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 28, 1980 and November 12, 1980, respectively. Signed by the Mayor on November 25, 1980, it was assigned Act No. 3-300 and transmitted to both Houses of Congress for its review.

CASE NOTES

In general.

Trial court did not abuse its discretion in approving proposed settlement of antitrust action involving price collusion in furnishing of soft drinks, even though opponent of transfer submitted affidavit alleging that attorney for claimants said documents received had been "mostly transactional" and "not very helpful." D.C. Code 1981, §§ 28-4501 to 28-4518. Shepherd Park Citizens Ass'n v. General Cinema Beverages, Inc., 584 A.2d 20, 1990 D.C. App. LEXIS 323 (1990).

Trial court did not abuse its discretion in approving settlement of antitrust lawsuit brought on behalf of indirect purchasers of soft drinks alleging collusion in fixing of prices, based on assessment of damages at between $340,907 and $480,000, compared to damages of $4,500,000 paid in settlement of lawsuit brought by direct purchasers; federal lawsuit involved considerable amount representing legal fees, and damages were reasonable considering that federal lawsuit had covered greater Washington, D.C., area while present case covered only population within District of Columbia. D.C. Code 1981, §§ 28-4501 to 28-4518. Shepherd Park Citizens Ass'n v. General Cinema Beverages, Inc., 584 A.2d 20, 1990 D.C. App. LEXIS 323 (1990).

§ 28-4502. Contract, combination, or conspiracy to restrain trade.

Every contract, combination in the form of a trust or otherwise, or conspiracy

in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Cross references. — Prescription drugs, unfair trade restraints, see § 48-804.02.

Section references. — This section is referenced in § 28-4506.

Prior Codifications. — 1981 Ed., § 28-4502.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

CASE NOTES

ANALYSIS

Burden of proof.
Contracts not to engage in competing business.
Elements of offense.
Injunctions.
Pleadings.
Price fixing.
Standing.

Burden of proof.

Plaintiff bears burden of pleading and proving an illegal conspiracy under the Sherman Act. Sherman Act, § 1 et seq., 15 U.S.C. § 1 et seq. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

To meet burden of pleading and proving an illegal conspiracy under Sherman Act, plaintiff must demonstrate that each defendant made a conscious commitment to an illegal conspiracy; present competent evidence that each defendant took acts in furtherance of that conspiracy; and make a showing that conspiracy was proximate cause of antitrust injury to plaintiff. Sherman Act, § 1 et seq., 15 U.S.C. § 1 et seq. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

Contracts not to engage in competing business.

Under District of Columbia law, covenants restricting competition are valid if ancillary to some other legitimate interest. Red Sage Ltd. P'ship v. Despa Deutsche Sparkassen Immobilien-Anlage-Gasellschaft MBH, 254 F.3d 1120, 2001 U.S. App. LEXIS 15625 (C.A.D.C. 2001).

Under District of Columbia law, covenants restraining trade, even if ancillary to some legitimate interest, are invalid if they are greater than is needed to protect the promisee's legitimate interest. Red Sage Ltd. P'ship v. Despa Deutsche Sparkassen Immobilien-Anlage-Gasellschaft MBH, 254 F.3d 1120, 2001 U.S. App. LEXIS 15625 (C.A.D.C. 2001).

Use restriction in lease which prohibited food court tenant from selling bagels and sandwiches was not unreasonable restraint of trade; lease provision was not so detrimental to smooth operation of freely competitive private economy as to be unreasonable. Venture Holdings v. Carr, 673 A.2d 686, 1996 D.C. App. LEXIS 62 (1996).

Fact that landlord enforced use restriction in lease which prohibited food court tenant from selling bagels and sandwiches, but may not have enforced similar restriction against another food court tenant, did not constitute unreasonable restraint of trade. Venture Holdings v. Carr, 673 A.2d 686, 1996 D.C. App. LEXIS 62 (1996).

Landlord's strict enforcement of use restriction in lease which prohibited food court tenant from selling bagels and sandwiches was not unreasonable restraint of trade, even if landlord's motive was to try to force tenant out of business; as long as landlord's act was lawful, it's motive in enforcing use restriction was immaterial. Venture Holdings v. Carr, 673 A.2d 686, 1996 D.C. App. LEXIS 62 (1996).

Elements of offense.

In resolving whether a particular restraint on trade constitutes a violation of Sherman Act §§ 1, and its District of Columbia counterpart, under "rule of reason" test, general issue is whether the restraint's anticompetitive effects substantially outweigh the procompetitive effects for which the restraint is reasonably necessary. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

Injunctions.

Party threatened with injury that has yet to materialize has injunctive remedy under the Clayton Act. Clayton Act, § 16, 15 U.S.C. § 26. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

There was likelihood of prevailing on merits of claim that conspiracy aspect of restraint of trade requirement was satisfied, supporting issuance of preliminary injunction barring as Sherman Act §§ 1 violation solicitation of shareholders' consents to replacement of board of directors of regional airline; there was memorandum of understanding (MOU) between regional airline and major airline, calling for cooperative operations, which would become operative if regional airline was successful in effort to replace board of directors of suing airline with other directors who would authorize similar cooperation agreement with major airline, and if MOU became effective it would kill suing airline's plan to operate as independent carrier, in competition with major airline. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

Public interest favored issued of preliminary injunction, barring as violative of Sherman Act and District of Columbia counterpart solicitation of consent of shareholders of regional airline, affiliated with major airline, for removal of board of directors and replacement by alternate board that would reverse plans to transform airline into independent carrier that would compete with major airline; injunction would assist enforcement of antitrust laws, and accommodate District of Columbia and Virginia authorities interested in reviewing situation. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

Irreparable harm requirement was satisfied in connection with request for preliminary injunction, barring on antitrust grounds solicitation of shareholder consents for removal of board of directors of regional airlines, to allow for replacement with board that would favor continuation of cooperation relationship with major carrier rather than establishment of independent airline operations; board replacement would interfere with establishment of critical business relationships needed for independence status, and losses could not be made good if ousted directors were ultimately reinstated following trial of claims that solicitation was antitrust violation, while other regional airline seeking board replacement would suffer only compensable monetary damages if injunction was issued. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

There was likelihood of prevailing on merits of claim that unreasonable restraint of trade was present, under applicable rule of reason test, in violation of Sherman Act §§ 1 and District of Columbia counterpart, supporting preliminary injunction barring solicitation of consents, by shareholders of regional airline affiliated with major airline, to replacement of board of directors; stifling of plans to create independent airline, favored by present board, which would occur if board was removed, would have required anticompetitive effect on air travel from hubs where airline had substantial presence. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

Pleadings.

Party alleging violations of the antitrust laws need not necessarily await elimination from market before bringing private cause of action under the Clayton Act; in order to make out private cause of action for damages under the Act, party must allege injury to business or property resulting from violation of the antitrust laws. Clayton Act, § 4, 15 U.S.C. § 15. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

Physician's allegations that hospital officials conspired to preclude his membership in health maintenance organization and preferred provider organization, and interfered with this application for reemployment to staff at another hospital, sufficiently alleged antitrust injury to qualify for damages under the Clayton Act. Sherman Anti-Trust Act, § 2, 15 U.S.C. § 2; Clayton Act, § 4, 15 U.S.C. § 15. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

To state a claim for restraint of trade, a plaintiff must allege that defendants entered into some contract, combination, conspiracy, or other concerted activity that unreasonably restricts trade in the relevant market. WAKA, LLC v. DC Kickball, 517 F.Supp.2d 245, 2007 U.S. Dist. LEXIS 37997 (2007).

Allegation that kickball association restrained trade by asserting a baseless copyright claim against operators of adult kickball league did not state claim for violation of Sherman Act and District of Columbia prohibitions against contract, combination, or conspiracy in restraint of trade; operators only alleged a unilateral and independent act and did not even attempt to name any other entities with which association engaged in any concerted activity. WAKA, LLC v. DC Kickball, 517 F.Supp.2d 245, 2007 U.S. Dist. LEXIS 37997 (2007).

Allegations by communications corporation which operated nationwide Internet Yellow Pages service that, as result of conspiracy involving regional telephone operating companies, Internet users seeking Internet Yellow Pages service were directed by popular web browser toward nationwide service provided by regional companies, were sufficient to state claims under District of Columbia statutes for unlawful restraint of trade, and for conspiring to monopolize trade. D.C. Code 1981, §§ 28-

4502, 28-4503. GTE New Media Servs., Inc. v. Ameritech Corp., 21 F.Supp.2d 27, 1998 U.S. Dist. LEXIS 15413 (1998), remanded by 199 F.3d 1343, 339 U.S. App. D.C. 332, 2000 U.S. App. LEXIS 257, 2000-1 Trade Cas. (CCH) P72749 (2000).

Physician's allegations that hospital officials conspired to preclude his membership at health maintenance organization and preferred provider organization and interfered with his application for reemployment to staff at another hospital did not allege separate conspiracies but, rather, allegations regarding health maintenance organization and preferred provider organization were intended as examples of acts in furtherance of combination and conspiracy to boycott physician from maintaining staff membership and privileges at hospital; therefore, since antitrust claims against hospital were unripe, so too were allegations regarding health maintenance organization and preferred provider organization. Sherman Act, § 1 et seq., 15 U.S.C. § 1 et seq. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

If physician intended to allege conspiracy against health maintenance organization and preferred provider organization separate from a conspiracy to boycott physician from maintaining staff membership and privileges at a hospital, he could not recover, absent allegations that hospital engaged in any conduct with respect to the two other entities. Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

Facts alleged by physician failed to properly allege an antitrust conspiracy to interfere with his appointment to a hospital; physician alleged that credentials committee of hospital asked him to secure completed questionnaire from chief of obstetrics/gynecology at each hospital at which he had privileges and that chief failed to return questionnaire in timely manner but there was no evidence that other defendants were aware of chief's conduct or that each defendant had made conscious commitment to support the chief in that regard. Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

Brewery owner could not bring claim for conspiracy against law firm which had represented alleged finder of securities underwriter, because such claim was entirely derivative of owner's claim against finder for tortious interference with prospective economic advantage, relating to underwriter's decision not to provide financing; law firm could not conspire with its client by merely acting within scope of its employment as advisor to or advocate on behalf a client. Fischer v. Estate of Flax, 816 A.2d 1, 2003 D.C. App. LEXIS 19 (2003), remanded by 935 A.2d 362, 2007 D.C. App. LEXIS 659 (D.C. 2007), remanded by 935 A.2d 1091, 2007 D.C. App. LEXIS 669 (D.C. 2007).

Price fixing.

When a company is victimized by price-fixing, its damages that may be trebled are not the total price it paid, but rather the overcharge. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

Where company victimized by price-fixing reduced some of its damages by obtaining a price reduction in the form of kickbacks, these savings are deducted from the damage award before trebling. Dist. Cablevision Ltd. P'shp v. Bassin, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

A price fixing violation of the Antitrust Act is also a violation of the Consumer Protection Procedures Act. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

Standing.

Concerted action requirement for antitrust standing was satisfied by regional airline, bringing suit against another regional airline, claiming restraint of trade in violation of Sherman Act §§ 1 and District of Columbia counterpart arising out of memorandum of understanding (MOU) between second airline and major airline that would become operative if second airline was successful in effort to replace board of directors of suing airline with other directors who would authorize cooperation agreement with major airline; while second airline claimed it acted unilaterally in pursuit of its own business interests, there was evidence that it was helping out major airline, which feared that suing airline would become competitive independent. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

Antitrust injury requirement for standing was satisfied by regional airline, bringing suit against another regional airline, claiming restraint of trade in violation of Sherman Act §§ 1 and District of Columbia counterpart arising out of agreement between second airline and major airline that would become operative if second airline was successful in effort to replace board of directors of suing airlines with other directors who would authorize cooperative agreement with major airline; as objective

could be satisfied without need for acquisition that would leave suing airline on same footing as other airline, suing airline could sustain economic loss attributable to antitrust causes if agreement was implemented. Atl. Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc., 295 F.Supp.2d 75, 2003 U.S. Dist. LEXIS 22792 (2003).

§ 28-4503. Monopolization.

It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Section references. — This section is referenced in § 28-4506.

Prior Codifications. — 1981 Ed., § 28-4503.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

CASE NOTES

Analysis

Injunctions.
Pleadings.
Sham litigation.
Stay of proceedings.

Injunctions.

Party threatened with injury that has yet to materialize has injunctive remedy under the Clayton Act. Clayton Act, § 16, 15 U.S.C. § 26. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

Pleadings.

Party alleging violations of the antitrust laws need not necessarily await elimination from market before bringing private cause of action under the Clayton Act; in order to make out private cause of action for damages under the Act, party must allege injury to business or property resulting from violation of the antitrust laws. Clayton Act, § 4, 15 U.S.C. § 15. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

Physician's allegations that hospital officials conspired to preclude his membership in health maintenance organization and preferred provider organization, and interfered with this application for reemployment to staff at another hospital, sufficiently alleged antitrust injury to qualify for damages under the Clayton Act. Sherman Anti-Trust Act, § 2, 15 U.S.C. § 2; Clayton Act, § 4, 15 U.S.C. § 15. Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1991 U.S. App. LEXIS 28952 (C.A.D.C. 1991).

Allegation that kickball association filed a baseless lawsuit against operators of adult kickball league for infringing copyright in rules of the sport and had intent to inhibit competition stated claim of monopolization or attempted monopolization of market for organizing and conducting adult kickball leagues. WAKA, LLC v. DC Kickball, 517 F.Supp.2d 245, 2007 U.S. Dist. LEXIS 37997 (2007).

Allegations by communications corporation which operated nationwide Internet Yellow Pages service that, as result of conspiracy involving regional telephone operating companies, Internet users seeking Internet Yellow Pages service were directed by popular web browser toward nationwide service provided by regional companies, were sufficient to state claims under District of Columbia statutes for unlawful restraint of trade, and for conspiring to monopolize trade. D.C. Code 1981, §§ 28-4502, 28-4503. GTE New Media Servs., Inc. v. Ameritech Corp., 21 F.Supp.2d 27, 1998 U.S. Dist. LEXIS 15413 (1998), remanded by 199 F.3d 1343, 339 U.S. App. D.C. 332, 2000 U.S. App. LEXIS 257, 2000-1 Trade Cas. (CCH) P72749 (2000).

Physician's allegations that hospital officials conspired to preclude his membership at health maintenance organization and preferred provider organization and interfered with his application for reemployment to staff at another hospital did not allege separate conspiracies but, rather, allegations regarding health maintenance organization and preferred provider organization were intended as examples of acts in furtherance of combination and conspiracy to boycott physician from maintaining staff membership and privileges at hospital; therefore, since antitrust claims against hospital were

unripe, so too were allegations regarding health maintenance organization and preferred provider organization. Sherman Act, § 1 et seq., 15 U.S.C. § 1 et seq. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

If physician intended to allege conspiracy against health maintenance organization and preferred provider organization separate from a conspiracy to boycott physician from maintaining staff membership and privileges at a hospital, he could not recover, absent allegations that hospital engaged in any conduct with respect to the two other entities. Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

Facts alleged by physician failed to properly allege an antitrust conspiracy to interfere with his appointment to a hospital; physician alleged that credentials committee of hospital asked him to secure completed questionnaire from chief of obstetrics/gynecology at each hospital at which he had privileges and that chief failed to return questionnaire in timely manner but there was no evidence that other defendants were aware of chief's conduct or that each defendant had made conscious commitment to support the chief in that regard. Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2. Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140, 1995 U.S. Dist. LEXIS 15475 (1995), vacated by 1996 U.S. Dist. LEXIS 9532, 1996-2 Trade Cas. (CCH) P71511 (D.D.C. June 24, 1996).

Sham litigation.

Allegation that kickball association engaged in anticompetitive behavior by filing a baseless lawsuit against adult kickball league operators for infringing copyright in rules of the sport invoked the sham litigation exception to the Noerr-Pennington doctrine of antitrust immunity; association allegedly filed a baseless copyright infringement suit with the intent of inhibiting competition. WAKA, LLC v. DC Kickball, 517 F.Supp.2d 245, 2007 U.S. Dist. LEXIS 37997 (2007).

Stay of proceedings.

Stay of antitrust counterclaims by operators of adult kickball league was warranted in kickball association's copyright infringement action; if association prevailed on copyright infringement claim, operators could not succeed on counterclaims. WAKA, LLC v. DC Kickball, 517 F.Supp.2d 245, 2007 U.S. Dist. LEXIS 37997 (2007).

§ 28-4504. Exclusions.

(a) Labor of a human being is not a commodity or an article of commerce. Nothing contained in this chapter shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade.

(b) This chapter does not make illegal the activity of:

(1) any non-profit corporation, trust, or organization established exclusively for religious, charitable, literary, or educational purposes to the extent that the activity is religious, charitable, literary, or educational; or

(2) the Washington Metropolitan Area Transit Authority.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4504.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4505. Civil investigative demand.

(a) Whenever the Corporation Counsel has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation, the Corporation Counsel may, prior to the institution of a proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

(b) Each such demand shall:

(1) state the nature of:

(A) the conduct under investigation constituting the alleged antitrust violation; or

(B) the activities under investigation which, if consummated, may result in an antitrust violation; and

(C) the applicable provision of law;

(2) if it is a demand for production of documentary material:

(A) describe the class or classes of documentary material to be produced with sufficient definiteness as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time for the material demanded to be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available;

(3) if it is a demand for answers to written interrogatories:

(A) propound with definiteness the written interrogatories to be answered;

(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(C) identify the custodian to whom such answers shall be submitted; or

(4) if it is a demand for the giving of oral testimony:

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify an assistant corporation counsel who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

(c) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under:

(1) the standards applicable to subpoenas or subpoenas duces tecum issued by the Superior Court of the District of Columbia in aid of a grand jury investigation; or

(2) the standards applicable to discovery requests under the Superior Court of the District of Columbia Rules of Civil Procedure, to the extent that

the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this chapter.

(d) Any such demand shall be served in any manner provided for service of process in the Superior Court of the District of Columbia, or if the person to be served has no place of business within the District of Columbia, the demand may be served by depositing a duly executed copy in the United States mails by registered mail, return receipt requested, addressed to such person at that person's principal office or place of business.

(e) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(f) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless such procedure is objected to, in which event the reasons for the objection shall be stated with specificity in lieu of an answer, and such reasons shall be submitted under a sworn certificate.

(g)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the District of Columbia. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be recorded and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(2) The assistant corporation counsel conducting the examination shall exclude from the place where the examination is held all other persons: except, the person being examined, the person's counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the District of Columbia, or in such other place as may be agreed upon by the assistant corporation counsel conducting the examination and such person.

(4) When the testimony is fully transcribed, the assistant corporation counsel or the officer shall afford the witness (who may be accompanied by counsel) a reasonable opportunity to examine the transcript; and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the assistant corporation counsel with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill,

cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days of the witness being afforded a reasonable opportunity to examine the transcript, the officer or the assistant corporation counsel shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) The officer shall certify on the transcript that the witness was duly sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or assistant corporation counsel shall promptly deliver or send the transcript by registered mail, return receipt requested, addressed to the custodian.

(6) Upon request, the assistant corporation counsel shall furnish a copy of the transcript at no cost to the witness only: except, that the Corporation Counsel may for good cause limit such witness to inspection of the official transcript of the witness's testimony.

(7) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when a claim is made that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the Corporation Counsel may petition the Superior Court of the District of Columbia pursuant to this section for an order compelling such person to answer such question. If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled by order of court upon the granting of immunity. No testimony or other disclosure compelled under court order or any information directly or indirectly derived from such ordered testimony or disclosure may be used against the person in any criminal case except a prosecution for perjury or otherwise failing to comply with the order.

(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same mileage reimbursements which are paid to witnesses in the Superior Court of the District of Columbia.

(h) Whenever any person fails to comply with any civil investigative demand duly served upon that person under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Corporation Counsel may file, in the Superior Court of the District of Columbia and serve upon such person a petition for an order of such court for the enforcement of this chapter. A

person who, with the intent to avoid, prevent, or obstruct compliance, in whole or in part, with an investigative demand duly and properly made under this section, withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony which is the subject of such demand, or who attempts to do so or solicits another to do so shall upon conviction thereof be fined not more than not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than one (1) year or both.

(i) Within 20 days after the service of any such civil investigative demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file in the Superior Court of the District of Columbia and serve upon the Corporation Counsel a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portion of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.

(j) At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance with any such demand, such person may file, in the Superior Court of the District of Columbia, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon the custodian by this section.

(k) Any procedure, other than an action to enforce a demand pursuant to subsection (h) of this section, or testimony taken or material produced under this section or voluntarily in the course of an investigation shall be exempt from the provisions of the District of Columbia Freedom of Information Act (section 2-531 et seq.) and shall be kept confidential by the Corporation Counsel before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person who has testified, answered interrogatories, or produced material: except, that testimony taken or material or information produced under this section may be disclosed by the Corporation Counsel to any officer or employee of any federal or state law enforcement agency upon the prior certification of an officer of any such federal or state law enforcement agency that such testimony, material, or information will be maintained in confidence and will be used only for official law enforcement purposes.

(l) Unless otherwise authorized or required by law, any employee of the District of Columbia who shall intentionally disclose information kept confidential by subsection (k) of this section shall be guilty of a misdemeanor punishable by a fine up to $500.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368; Apr. 9, 1997, D.C. Law 11-255, § 27(dd), 44 DCR 1271; June 11, 2013, D.C. Law 19-317, § 285(d), 60 DCR 2064.)

Cross references. — Freedom of information, exemptions from disclosure, redaction, see § 2-534.

Section references. — This section is referenced in § 2-534 and § 28-4513.

Prior Codifications. — 1981 Ed., § 28-4505.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "not more than the amount set forth in [§ 22-3571.01]" for "not more than $5,000" in (h).

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 19-317. — Law 19-317, the "Criminal Fine Proportionality Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-214. The Bill was adopted on first and second readings on Oct. 16, 2012, and Nov. 1, 2012, respectively. Signed by the Mayor on Jan. 23, 2013, it was assigned Act No. 19-641 and transmitted to Congress for its review. D.C. Law 19-317 became effective on June 11, 2013.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

CASE NOTES

In general.

Trial court did not abuse its discretion in approving proposed settlement of antitrust action alleging price collusion in sale of soft drinks on grounds that claimants had failed to employ use immunity to get further evidence; there had been precomplaint interviews with some executives of suppliers and access had been granted to Department of Justice records covering a related investigation. D.C. Code 1981, § 28-4505(g)(7). Shepherd Park Citizens Ass'n v. General Cinema Beverages, Inc., 584 A.2d 20, 1990 D.C. App. LEXIS 323 (1990).

§ 28-4506. Criminal enforcement by the District of Columbia.

Every person who violates section 28-4502 or 28-4503 shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than the amount set forth in [§ 22-3571.01], or by imprisonment not exceeding one (1) year, or both. The Corporation Counsel shall commence and try all prosecutions for violations of section 28-4502 or 28-4503. Whenever a corporation violates section 28-4502 or 28-4503, the individual directors, officers, or agents of such corporation who have intentionally authorized, ordered or ratified the acts constituting such violation shall be punishable in accordance with this section.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368; June 11, 2013, D.C. Law 19-317, § 285(e), 60 DCR 2064.)

Section references. — This section is referenced in § 28-4510 and § 28-4511.

Prior Codifications. — 1981 Ed., § 28-4506.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "of not more than the amount set forth in [§ 22-3571.01]" for "not exceeding $50,000").

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see His-

torical and Statutory Notes following § 28-4501.

Legislative history of Law 19-317. — See note to § 28-4505.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

§ 28-4507. Damages and injunctive relief for injuries to or within the District of Columbia.

(a) Whenever the District of Columbia government is injured in its business or property by a violation of this chapter, the Corporation Counsel may bring a civil action in the name of the District of Columbia for damages, or for appropriate injunctive or other equitable relief, or for both, without prejudice to the right of the District of Columbia to bring similar or identical actions under any other statute. In such an action, in addition to any appropriate injunctive or equitable relief, the court may award the District of Columbia damages and the cost of suit, including reasonable attorney's fees.

(b) The Corporation Counsel may bring a civil action in the name of the District of Columbia as parens patriae on behalf of any individual residing in the District of Columbia in any court of competent jurisdiction for injury sustained by such individual to such individual's property by reason of any violation of this chapter.

(1) The court shall award the District of Columbia, as monetary relief, threefold the total damages sustained by such natural persons, and the cost of suit, including reasonable attorney's fees.

(2) Monetary relief recovered in an action under this subsection shall:

(A) be distributed in such manner as the court may authorize; or

(B) be deemed a civil penalty by the court and deposited with the District of Columbia, subject in either case to the requirement that any distribution procedures adopted shall first afford each person a reasonable opportunity to secure each such person's appropriate portion of the net monetary relief.

(c)(1) In any action brought under subsection (b) of this section, the Corporation Council shall, at such times, in such manner, and with such content as the court may direct, cause notice to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court shall direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (b) of this section may elect to exclude from adjudication the portion of the District of Columbia claim for monetary relief attributable to that person by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(d) In any action under subsection (b) of this section, in which there has been a determination that a defendant violated a provision of this chapter, damages may be proved and assessed in the aggregate by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court may permit, without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

(e) The court may award under this section, pursuant to a motion by the District of Columbia promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the District of Columbia setting forth a claim under this chapter and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just under the circumstances. In determining whether an award of interest under this section for any period is just under the circumstances, the court shall consider only:

(1) whether the District of Columbia or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the District of Columbia or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether the District of Columbia or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368; Apr. 9, 1997, D.C. Law 11-255, § 27(ee), 44 DCR 1271.)

Section references. — This section is referenced in § 28-4511.

Prior Codifications. — 1981 Ed., § 28-4507.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-4506.

CASE NOTES

ANALYSIS

Class action.
Judicial authority.
Review.

Class action.

Settlement agreement in antitrust action against vitamin distributors and sellers, which did not award consumer class direct monetary relief, but instead provided for cy pres fund, was not contrary to statute authorizing that monetary relief, in cases where District intervened as parens patriae on behalf of residents, would be deposited into District anti-trust fund; there was no reasonable opportunity to award each individual member of consumer class appropriate portion of net monetary relief, given relatively small size of District's share of consumer settlement fund, prohibitive costs of administering distribution system, and difficulty of identifying District residents who were indirect purchasers of vitamin products. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

A presumption of adequate representation by counsel in class action exists where the government is involved. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

There was no conflict of interest on part of class counsel in their representation of both commercial class and consumer class of indirect purchasers of vitamin products in antitrust action against distributors and sellers of vitamins, though under settlement agreement, funds would be distributed directly to commercial class members and indirectly to consumer class members, where there was no hint of irregularity in structure or process of negotiations or behavior of counsel, and District government participated in settlement negotiations on behalf of District residents, thus additionally protecting interests of consumers. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

To determine the adequacy of representation by class counsel, which factors in competency and conflicts of class counsel, the Court of Appeals applies the following legal principle: a

class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Trial court's denial of consumer class objectors' motions to intervene in class action litigation against vitamin distributors and sellers caused objectors no prejudice, where objectors filed written statements in opposition to settlement agreement and were permitted to make oral arguments during trial court's final hearing to determine fairness of the agreement. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Under statute authorizing that, in cases where District intervenes as parens patriae on behalf of residents, monetary relief, in form of settlement proceeds, would be deposited into District anti-trust fund, a consumer is not guaranteed net monetary relief on an individual basis; rather, what is guaranteed is a reasonable opportunity to secure an appropriate portion of the net monetary relief. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Cy pres distribution of settlement award, rather than direct distribution to individual members of consumer class, was appropriate in class action against vitamin distributors and sellers; direct distribution would be infeasible, and fund would benefit consumers, as fund would serve District residents by expanding pediatric services, operating medical clinic, counseling pregnant adolescents, offering health-related education to schoolchildren, and enforcing District's consumer protection law. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Judicial authority.

Court could order a deposit of proceeds from antitrust suit brought on behalf of indirect purchasers of soft drinks claiming collusion in establishment of pricing, into special "antitrust Fund"; impracticability of determining who had been soft drink purchasers and, and in what quantities, during period in question precluded distribution to affected individuals. D.C. Code 1981, §§ 28-4507(b)(2)(B), 28-4516(a). Shepherd Park Citizens Ass'n v. General Cinema Beverages, Inc., 584 A.2d 20, 1990 D.C. App. LEXIS 323 (1990).

Review.

The review by Court of Appeals of a trial court's approval of a settlement agreement under the local parens patriae statute or in the analogous context of class actions is limited, and the court gives great weight to the trial judge's views because he or she is exposed to the litigants, and their strategies, positions and proofs. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Parties appealing settlement agreement in class action must show that the trial court abused its discretion; this generally requires a showing either that the agreement in question was so manifestly unfair as to preclude judicial approval, or that the court did not have sufficient facts before it to make an informed judgment. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

§ 28-4508. Relief for private parties.

(a) Any person who is injured in that person's business or property by reason of anything forbidden by this chapter may bring a civil action for damages, for appropriate injunctive or other equitable relief, or for both. In such an action, in addition to any appropriate injunctive or equitable relief, the court shall award as monetary relief: (1) threefold the total damage sustained by such person; and (2) as determined by the court, the costs of suit including reasonable attorney's fees.

(b) The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under this chapter and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just under the circumstances. In determining whether an award of interest under this section for any period is just under the circumstances, the court shall consider only:

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to

show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(c) In any class action brought under this section by purchasers or sellers, the fact of injury and the amount of damages sustained by the members of the class may be proven on a class-wide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Section references. — This section is referenced in § 28-4510 and § 28-4511.

Prior Codifications. — 1981 Ed., § 28-4508.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

CASE NOTES

ANALYSIS

Class actions.
Pleadings.
Review.

Class actions.

Cy pres distribution of settlement award, rather than direct distribution to individual members of consumer class, was appropriate in class action against vitamin distributors and sellers; direct distribution would be infeasible, and fund would benefit consumers, as fund would serve District residents by expanding pediatric services, operating medical clinic, counseling pregnant adolescents, offering health-related education to schoolchildren, and enforcing District's consumer protection law. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

A presumption of adequate representation by counsel in class action exists where the government is involved. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

There was no conflict of interest on part of class counsel in their representation of both commercial class and consumer class of indirect purchasers of vitamin products in antitrust action against distributors and sellers of vitamins, though under settlement agreement, funds would be distributed directly to commercial class members and indirectly to consumer class members, where there was no hint of irregularity in structure or process of negotiations or behavior of counsel, and District government participated in settlement negotiations on behalf of District residents, thus additionally protecting interests of consumers. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

To determine the adequacy of representation by class counsel, which factors in competency and conflicts of class counsel, the Court of Appeals applies the following legal principle: a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

Trial court's denial of consumer class objectors' motions to intervene in class action litigation against vitamin distributors and sellers caused objectors no prejudice, where objectors filed written statements in opposition to settlement agreement and were permitted to make oral arguments during trial court's final hearing to determine fairness of the agreement. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

A class action is not in conflict with the requirement of § 28-4509(a), that the indirect purchaser individually prove "payment of all or

any part of any overcharge" in order to be deemed "injured"; class damages may be reckoned on a classwide basis and the individual member, who has qualified as "injured" under § 28-4509(a), is allowed individual damages under subsection (c) of this section pursuant to the "ratio" payout specified in that section. Goda v. Abbott Lab., 125 WLR 1117 (Super. Ct. 1997).

Finding that common questions of law and fact predominated over individual questions, the court certified a class action suit charging a horizontal, price-fixing conspiracy by pharmaceutical manufacturers, although the court structured the action in subclasses and extended Medicaid recipients and members of certain health plans. Goda v. Abbott Lab., 125 WLR 1117 (Super. Ct. 1997).

Pleadings.

Where a complaint fails to state a claim under the Sherman Act, for any reason other than lack of an effect on interstate commerce, it also fails as a matter of law under the District of Columbia Unfair Trade Practices Act. Sherman Act,§ 1, as amended, 15 U.S.C. § 1; D.C. Code 1981, § 28-4508. Wesley v. Howard Univ., 3 F.Supp.2d 1, 1998 U.S. Dist. LEXIS 6047 (1998).

If complaint fails to state claim under Sherman Antitrust Act, it also fails to state claim under District of Columbia Unfair Trade Practices Act. Sherman Act, § 1 et seq., as amended, 15 U.S.C. § 1 et seq.; D.C. Code 1981, § 28-4508. Dial A Car v. Transportation, Inc., 884 F. Supp. 584, 1995 U.S. Dist. LEXIS 5927 (1995), affirmed by 82 F.3d 484, 317 U.S. App. D.C. 240, 1996 U.S. App. LEXIS 9934, 1996-1 Trade Cas. (CCH) P71384 (1996).

Review.

Parties appealing settlement agreement in class action must show that the trial court abused its discretion; this generally requires a showing either that the agreement in question was so manifestly unfair as to preclude judicial approval, or that the court did not have sufficient facts before it to make an informed judgment. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

The review by Court of Appeals of a trial court's approval of a settlement agreement under the local parens patriae statute or in the analogous context of class actions is limited, and the court gives great weight to the trial judge's views because he or she is exposed to the litigants, and their strategies, positions and proofs. Boyle v. Giral, 820 A.2d 561, 2003 D.C. App. LEXIS 156 (2003).

§ 28-4509. Indirect purchasers.

(a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.

(b) In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

(c) In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Section references. — This section is referenced in § 28-4510.

Prior Codifications. — 1981 Ed., § 28-4509.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

CASE NOTES

ANALYSIS

Class actions.
Price fixing.

Class actions.

A class action is not in conflict with the requirement of subsection (a) of this section, that the indirect purchaser individually prove "payment of all or any part of any overcharge" in order to be deemed "injured"; class damages may be reckoned on a classwide basis and the individual member, who has qualified as "injured" under subsection (a) of this section, is allowed individual damages under § 28-4508(c) pursuant to the "ratio" payout specified in that section. Goda v. Abbott Lab., 125 WLR 1117 (Super. Ct. 1997).

Price fixing.

A price fixing violation of the Antitrust Act is also a violation of the Consumer Protection Procedures Act. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

§ 28-4510. Judgment in favor of the District of Columbia as prima facie evidence.

A final judgment or decree determining that a person has violated this chapter in an action brought by the District of Columbia under section 28-4506, other than a consent judgment or decree entered before any testimony at trial has been taken or entered pursuant to a plea of nolo contendere, shall be prima facie evidence against such person in any other action against such person under section 28-4508 or 28-4509 as to all matters with respect to which the judgment or decree would be an estoppel between the parties to that judgment or decree.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4510.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4511. Limitations on actions.

(a) An action under section 28-4506 to recover a criminal penalty is barred if the action is not commenced within four (4) years after the commission of an act constituting in whole or in part the offense or wrongful action charged.

(b) An action under section 28-4507 or 28-4508 to recover damages is barred if the action is not commenced within four (4) years after the cause of action accrues, or within one (1) year after the conclusion of any timely action brought by the District of Columbia under section 28-4506, based in whole or in part on any matter complained of in the action for damages under section 28-4507 or 28-4508, whichever is later.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4511.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

CASE NOTES

In general.

Statutes of limitations applicable to consumer's claims against compact disc (CD) producers and distributors, under Antitrust Act and Consumer Protection Procedures Act, were not tolled, pursuant to fraudulent concealment doctrine, where consumer's attorney was served with complaint asserting same basic claims against producers and distributors some four years and seven months before filed action on behalf of consumer. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

Doctrine of equitable tolling did not permit consumer to stack one class action lawsuit on another, so as to allow her to file claims against compact disc (CD) producers and distributors, under Antitrust Act and Consumer Protection Procedures Act, based on conduct that occurred outside the statutes of limitations applicable to those claims. Marbry v. EMI Music Distribution, Inc., 129 WLR 2065 (Super. Ct. 2001).

§ 28-4512. Assurance of discontinuance.

(a) In enforcing this chapter, the Corporation Counsel may accept an assurance of discontinuance of an act or practice considered in violation of this chapter from any person engaged in the act or practice.

(b) The assurance of discontinuance shall be in writing and shall be effective only upon the approval of the Superior Court of the District of Columbia.

(c) The assurance of discontinuance may not be considered for any purpose as an admission of a violation. Proof of failure to comply with the assurance of discontinuance is prima facie evidence of a violation of this chapter.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4512.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4513. Cooperation with federal government and states.

Except as provided in section 28-4505(k), the Corporation Counsel may cooperate with the federal government and the states in the enforcement of this chapter.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4513.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4514. Remedies cumulative.

The remedies provided for in this chapter are cumulative.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4514.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4515. Uniformity.

It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4515.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4516. District of Columbia Antitrust Fund. [Repealed].

Repealed.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368; Dec. 7, 2004, D.C. Law 15-205, § 3302, 51 DCR 8441; Sept. 14, 2011, D.C. Law 19-21, § 9003(b), 58 DCR 6226.)

Prior Codifications. — 1981 Ed., § 28-4516.

Emergency legislation. — For temporary (90 day) amendment of section, see § 3302 of Fiscal Year 2005 Budget Support Emergency Act of 2004 (D.C. Act 15-486, August 2, 2004, 51 DCR 8236).

For temporary (90 day) amendment of section, see § 3302 of Fiscal Year 2005 Budget Support Congressional Review Emergency Act of 2004 D.C. Act 15-594, October 26, 2004, 51 DCR 11725).

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

Legislative history of Law 15-205. — Law 15-205, the "Fiscal Year 2005 Budget Support Act of 2004", was introduced in Council and assigned Bill No. 15-768, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 14, 2004, and June 29, 2004, respectively. Signed by the Mayor on August 2, 2004, it was assigned Act No. 15-487 and transmitted to both Houses of Congress for its review. D.C. Law 15-205 became effective on December 7, 2004.

Legislative history of Law 19-21. — For history of Law 19-21, see notes under § 28-3911.

Short title. — Short title of subtitle C of title III of Law 15-205: Section 3301 of D.C. Law 15-205 provided that subtitle C of title III of the act may be cited as the Antitrust Fund Cap Increase Act of 2004.

§ 28-4517. Severability.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4517.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

§ 28-4518. Relation to other law.

Nothing contained in this chapter shall be applicable to conduct or activity specifically regulated, permitted, or required by any regulatory body, agency, or commission acting under statutory authority of the District of Columbia or the United States.

(Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.)

Prior Codifications. — 1981 Ed., § 28-4518.

Legislative history of Law 3-169. — For legislative history of D.C. Law 3-169, see Historical and Statutory Notes following § 28-4501.

Chapter 45A. Cigarette Sales Below Cost.

§ 28-4521. Definitions.

For the purposes of this chapter, the term:

(1) "Cash and carry" means the purchaser is responsible for the transportation of a purchased article or product to the purchaser's designated destination.

(2) "Cigarettes" means any size or shaped roll for smoking that is made of tobacco or tobacco mixed with another ingredient and wrapped in paper or in any other material except tobacco. The term "cigarettes" does not include cigars.

(3) "Cost" means the invoice or replacement cost, whichever is lower, of cigarettes to the retailer or wholesaler, plus:

(A) The cost of doing business by the retailer or wholesaler; or

(B) In the absence of proof of the cost of doing business, a markup of 2% on the total of the invoice or replacement cost, and the face value of any applicable excise taxes, shall be prima facie proof of the cost of doing business with regard to cigarettes being sold at wholesale; and

(C) In the absence of proof of the cost of doing business, a markup of 8% on the total of the invoice or replacement cost shall be prima facie proof of the cost of doing business with regard to cigarettes being sold at retail. With regard to any determination of the cost of cigarettes to a wholesaler or retailer, the surtax imposed by § 47-2402 shall not be considered in determining the cost of the articles or products.

With regard to any determination of the cost of cigarettes to a wholesaler or retailer, a fractional part of a cent equal to 1/10 of 1% or more shall be rounded off to the next higher cent. Except as provided in § 28-4522, discounts granted for cash payments or electronic fund transfers shall not be used to reduce cost determinations.

Notwithstanding § 28-4522, articles or products given gratis or payments made to a retailer or wholesaler for display, advertising, or promotion purposes shall not be considered in determining the cost of the articles or products.

(4) "Retailer" means any person engaged in the business of making retail sales of cigarettes within the District of Columbia at a store, stand, booth, or concession, through vending machines, or otherwise. If the person is engaged in the business of making both retail and wholesale sales of cigarettes, the term applies only to the retail sales of cigarettes portion of the business.

(5) "Wholesaler" means a person who purchases cigarettes directly from a manufacturer. The term "wholesaler" includes a person, who as a subwholesaler, purchases cigarettes from another wholesaler solely for the purpose of bona fide resale to retailers other than those directly or indirectly owned, affiliated, or controlled by him, and services the retailers by maintain-

ing an established place of business for the sale of cigarettes, including warehouse facilities, adequate inventory, proper accounting records, and necessary equipment and vehicles for the storage and distribution of cigarettes.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489; Sept. 14, 2011, D.C. Law 19-21, § 8053, 58 DCR 6226.)

Section references. — This section is referenced in § 28-4522.

Prior Codifications. — 1981 Ed., § 28-4521.

Effect of amendments. — D.C. Law 19-21, in subsec. (3)(C), substituted "at retail. With regard to any determination of the cost of cigarettes to a wholesaler or retailer, the surtax imposed by § 47-2402 shall not be considered in determining the cost of the articles or products." for "at retail.".

Legislative history of Law 10-89. — Law 10-89, the "Cigarette Sales Below Cost Act of 1994," was introduced in Council and assigned Bill No. 10-79, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 7, 1993, and January 4, 1994, respectively. Signed by the Mayor on January 21, 1994, it was assigned Act No. 10-166 and transmitted to both Houses of Congress for its review. D.C. Law 10-89 became effective on March 22, 1994.

Legislative history of Law 19-21. — For history of Law 19-21, see notes under § 47-305.02.

§ 28-4522. Prohibitions.

(a) It shall be unlawful for any individual, corporation, joint stock company, business trust, partnership, business association, or other legal entity engaged in business within the District of Columbia, for the purpose of injuring competitors or destroying competition, to sell, offer for sale, or advertise for sale cigarettes for less than cost, either at retail or wholesale, or to give, offer to give, or advertise an intent to give away any cigarettes for the purpose of injuring competitors or destroying competition.

(b) Notwithstanding subsection (a) of this section and § 28-4521(2), the presumptive wholesale markup of 2% may be reduced by $\frac{1}{10}$ of 1% for the wholesale sale of cigarettes on a cash and carry basis.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Section references. — This section is referenced in § 28-4521, § 28-4523, and § 28-4526.

Prior Codifications. — 1981 Ed., § 28-4522.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

§ 28-4523. Exceptions.

The prohibitions of § 28-4522 shall not apply to any sale made:

(1) In closing out in good faith the wholesaler's or retailer's stock, or any part thereof, for the purpose of discontinuing the wholesaler's or retailer's trade in any such stock, and in the case of the sale of seasonal goods or the bona fide sale of perishable goods to prevent loss to the wholesaler or retailer by spoilage or depreciation, if adequate notice is given to the public;

(2) When the goods are damaged or deteriorated in quality and notice is given to the public;

(3) By a person affected by this chapter acting under the order of any court of competent jurisdiction;

(4) In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product or service in the same locality or trade area;

(5) When the product or article is sold upon the final liquidation of a business of the wholesaler or retailer;

(6) Where the article or product is sold for charitable purposes or to relief agencies; or

(7) Where the article or product is sold on contract to any agency or department of the District of Columbia or of the federal, any state, or other local government.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Prior Codifications. — 1981 Ed., § 28-4523.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

§ 28-4524. Unfair trade practice.

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts for cigarettes, whether in the form of money or otherwise, or secretly extending to certain purchasers of cigarettes special services or privileges not extended to all purchasers of cigarettes, upon like terms and conditions, to the injury of a competitor, and where such payment or allowance tends to destroy competition, is an unfair trade practice. Any wholesaler or retailer of cigarettes resorting to such an unfair trade practice shall be subject to the penalties provided in § 28-4525.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Section references. — This section is referenced in § 28-4526.

Prior Codifications. — 1981 Ed., § 28-4524.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

§ 28-4525. Penalties.

(a) *Injunctive relief.* — Any appropriate agency of the District of Columbia or any person injured by any violation of the provisions of this chapter, or any trade association representative of such a person, may bring an action in the Superior Court of the District of Columbia to prevent, restrain, or enjoin such a violation. In such an action, it shall not be necessary that actual damages to the plaintiff be alleged or proved, but where alleged and proved, in addition to equitable and injunctive relief, the court shall award the plaintiff as monetary relief threefold the total damage sustained by the person, and, as determined by the court, the costs of suit, including reasonable attorney's fees.

(b) *Monetary relief.* — In the event no injunctive relief is sought or required, any person injured by a violation of the provisions of this chapter may maintain an action for damages alone in the Superior Court of the District of

Columbia. In such an action, the court shall award the plaintiff as monetary relief threefold the total damage sustained by the person, and, as determined by the court, the costs of suit, including reasonable attorney's fees.

(c) *Suspension or revocation of license.* — The Mayor may suspend or revoke any business license or permit of any wholesaler or retailer engaged in the retail or wholesale trade of cigarettes upon sufficient cause appearing of the violation of any provision of this chapter. Such a wholesaler or retailer shall be entitled to due process, including notice and the opportunity for a hearing before the appropriate agency of the District of Columbia. Any suspension shall be for a period not to exceed 5 consecutive business days. A revocation shall be issued only upon a finding by the appropriate agency of the District of Columbia that the affected business license or permit holder is guilty of wilful and persistent violations of the provisions of this chapter. Any person who has had a business license or permit revoked, pursuant to the terms of this section, may apply to the appropriate agency of the District of Columbia for reinstatement only after the expiration of 1 year. Any suspension or revocation issued pursuant to this section shall be reviewable by the Superior Court of the District of Columbia.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Section references. — This section is referenced in § 28-4524 and § 28-4526.

Prior Codifications. — 1981 Ed., § 28-4525.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

§ 28-4526. Effect of judgment.

A final judgment or decree determining that a person has violated this chapter in an action brought by the District of Columbia under § 28-4522 or § 28-4524, other than a consent judgment or decree entered before any testimony at trial has been taken or entered pursuant to a plea of nolo contendere, shall be prima facie evidence against the person in any other action against the person under § 28-4525(b) and (c) as to all matters with respect to which the judgment or decree would be an estoppel between the parties to that judgment or decree.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Prior Codifications. — 1981 Ed., § 28-4526.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

§ 28-4527. Rulemaking.

(a) The Mayor may issue proposed rules, pursuant to subchapter I of Chapter 5 of Title 2, to implement the provisions of this chapter. The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by

resolution within this 45-day review period, the proposed rules shall be deemed approved.

(b) The Mayor may issue emergency rules, without prior Council approval, which shall be effective for not more than 90 days.

(Mar. 22, 1994, D.C. Law 10-89, § 2(b), 41 DCR 489.)

Prior Codifications. — 1981 Ed., § 28-4527.

Legislative history of Law 10-89. — For legislative history of D.C. Law 10-89, see Historical and Statutory Notes following § 28-4521.

CHAPTER 45B. EXCESSIVE PRICING.

§ 28-4551. Findings.

The Council of the District of Columbia finds that:

(1) The excessive prices of prescription drugs in the District of Columbia is threatening the health and welfare of the residents of the District as well as the District government's ability to ensure that all residents receive the health care they need, and these excessive prices directly and indirectly cause economic harm to the District and damage the health and safety of its residents;

(2) The traditional police powers of the District of Columbia include protecting and promoting the health, safety, and welfare of its residents, regulating monopoly pricing of goods and services, and regulating to assure consumer protection and to prevent and sanction unfair trade practices; and

(3) To promote the health, safety, and welfare of its residents, it is incumbent on the government of the District of Columbia to take action to restrain the excessive prices of prescription drugs through mechanisms that are consistent with District and federal law, including the Constitution.

(Dec. 10, 2005, D.C. Law 16-37, § 2, 52 DCR 9061.)

Legislative history of Law 16-37. — Law 16-37, the "Prescription Drug Excessive Pricing Act of 2005", was introduced in Council and assigned Bill No. 16-114 which was referred to the Committee on Judiciary. The Bill was adopted on first and second readings on May 3, 2005, and July 6, 2005, respectively. Signed by the Mayor on October 4, 2005, it was assigned Act No. 16-171 and transmitted to both Houses of Congress for its review. D.C. Law 16-37 became effective on December 10, 2005.

CASE NOTES

ANALYSIS

Jurisdiction.
Standing.
Validity.

Jurisdiction.

Claim of trade associations for pharmaceutical and biotechnology companies, that District of Columbia's Prescription Drug Excessive Pricing Act was conflict preempted by federal patent laws, arose under patent laws, and thus Court of Appeals for the Federal Circuit had jurisdiction over appeal of decision from district court which determined that Act was conflict preempted; although no patent statute explicitly authorized preemption claims, patent law was necessary element of preemption cause of action that appeared in complaint. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

Standing.

Members of plaintiff trade associations for pharmaceutical and biotechnology companies had actual and well-founded fear that District of Columbia's Prescription Drug Excessive Pricing Act would be enforced against them, for purpose of standing inquiry of whether associations themselves had standing to challenge Act on behalf of their members, where, among other things, Act itself contained finding that prices of prescription drugs in District of Columbia were presently "excessive," which was same word as standard for illegal price, and findings section also declared that "it is incumbent on the government of the District of Columbia to take action to restrain the excessive

prices of prescription drugs." Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

Trade associations for pharmaceutical and biotechnology companies, who sought to shape policy in manner favorable to member pharmaceutical and biotechnology companies, could have standing to bring action to challenge constitutionality of District of Columbia's Prescription Drug Excessive Pricing Act without directly joining members in action; although associations did not manufacture patented prescription drugs or otherwise engage in activities likely to fall within ambit of Act, subject matter of case was highly germane to their respective purposes. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

Validity.

District of Columbia Prescription Drug Excessive Pricing Act, which barred excessive pricing of patented prescription drugs, was conflict preempted by federal patent law, since it constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

District of Columbia statute permitting interested party to establish prima facie case of excessive pricing of pharmaceutical product by comparing domestic wholesale price of drug with its wholesale price in one of four specified foreign countries was not facially unconstitutional under Foreign Commerce Clause, where foreign country comparison was optional approach for establishing prima facie case, and it was possible to establish prima facie case without reference to foreign drug prices. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring imposition of minimum resale requirements for patented prescription drugs had per se invalid extraterritorial reach, in violation of Commerce Clause, as applied to transactions between manufacturers and wholesalers that occurred wholly out of state, despite District's claim that statutes fell within its police powers as regulation of public health, where all manufacturers were located outside of District, manufacturers sold overwhelming bulk of their patented prescription drugs in out-of-state transactions to wholesalers or large retail chains that maintained their own warehousing and retail distribution systems, and statutes explicitly exempted in-state retailers from liability. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

State statute directly regulating commerce occurring beyond boundaries of that state is per se invalid under Commerce Clause and generally struck down without further inquiry. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

"Conflict preemption" applies to those situations where compliance with both state and federal regulations is either physical impossibility or stands as obstacle to accomplishment and execution of full purposes and objectives of Congress. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

"Field preemption" applies to those situations where scheme of federal regulation is so pervasive as to make reasonable inference that Congress left no room for states to supplement it. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring excessive pricing of patented prescription drugs constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs, and thus violated Supremacy Clause; statutes were intended to force manufacturers to limit wholesale price of patented drugs to less than 30% more than wholesale price of same drugs sold in four designated "high income" countries, which would upset balance of system of rewards calculated by Congress to insure continued strength of industry vital to national interests. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

§ 28-4552. Definitions.

For the purposes of this chapter, the term:

(1) "Affected party" means any person directly or indirectly affected by

excessive prices of patented prescription drugs, including any organization representing such persons or any person or organization representing the public interest.

(2) "High income country" means the United Kingdom, Germany, Canada, or Australia.

(Dec. 10, 2005, D.C. Law 16-37, § 2, 52 DCR 9061.)

Legislative history of Law 16-37. — For Law 16-37, see notes following § 28-4551.

CASE NOTES

Validity.

District of Columbia Prescription Drug Excessive Pricing Act, which barred excessive pricing of patented prescription drugs, was conflict preempted by federal patent law, since it constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

District of Columbia statutes barring imposition of minimum resale requirements for patented prescription drugs had per se invalid extraterritorial reach, in violation of Commerce Clause, as applied to transactions between manufacturers and wholesalers that occurred wholly out of state, despite District's claim that statutes fell within its police powers as regulation of public health, where all manufacturers were located outside of District, manufacturers sold overwhelming bulk of their patented prescription drugs in out-of-state transactions to wholesalers or large retail chains that maintained their own warehousing and retail distribution systems, and statutes explicitly exempted in-state retailers from liability. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring excessive pricing of patented prescription drugs constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs, and thus violated Supremacy Clause; statutes were intended to force manufacturers to limit wholesale price of patented drugs to less than 30% more than wholesale price of same drugs sold in four designated "high income" countries, which would upset balance of system of rewards calculated by Congress to insure continued strength of industry vital to national interests. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

§ 28-4553. Excessive pricing in sales of prescription drugs, a violation of law.

It shall be unlawful for any drug manufacturer or licensee thereof, excluding a point of sale retail seller, to sell or supply for sale or impose minimum resale requirements for a patented prescription drug that results in the prescription drug being sold in the District for an excessive price.

(Dec. 10, 2005, D.C. Law 16-37, § 2, 52 DCR 9061.)

Legislative history of Law 16-37. — For Law 16-37, see notes following § 28-4551.

CASE NOTES

Validity.

District of Columbia Prescription Drug Excessive Pricing Act, which barred excessive pricing of patented prescription drugs, was conflict preempted by federal patent law, since it constituted clear obstacle to accomplishment

and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

District of Columbia statutes barring imposition of minimum resale requirements for patented prescription drugs had per se invalid extraterritorial reach, in violation of Commerce Clause, as applied to transactions between manufacturers and wholesalers that occurred wholly out of state, despite District's claim that statutes fell within its police powers as regulation of public health, where all manufacturers were located outside of District, manufacturers sold overwhelming bulk of their patented prescription drugs in out-of-state transactions to wholesalers or large retail chains that maintained their own warehousing and retail distribution systems, and statutes explicitly exempted in-state retailers from liability. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring excessive pricing of patented prescription drugs constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs, and thus violated Supremacy Clause; statutes were intended to force manufacturers to limit wholesale price of patented drugs to less than 30% more than wholesale price of same drugs sold in four designated "high income" countries, which would upset balance of system of rewards calculated by Congress to insure continued strength of industry vital to national interests. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

§ 28-4554. Burden of proof; determination of excessive pricing.

(a) A prima facie case of excessive pricing shall be established where the wholesale price of a patented prescription drug in the District is over 30% higher than the comparable price in any high income country in which the product is protected by patents or other exclusive marketing rights.

(b) Where a prima facie case of excessive pricing is shown, the burdens of providing evidence and of proving by a preponderance of the evidence shall shift to the defendant to show that a given prescription drug is not excessively priced given demonstrated costs of invention, development and production of the prescription drug, global sales and profits to date, consideration of any government funded research that supported the development of the drug, and the impact of price on access to the prescription drug by residents and the government of the District of Columbia.

(Dec. 10, 2005, D.C. Law 16-37, § 2, 52 DCR 9061.)

Legislative history of Law 16-37. — For Law 16-37, see notes following § 28-4551.

CASE NOTES

ANALYSIS

Standing.
Validity.

Standing.

Members of plaintiff trade associations for pharmaceutical and biotechnology companies had actual and well-founded fear that District of Columbia's Prescription Drug Excessive Pricing Act would be enforced against them, for purpose of standing inquiry of whether associations themselves had standing to challenge Act on behalf of their members, where, among other things, Act itself contained finding that prices of prescription drugs in District of Columbia were presently "excessive," which was same word as standard for illegal price, and findings section also declared that "it is incumbent on the government of the District of Columbia to take action to restrain the excessive

prices of prescription drugs." Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

Trade associations for pharmaceutical and biotechnology companies, who sought to shape policy in manner favorable to member pharmaceutical and biotechnology companies, could have standing to bring action to challenge constitutionality of District of Columbia's Prescription Drug Excessive Pricing Act without directly joining members in action; although associations did not manufacture patented prescription drugs or otherwise engage in activities likely to fall within ambit of Act, subject matter of case was highly germane to their respective purposes. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

Trade associations for pharmaceutical and biotechnology companies had standing to bring pre-enforcement actions challenging constitutionality of state statute barring excessive pricing of patented prescription drugs, where state legislature had already determined that excessive pricing already existed in state, statute permitted any affected party to bring suit, statute applied only to manufacturers, and manufacturers had no control over retailers' pricing decisions. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

To establish standing, organization must allege sufficient facts to establish that at least one member is threatened with specific injury or has suffered injury in fact. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

Organization can have standing to bring claims on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) interest it seeks to protect are germane to organization's purpose; and (3) neither claim asserted nor relief requested requires participation of individual members in lawsuit. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

Validity.

District of Columbia Prescription Drug Excessive Pricing Act, which barred excessive pricing of patented prescription drugs, was conflict preempted by federal patent law, since it constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

District of Columbia statutes barring excessive pricing of patented prescription drugs constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs, and thus violated Supremacy Clause; statutes were intended to force manufacturers to limit wholesale price of patented drugs to less than 30% more than wholesale price of same drugs sold in four designated "high income" countries, which would upset balance of system of rewards calculated by Congress to insure continued strength of industry vital to national interests. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring imposition of minimum resale requirements for patented prescription drugs had per se invalid extraterritorial reach, in violation of Commerce Clause, as applied to transactions between manufacturers and wholesalers that occurred wholly out of state, despite District's claim that statutes fell within its police powers as regulation of public health, where all manufacturers were located outside of District, manufacturers sold overwhelming bulk of their patented prescription drugs in out-of-state transactions to wholesalers or large retail chains that maintained their own warehousing and retail distribution systems, and statutes explicitly exempted in-state retailers from liability. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statute permitting interested party to establish prima facie case of excessive pricing of pharmaceutical product by comparing domestic wholesale price of drug with its wholesale price in one of four specified foreign countries was not facially unconstitutional under Foreign Commerce Clause, where foreign country comparison was optional approach for establishing prima facie case, and it was possible to establish prima facie case without reference to foreign drug prices. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

§ 28-4555. Judicial remedies.

(a) Any affected party, including the District of Columbia, shall have standing to file a civil suit in a court of competent jurisdiction for a violation of this chapter and to seek a remedy, including declaratory and injunctive relief. If the District of Columbia is the plaintiff, it may seek remedies on its own behalf, on behalf of all residents of the District of Columbia, or both.

(b) If a judge of a court of competent jurisdiction finds that there has been excessive pricing in a suit filed by an affected party, the judge shall levy the appropriate civil penalties and may order, if supported by the evidence:

(1) Temporary, preliminary, or permanent injunctions to enjoin the sales of prescription drugs in the District at excessive prices;

(2) Appropriate fines for each violation;

(3) Damages, including treble damages;

(4) Reasonable attorney's fees;

(5) The cost of litigation; or

(6) Any other relief the court deems proper.

(Dec. 10, 2005, D.C. Law 16-37, § 2, 52 DCR 9061.)

Legislative history of Law 16-37. — For Law 16-37, see notes following § 28-4551.

CASE NOTES

Validity.

District of Columbia Prescription Drug Excessive Pricing Act, which barred excessive pricing of patented prescription drugs, was conflict preempted by federal patent law, since it constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs. Biotechnology Indus. Org. v. District of Columbia, 496 F.3d 1362, 2007 U.S. App. LEXIS 18236 (2007).

District of Columbia statutes barring imposition of minimum resale requirements for patented prescription drugs had per se invalid extraterritorial reach, in violation of Commerce Clause, as applied to transactions between manufacturers and wholesalers that occurred wholly out of state, despite District's claim that statutes fell within its police powers as regulation of public health, where all manufacturers were located outside of District, manufacturers sold overwhelming bulk of their patented prescription drugs in out-of-state transactions to wholesalers or large retail chains that maintained their own warehousing and retail distribution systems, and statutes explicitly exempted in-state retailers from liability. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

District of Columbia statutes barring excessive pricing of patented prescription drugs constituted clear obstacle to accomplishment and execution of purpose and objectives set by Congress in passing federal patent laws relating to prescription drugs, and thus violated Supremacy Clause; statutes were intended to force manufacturers to limit wholesale price of patented drugs to less than 30% more than wholesale price of same drugs sold in four designated "high income" countries, which would upset balance of system of rewards calculated by Congress to insure continued strength of industry vital to national interests. Pharm. Research & Mfrs. of Am. v. District of Columbia, 406 F.Supp.2d 56, 2005 U.S. Dist. LEXIS 37897 (2005), affirmed by 496 F.3d 1362, 2007 U.S. App. LEXIS 18236, 83 U.S.P.Q.2d (BNA) 1639 (Fed. Cir. 2007).

CHAPTER 46. CONSUMER CREDIT SERVICE ORGANIZATIONS.

§ 28-4601. Definitions.

For the purposes of this chapter the term:

(1) "Consumer" means any person who is solicited to purchase or who purchases the services of a consumer credit service organization.

(2)(A) "Consumer credit service organization" means any person who, with respect to the extension of credit by others, sells, provides, performs, or represents that he or she can sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services:

(i) Improvement of a consumer's credit record, history, or rating;

(ii) Obtain an extension of credit for a consumer; or

(iii) Provide advice or assistance to a consumer regarding any matter related to the consumer's personal, household, or family credit.

(B) A consumer credit service organization shall include a salesperson, agent, or representative of a consumer credit service organization.

(C) A consumer credit service organization shall include an independent agent who sells or attempts to sell the services of a consumer credit service organization.

(D) A consumer credit service organization does not include:

(i) Any person authorized to make a loan or extension of credit under the laws of the District of Columbia ("District") or the United States who is subject to regulation and supervision by the District or the United States, or a lender approved by the United States Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act, approved June 27, 1934 (48 Stat. 1246; 12 U.S.C. 1701 et seq.);

(ii) Any bank, savings bank, or savings and loan institution whose deposits or accounts are eligible for insurance by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, or a subsidiary of any bank, savings bank, or savings and loan institution with deposits or accounts that are eligible for insurance by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Corporation;

(iii) Any credit union doing business in the District pursuant to the Federal Credit Union Act, approved August 1, 1964 (78 Stat. 377; § 26-501 et seq.);

(iv) Any nonprofit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1954, approved August 16, 1954 (68A Stat. 3; 26 U.S.C. 1 et seq.);

(v) Any person who operates a collection agency pursuant to the laws of the District;

(vi) Any person licensed to practice law in the District if the person renders consumer credit services within the course and scope of his or her practice;

(vii) Any broker-dealer registered with the United States Securities and Exchange Commission or the United States Commodity Futures Trading Commission if the broker-dealer is acting within the scope of the applicable federal securities or commodity futures laws and regulations; or

(viii) Any consumer reporting agency as defined in the Federal Fair Credit Reporting Act ("Fair Credit Reporting Act"), approved October 26, 1970 (84 Stat. 1128; 15 U.S.C. sec. 1681-1681t).

(3) "Extension of credit" means the right to defer payment of a debt or to incur a debt and defer payment of the debt as offered or granted primarily for personal, family, or household purposes.

(4) "Person" means any individual, corporation, firm, agency, company, joint venture, association, organization, partnership, society, or joint stock company.

(Mar. 8, 1991, D.C. Law 8-236, § 2, 38 DCR 306.)

Prior Codifications. — 1981 Ed., § 28-4601.

Legislative history of Law 8-236. — Law 8-236, the "Consumer Credit Service Organizations Amendment Act of 1990," was introduced in Council and assigned Bill No. 8-70, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-319 and transmitted to both Houses of Congress for is review.

References in text. — The "Federal Savings and Loan Insurance Corporation", referred to in (2)(D)(ii), has been abolished. For provisions relating to the abolition of the Federal Savings and Loan Insurance Corporation and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

CASE NOTES

Consumer credit service organization.

Genuine issue of material fact existed as to extent of contacts of lender's attorney with sole member of limited liability company (LLC) in connection with loan, precluding summary judgment as to whether attorney was a "consumer credit service organization liable" liable under District of Columbia's Consumer Credit Service Organization Act (CCSOA) in action alleging that attorney fraudulently misrepresented the nature of loan to LLC which was secured by condominium which member transferred to LLC, and that attorney failed to provide member with certain disclosures. Sloan v. Urban Title Servs., Inc., 689 F.Supp.2d 94, 2010 U.S. Dist. LEXIS 12604 (2010).

§ 28-4602. Registration statement.

(a) A consumer credit service organization that operates in the District shall:

(1) Register with the Mayor by filing, on a form prescribed by the Mayor, a registration statement and paying a registration fee of $300; and

(2) Pay an annual fee of $200 before April 2 of each subsequent year or at any other time established by regulation.

(b) If there is a change in any of the information provided in the registration

statement, the registrant shall report the change in writing to the Mayor within 10 days of the change.

(c) If, in the opinion of the Mayor, the registration statement fails to disclose sufficient information required by this chapter or the rules issued pursuant to this chapter, the registrant shall file in writing any additional information requested by the Mayor. The Mayor shall not accept the registration statement until all the requested information is furnished.

(Mar. 8, 1991, D.C. Law 8-236, § 3, 38 DCR 306; Apr. 9, 1997, D.C. Law 11-255, § 27(ff), 44 DCR 1271; Oct. 3, 2001, D.C. Law 14-28, § 3302, 48 DCR 6981.)

Section references. — This section is referenced in § 28-4606.

Prior Codifications. — 1981 Ed., § 28-4602.

Effect of amendments. — D.C. Law 14-28 rewrote subsec. (a) which had read as follows: "(a) A consumer credit service organization that operates in the District shall: (1) Register with the Mayor; and (2) On a form prescribed by the Mayor, file a registration statement with the Mayor."

Emergency legislation. — For temporary (90 day) amendment of section, see § 3002 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 14-28. — Law 14-28, the "Fiscal Year 2002 Budget Support Act of 2001", was introduced in Council and assigned Bill No. 14-144, which was referred to the Committee Of the Whole. The Bill was adopted on first and second readings on May 1, 2001, and June 5, 2001, respectively. Signed by the Mayor on June 29, 2001, it was assigned Act No. 14-85 and transmitted to both Houses of Congress for its review. D.C. Law 14-28 became effective on October 3, 2001.

§ 28-4603. Prohibited acts.

A consumer credit service organization shall not:

(1) Charge or receive money or other valuable consideration prior to completion of the services the consumer credit service organization has agreed to perform for a consumer, unless the consumer credit service organization has obtained a surety bond or established a trust account as required by § 28-4604;

(2) Charge or receive money or other valuable consideration solely for referral of a consumer to a retail seller who may extend credit to the consumer if the credit that is to be extended to the consumer is based upon substantially the same terms as credit available to the general public;

(3) Make any statement or counsel or advise a consumer to make any statement regarding the consumer's creditworthiness, credit standing, or credit capacity that the consumer credit service organization knows or reasonably should have known is false or misleading to the following:

(A) A credit reporting agency;

(B) A person who has extended credit to a consumer; or

(C) A person to whom a consumer is applying for an extension of credit;

(4) In connection with the offer or sale of the services:

(A) Make or use a false or misleading representation;

(B) Fail to disclose a material fact, policy, or method; or

(C) Directly or indirectly engage in an act or course of business to defraud or deceive a consumer;

(5) Make or use as a part of its trade name, or employ in any communication, correspondence, notice, advertisement, circular, or other writing or publication, the word "repair" in a manner that reasonably conveys the impression or belief that the organization is able to provide a consumer with an immediate correction or rehabilitation of the consumer's credit problem;

(6) Attempt to waive any provision of this chapter or coerce, influence, or direct a consumer to waive any provision of this chapter or any rule issued pursuant to this chapter; or

(7) Fail or refuse to comply with any provision of this chapter or any rule issued pursuant to this chapter.

(Mar. 8, 1991, D.C. Law 8-236, § 4, 38 DCR 306; Apr. 9, 1997, D.C. Law 11-255, § 27(gg), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-4603.

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-4602.

§ 28-4604. Bond requirements.

(a) A consumer credit service organization that charges or receives money or other valuable consideration prior to completion of services under a contract or agreement shall obtain a surety bond or establish a trust account that guarantees a refund to a consumer of any money or other valuable consideration paid by the consumer. The bond shall be in the amount of $25,000 and issued by a surety company legally allowed to do business in the District. A trust account established to guarantee a refund to a consumer shall have a minimum balance of $25,000 and be deposited at a federally insured bank or savings and loan association located in the District.

(b) Funds from the bank account or surety bond shall be used to refund payment to a consumer who cancels a contract, to pay any damages assessed against a consumer credit service organization in an action arising from a violation of this chapter, or to settle a consumer complaint filed with the Mayor against a consumer credit service organization.

(Mar. 8, 1991, D.C. Law 8-236, § 5, 38 DCR 306.)

Section references. — This section is referenced in § 28-4603.

Prior Codifications. — 1981 Ed., § 28-4604.

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

§ 28-4605. Disclosure; written agreement required.

(a) Prior to the execution of a contract or agreement between a consumer and a consumer credit service organization or prior to the receipt by the

consumer credit service organization of any money or other valuable consideration, whichever occurs first, the consumer credit service organization shall provide the consumer with a statement that contains the information required pursuant to subsection (b) of this section. The consumer credit service organization shall maintain for 3 years a copy of the statement signed by the consumer acknowledging receipt of the statement required by subsection (b) of this section.

(b) The information statement shall include the following:

(1) A complete and accurate statement of a consumer's right to review any file relating to the consumer that is maintained by the consumer credit reporting agency, as provided under the Fair Credit Reporting Act (15 U.S.C. 1681-1681t);

(2) A statement that a consumer may review his or her consumer credit reporting agency's file at no charge if a request is made to the consumer credit reporting agency within 30 days after receiving notice that credit has been denied;

(3) The approximate amount that the consumer credit service organization will charge a consumer to review his or her consumer credit reporting agency's file if a request has not been made within 30 days after receiving notice that credit has been denied;

(4) A statement of a consumer's right to dispute the completeness or accuracy of any information contained in any file on the consumer maintained by a consumer credit service organization as allowed by applicable District or federal law;

(5) A complete and detailed description of the services to be performed by the consumer credit service organization for a consumer and the total amount the consumer will be charged for the services;

(6) A statement that asserts a consumer's right to recover under a bond or trust account established pursuant to this chapter;

(7)(A) The name and address of the trust account depository and the trustee and the account number of the trust account; or

(B) The name and address of the surety company that issued the bond and the account number and date of the surety bond; and

(8) A statement that asserts a consumer's right to file a dispute directly with the consumer credit reporting agency in accordance with the provisions of the Fair Credit Reporting Act.

(c) Any contract between a consumer and the consumer credit service organization for the purchase of the services of the consumer credit service organization shall be in writing, dated, signed by the consumer, and include the following:

(1) The terms and conditions of payment, including the total of all the payments to be made by the consumer, regardless of whether the payments are to be made to the consumer credit service organization or to another person;

(2) A full and detailed description of the services to be performed by the consumer credit service organization for the consumer, including:

(A) A statement concerning the specific detrimental information with respect to a consumer's credit that the credit service organization proposes to remedy;

(B) Any guarantee or promise of full or partial refund; and

(C) The estimated completion date or estimated length of time necessary for completion of the services; and

(3) The address of the consumer credit service organization's principal place of business and the name and address of the organization's registered agent authorized to receive service of process.

(d) The contract shall be accompanied by a notice of cancellation that shall include the following:

(1) Notice of a consumer's right to cancel a contract within 5 calendar days of signing the contract;

(2) A provision that states that a consumer may cancel by personally delivering a copy of a signed and dated cancellation notice or by sending a notice of a cancellation by certified mail, return receipt requested, to the consumer credit service organization; and

(3) A provision that a consumer is entitled to receive a reimbursement within 10 days of receipt of the cancellation notice.

(e) The consumer credit service organization shall provide a consumer with a copy of the information statement, contract, disclosure statement, notice of cancellation, and any other document required by this chapter or the rules issued pursuant to this chapter.

(Mar. 8, 1991, D.C. Law 8-236, § 6, 38 DCR 306.)

Prior Codifications. — 1981 Ed., § 28-4605.

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

§ 28-4606. Enforcement.

(a) Except as provided in this chapter, no registration pursuant to section 3 [§ 28-4602] shall be suspended or revoked without a hearing pursuant to title 1 of the District of Columbia Administrative Procedure Act ("APA"), approved October 21, 1968 (82 Stat. 1204; § 2-501 et seq.).

(b) In any proceeding pursuant to this chapter, the burden of proving an exemption or exception is upon the person who claims the exemption or exception.

(c) This section does not prohibit the enforcement by any person of a right provided by this chapter or any other applicable District or federal law, rule, or regulation.

(Mar. 8, 1991, D.C. Law 8-236, § 7, 38 DCR 306.)

Prior Codifications. — 1981 Ed., § 28-4606.

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

§ 28-4607. Penalties.

(a) Any person who violates any provision of this chapter shall be fined not more than not more than the amount set forth in [§ 22-3571.01] per violation, imprisoned for not more than 1 year, or both.

(b) Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this act [this chapter] or the rules authorized by this chapter, pursuant to subchapters I and II of Chapter 18 of Title 2.

(c) Any consumer injured by a violation of this chapter may bring an action for recovery of damages within 3 years after the signing of the contract. Judgment shall be entered for actual damages and shall in no case be less than the amount paid by the consumer to the consumer credit service organization, plus reasonable attorney's fees and actual costs incurred to recover the damages. An award may also be entered for punitive damages.

(d) The remedies provided pursuant to this chapter are in addition to the remedies available pursuant to any other law.

(Mar. 8, 1991, D.C. Law 8-236, § 8, 38 DCR 306; June 11, 2013, D.C. Law 19-317, § 285(f), 60 DCR 2064.)

Prior Codifications. — 1981 Ed., § 28-4607.

Effect of amendments. — The 2013 amendment by D.C. Law 19-317 substituted "not more than the amount set forth in [§ 22-3571.01]" for "not more than $500" in (a).

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

Legislative history of Law 19-317. — Law 19-317, the "Criminal Fine Proportionality Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-214. The Bill was adopted on first and second readings on Oct. 16, 2012, and Nov. 1, 2012, respectively. Signed by the Mayor on Jan. 23, 2013, it was assigned Act No. 19-641 and transmitted to Congress for its review. D.C. Law 19-317 became effective on June 11, 2013.

Editor's notes. — Applicability of D.C. Law 19-317: Section 401 of D.C. Law 19-317 provided that the act shall apply only to offenses committed on or after June 11, 2013.

§ 28-4608. Rulemaking.

(a) The Mayor shall issue proposed rules, pursuant to subchapter I of Chapter 5 of Title 2, to implement the provisions of this chapter. The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved. Nothing in this section shall affect any requirements imposed upon the Mayor by subchapter I of Chapter 5 of Title 2.

(b) The proposed rules shall include, but not be limited to the following:

(1) Registration requirements;

(2) Sample disclosure provisions;

(3) Contract and notice of cancellation forms; and

(4) A schedule of civil fines.

(c) The Mayor may issue emergency rules without prior Council approval, which shall be effective for not more than 90 days and are consistent with subchapter I of Chapter 5 of Title 2.

(Mar. 8, 1991, D.C. Law 8-236, § 10, 38 DCR 306; Apr. 9, 1997, D.C. Law 11-255, § 27(hh), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28-4608.

Legislative history of Law 8-236. — For legislative history of D.C. Law 8-236, see Historical and Statutory Notes following § 28-4601.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 28-4602.

Editor's notes. — Most of the provisions of this chapter (§§ 28-4701 to 28-4712), are now codified at §§ 19-1309.01 to 19-1309.06, 19-1308.03, 19-1308.04, and 19-1308.05.

CHAPTER 47. UNIFORM PRUDENT INVESTOR ACT.

§§ 28-4701 to 28-4712. Prudent investor rule; standard of care; portfolio strategy; risk and return objectives; diversification; duties at inception of trusteeship; loyalty; impartiality; investment costs; reviewing compliance; delegation of investment and management functions; language invoking standard of chapter; uniformity of application and construction; application to existing relationships. [Repealed].

Repealed.

(Mar. 26, 1999, D.C. Law 12-187, (§ 1-12, 45 DCR 7802; Mar. 10, 2004, D.C. Law 15-104, § 4, 51 DCR 208.)

Prior Codifications. — 1981 Ed., § 28-4701 — 28-4712.

Legislative history of Law 15-104. — Law 15-104, the "Uniform Trust Act of 2003", was introduced in Council and assigned Bill No. 15-234, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 4, 2003, and December 2, 2003, respectively. Signed by the Mayor on December 18, 2003, it was assigned Act No. 15-286 and transmitted to both Houses of Congress for its review. D.C. Law 15-104 became effective on March 10, 2004.

Legislative history of Law 12-187. — Law 12-187, the "Uniform Prudent Investor Act of 1998," was introduced in Council and assigned Bill No. 12-154, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on July 7, 1998, and September 22, 1998, respectively. Signed by the Mayor on October 2, 1998, it was assigned Act No. 12-458 and transmitted to both Houses of Congress for its review. D.C. Law 12-187 became effective on March 26, 1999.

Editor's notes. — Most of the provisions of this chapter (§§ 28-4701 to 28-4712), are now codified at §§ 19-1309.01 to 19-1309.06, 19-1308.03, 19-1308.04, and 19-1308.05.

Uniform Law: These sections were based upon §§ 1-12 of the Uniform Prudent Investor Act.

CHAPTER 48. PRINCIPAL AND INCOME; UNIFORM LAW.

Subchapter I. Definitions and Fiduciary Duties.

§ 28-4801.01. Short title.

This chapter may be cited as the "Uniform Principal and Income Act".

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — Law 13-292, the "Omnibus Trusts and Estates Amendment Act of 2000", was introduced in Council and assigned Bill No. 13-298, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 5, 2000, and December 19, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-599 and transmitted to both Houses of Congress for its review. D.C. Law 13-292 became effective on April 27, 2001.

Editor's notes. — Section 1102 of D.C. Law 13-292 provided: "For purposes of Title 5 and Title 9 and sections 801(b), 805, and 806 of Title 8 of this act, the provisions relating to the administration of decedent's estates shall apply only to the estates of decedent's who die on or after the effective date of this act."

Uniform Law: This section is based upon

§ 101 of the Uniform Principal and Income Act (1997 Act).

§ 28-4801.02. Definitions.

For the purposes of this chapter, the term:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(2A) "Domestic partner" shall have the same meaning as provided in § 32-701(3).

(2B) "Domestic partnership" shall have the same meaning as provided in § 32-701(4).

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in subchapter IV of this chapter.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 26(a), 55 DCR 6758.)

Effect of amendments. — D.C. Law 17-231 added pars. (2A) and (2B).

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 17-231. — Law 17-231, the "Omnibus Domestic Partnership Equality Amendment Act of 2008", was introduced in Council and assigned Bill No. 17-135, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on April 1, 2008, and May 6, 2008, respectively. Signed by the Mayor on June 6, 2008, it was assigned Act No. 17-403 and transmitted to both Houses of Congress for its review. D.C. Law 17-231 became effective on September 12, 2008.

Editor's notes. — Uniform Law: This section is based upon § 102 of the Uniform Principal and Income Act (1997 Act).

§ 28-4801.03. Fiduciary duties; general principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of subchapters II and III of this chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under § 28-4801.04(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4801.04.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 103 of the Uniform Principal and Income Act (1997 Act).

§ 28-4801.04. Trustee's power to adjust.

(a) A trustee may adjust between principal and income to the extent the

trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in § 28-4801.03(a), that the trustee is unable to comply with § 28-4801.03(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse or domestic partner and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a) of this section.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 26(b), 55 DCR 6758.)

Section references. — This section is referenced in § 28-4801.03, § 28-4804.08, and § 28-4804.13.

Effect of amendments. — D.C. Law 17-231, in subsec. (c)(1), substituted "spouse or domestic partner" for "spouse".

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 17-231. — For Law 17-231, see notes following § 28-4801.04.

Editor's notes. — Uniform Law: This section is based upon § 104 of the Uniform Principal and Income Act (1997 Act).

Subchapter II. Decedent's Estate or Terminating Income Interest.

§ 28-4802.01. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in subchapters III

through V of this chapter which apply to trustees and the rules in paragraph (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in subchapters III through V of this chapter which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) of this section or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) of this section in the manner described in § 28-4802.02 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) of this section because of a payment described in § 28-4805.01 or § 28-4805.02 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4802.02, § 28-4803.02, and § 28-4805.01.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 201 of the Uniform Principal and Income Act (1997 Act).

§ 28-4802.02. Distribution to residuary and remainder beneficiaries.

(a) Each beneficiary described in § 28-4802.01(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4802.01.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 202 of the Uniform Principal and Income Act (1997 Act).

Subchapter III. Apportionment And End Of Income Interest.

§ 28-4803.01. When right to income begins and ends.

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 301 of the Uniform Principal and Income Act (1997 Act).

§ 28-4803.02. Apportionment of receipts and disbursements when decedent dies or income interest begins.

(a) A trustee shall allocate an income receipt or disbursement other than one to which § 28-4802.01(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is

required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which § 28-4804.01 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 302 of the Uniform Principal and Income Act ((1997 Act).

§ 28-4803.03. Apportionment when income interest ends.

(a) For the purposes of this section, the term "undistributed income" means net income received before the date on which an income interest ends. The term "undistributed income" does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than 5 percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 303 of the Uniform Principal and Income Act (1997 Act).

Subchapter IV. Allocation of Receipts During Administration of Trust.

Subpart 1—Receipts From Entities.

§ 28-4804.01. Character of receipts.

(a) For the purposes of this section, the term "entity" means a corporation, partnership, limited liability company, regulated investment company, real

estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which § 28-4804.02 applies, a business or activity to which § 28-4804.03 applies, or an asset-backed security to which § 28-4804.15 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4803.02, § 28-4804.02, and § 28-4804.15.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 401 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.02. Distribution from trust or estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, § 28-4804.01 or § 28-4804.15 applies to a receipt from the trust.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.01.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 402 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.03. Business and other activities conducted by trustee.

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;

(2) Farming;

(3) Raising and selling livestock and other animals;

(4) Management of rental properties;

(5) Extraction of minerals and other natural resources;

(6) Timber operations; and

(7) Activities to which § 28-4804.14 applies.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.01, § 28-4804.07, § 28-4804.14, and § 28-4805.03.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 403 of the Uniform Principal and Income Act (1997 Act).

Subpart 2—Receipts Not Normally Apportioned.

§ 28-4804.04. Principal receipts.

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate,

a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this subchapter;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in § 28-4805.02(a)(7) or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in part C of this subchapter.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 404 of the Uniform Principal and Income Act ((1997 Act).

§ 28-4804.05. Rental property.

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 405 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.06. Obligation to pay money.

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its

purchase price or its value when acquired by the trust shall be allocated to income.

(c) This section does not apply to an obligation to which § 28-4804.09, § 28-4804.10, § 28-4804.11, § 28-4804.12, § 28-4804.14, or § 28-4804.15 applies.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 406 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.07. Insurance policies and similar contracts.

(a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to § 28-4804.03, loss of profits from a business.

(c) This section does not apply to a contract to which § 28-4804.09 applies.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 407 of the Uniform Principal and Income Act (1997 Act).

Subpart 3—Receipts Normally Apportioned.

§ 28-4804.08. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by § 28-4804.09, § 28-4804.10, § 28-4804.11, § 28-4804.12, or § 28-4804.15 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in § 28-4801.04(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in § 28-4801.04(d) and may be released for the reasons and in the manner described in § 28-4801.04(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

(2) The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 408 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.09. Deferred compensation, annuities, and similar payments.

(a) For the purposes of this section, the term:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term "payment" includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For the purposes of subsections (d), (d-1), (d-2), and (d-3) of this section, the term "payment" also includes any payment from any separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, or a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not required to be made to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (d-1) of this section, subsections (d-2) and (d-3) of this section apply, and subsections (b) and (c) of this section do not apply, in determining the allocation of a payment made from a separate fund to:

(1) A trust to which an election to qualify for a marital deduction under section 2056(b)(7) of the Internal Revenue Code of 1986, approved August 5, 1997 (68A Stat. 392; 26 U.S.C. § 2056(b)(7)), has been made; or

(2) A trust that qualifies for the marital deduction under section 2056(b)(5) of the Internal Revenue Code of 1986, approved August 5, 1997 (68A Stat. 392; 26 U.S.C. § 2056(b)(5)).

(d-1) Subsections (d), (d-2), and (d-3) of this section do not apply if and to the extent that the series of payments would, without the application of subsection (d) of this section, qualify for the marital deduction under section 2056(b)(7)(C)

of the Internal Revenue Code of 1986, approved August 5, 1997 (68A Stat. 392; 26 U.S.C. § 2056(b)(7)(C)).

(d-2) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(d-3) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal 4 % of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under section 7520 of the Internal Revenue Code of 1986, approved November 10, 1988 (102 Stat. 3668; 26 U.S.C. § 7520), for the month preceding the accounting period for which the computation is made.

(e) This section does not apply to payments to which § 28-4804.10 applies.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 26(c), 55 DCR 6758; July 23, 2010, D.C. Law 18-197, § 2(b), 57 DCR 4524.)

Section references. — This section is referenced in § 28-4804.06, § 28-4804.07, § 28-4804.08, § 28-4804.10, § 28-4804.15, and § 28-4806.03.

Effect of amendments. — D.C. Law 17-231, in subsec. (d), substituted "marital or domestic partnership" for "marital".

D.C. Law 18-197 rewrote the section.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 17-231. — For Law 17-231, see notes following § 28-4801.04.

Legislative history of Law 18-197. — Law 18-197, the "Uniform Principal and Income Technical Amendments Act of 2010", was introduced in Council and assigned Bill No. 18-563, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on April 20, 2010, and May 4, 2010, respectively. Signed by the Mayor on May 19, 2010, it was assigned Act No. 18-409 and transmitted to both Houses of Congress for its review. D.C. Law 18-197 became effective on July 23, 2010.

Editor's notes. — Uniform Law: This section is based upon § 409 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.10. Liquidating asset.

(a) For the purposes of this section, the term "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term "liquidating asset" includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term

"liquidating asset" does not include a payment subject to § 28-4804.09, resources subject to § 28-4804.11, timber subject to § 28-4804.12, an activity subject to § 28-4804.14, an asset subject to § 28-4804.15, or any asset for which the trustee establishes a reserve for depreciation under § 28-4805.03.

(b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.06, § 28-4804.08, and § 28-4804.09.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 410 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.11. Minerals, water, and other natural resources.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent shall be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3) of this subsection, 90 percent of the net amount received shall be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, 90 percent of the amount shall be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on the effective date of this chapter, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before the effective date of this chapter. If the trust acquires an interest in minerals, water, or other natural resources after the effective date of this chapter, the trustee shall allocate receipts from the interest as provided in this chapter.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.06, § 28-4804.08, and § 28-4804.10.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 411 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.12. Timber.

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on the effective date of this chapter, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before the effective date of this chapter. If the trust acquires an interest in timberland after the effective date of this chapter, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.06, § 28-4804.08, and § 28-4804.10.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 412 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.13. Property not productive of income.

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse or domestic partner with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 28-

4801.04 and distributes to the spouse or domestic partner from principal pursuant to the terms of the trust are insufficient to provide the spouse or domestic partner with the beneficial enjoyment required to obtain the marital deduction, the spouse or domestic partner may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by § 28-4801.04(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 26(d), 55 DCR 6758.)

Effect of amendments. — D.C. Law 17-231, in subsec. (d), substituted "spouse or domestic partner" for "spouse".

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 17-231. — For Law 17-231, see notes following § 28-4801.04.

Editor's notes. — Uniform Law: This section is based upon § 413 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.14. Derivatives and options.

(a) For the purposes of this section, the term "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under § 28-4804.03 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.03, § 28-4804.06, and § 28-4804.10.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 414 of the Uniform Principal and Income Act (1997 Act).

§ 28-4804.15. Asset-backed securities.

(a) For the purposes of this section, the term "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term "asset-backed security" includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term "asset-backed security" does not include an asset to which § 28-4804.01 or § 28-4804.09 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.01, § 28-4804.02, § 28-4804.06, § 28-4804.08, and § 28-4804.10.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 415 of the Uniform Principal and Income Act (1997 Act).

Subchapter V. Allocation Of Disbursements During Administration Of Trust.

§ 28-4805.01. Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which § 28-4802.01(2)(B) or (C) applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4802.01 and § 28-4805.02.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 501 of the Uniform Principal and Income Act (1997 Act).

§ 28-4805.02. Disbursements from principal.

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in § 28-4805.01(1) and (2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in § 28-4805.01(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4802.01, § 28-4804.04, and § 28-4805.04.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 502 of the Uniform Principal and Income Act (1997 Act).

§ 28-4805.03. Transfers from income to principal for depreciation.

(a) For the purposes of this section, the term "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a

beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under § 28-4804.03 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Section references. — This section is referenced in § 28-4804.10.

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 503 of the Uniform Principal and Income Act (1997 Act).

§ 28-4805.04. Transfers from income to reimburse principal.

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) Disbursements described in § 28-4805.02(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 504 of the Uniform Principal and Income Act (1997 Act).

§ 28-4805.05. Income taxes.

(a) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to

principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c) of this section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; July 23, 2010, D.C. Law 18-197, § 2(c), 57 DCR 4524.)

Effect of amendments. — D.C. Law 18-197 rewrote subsecs. (c) and (d).

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 18-197. — For Law 18-197, see notes following § 28-4804.09.

Editor's notes. — Uniform Law: This section is based upon § 505 of the Uniform Principal and Income Act (1997 Act).

§ 28-4805.06. Adjustments between principal and income because of taxes.

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital or domestic partnership deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for

a marital or domestic partnership deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 26(e), 55 DCR 6758.)

Effect of amendments. — D.C. Law 17-231, in subsec. (b), substituted "marital or domestic partnership" for "marital".

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Legislative history of Law 17-231. — For Law 17-231, see notes following § 28-4801.04.

Editor's notes. — Uniform Law: This section is based upon § 506 of the Uniform Principal and Income Act (1997 Act).

Subchapter VI. Miscellaneous Provisions.

§ 28-4806.01. Uniformity of application and construction.

In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 601 of the Uniform Principal and Income Act (1997 Act).

§ 28-4806.02. Application of chapter to existing trusts and estates.

This chapter applies to every trust or decedent's estate existing on the effective date of this chapter [April 27, 2001] except as otherwise expressly provided in the will or terms of the trust or in this chapter.

(Apr. 27, 2001, D.C. Law 13-292, § 502(c), 48 DCR 2087.)

Legislative history of Law 13-292. — For Law 13-292, see notes following § 28-4801.01.

Editor's notes. — Uniform Law: This section is based upon § 605 of the Uniform Principal and Income Act (1997 Act).

§ 28-4806.03. Transitional matters.

Section 28-4804.09 applies to a trust described in § 28-4804.09(d) on and after the following dates:

(1) If the trust is not funded as of [July 23, 2010], the date of the decedent's death;

(2) If the trust is initially funded in the calendar year beginning January 1, 2010, the date of the decedent's death; or

(3) If the trust is not described in paragraph (1) or (2) of this section, January 1, 2010.

(July 23, 2010, D.C. Law 18-197, § 2(d), 57 DCR 4524.)

Legislative history of Law 18-197. — For Law 18-197, see notes following § 28-4804.09.

Chapter 49. Uniform Electronic Transactions.

§ 28-4901. Definitions.

For the purposes of this chapter, the term:

(1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a State or of a county, municipality, or other political subdivision of a State.

(10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(15) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a State.

(16) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — Law 14-28, the "Fiscal Year 2002 Budget Support Act of 2001", was introduced in Council and assigned Bill No. 14-144, which was referred to the Committee Of the Whole. The Bill was adopted on first and second readings on May 1, 2001, and June 5, 2001, respectively. Signed by the Mayor on June 29, 2001, it was assigned Act No. 14-85 and transmitted to both Houses of Congress for its review. D.C. Law 14-28 became effective on October 3, 2001.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Mayor's Orders. — Citywide Email Retention Policy, see Mayor's Order 2007-157, July 5, 2007 (54 DCR 9613).

Citywide Email Retention Policy, see Mayor's Order 2007-207, September 21, 2007 (55 DCR 127).

Rescission of Mayor's Order 2007-157, dated July 5, 2007, on Citywide Email Retention Policy, see Mayor's Order 2007-228, October 15, 2007 (55 DCR 149).

Editor's notes. — This section is based upon § 2 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4902. Scope.

(a) Except as otherwise provided in subsection (b) of this section, this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) Subtitle I of this title, except for §§ 28:1-107 and 28:1-206 and Articles 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section.

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 3 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4903. Prospective application.

This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after [October 3, 2001].

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 4 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4904. Use of electronic records and electronic signatures; variation by agreement.

(a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 5 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4905. Construction and application.

This chapter must be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable law;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 6 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4906. Legal recognition of electronic records, electronic signatures, and electronic contracts.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 7 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4907. Provision of information in writing; presentation of records.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (1) to be posted or displayed in a certain manner, (2) to be sent, communicated, or transmitted by a specified method, or (3) to contain information that is formatted in a certain manner, the following rules apply:

(A) The record must be posted or displayed in the manner specified in the other law.

(B) Except as otherwise provided in subsection (d)(2) of this section, the record must be sent, communicated, or transmitted by the method specified in the other law.

(C) The record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) To the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this chapter to send, communicate, or transmit a record by first-class mail, postage prepaid, may be varied by agreement to the extent permitted by the other law.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 8 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4908. Attribution and effect of electronic record and electronic signature.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this section is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 9 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4909. Effect of change or error.

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) Promptly notifies the other person of the error and that the

individual did not intend to be bound by the electronic record received by the other person;

(B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) Has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) of this subsection nor paragraph (2) of this subsection applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) of this subsection may not be varied by agreement.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 10 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4910. Notarization and acknowledgment.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 11 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4911. Retention of electronic records; originals.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) of this section does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this section.

(f) A record retained as an electronic record in accordance with subsection (a) of this section satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after [October 3, 2001] specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of the District of Columbia from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Section references. — This section is referenced in § 28-4917.

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 12 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4912. Admissibility in evidence.

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 13 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4913. Automated transaction.

In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 14 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4914. Time and place of sending and receipt.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) Is in a form capable of being processed by that system; and

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed

§ 28-4916. Creation and retention of electronic records and conversion of written records by governmental agencies.

The Mayor shall determine whether, and the extent to which, a governmental agency will create electronic records and convert written records to electronic records. The retention of electronic records shall conform to the requirements and practices established under Chapter 17 of Title 2 of the District of Columbia Official Code.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881; June 13, 2008, D.C. Law 17-175, § 3, 55 DCR 5387.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

D.C. Law 17-175 rewrote the section which had read as follows: "The Mayor shall determine whether, and the extent to which, a governmental agency will create and retain electronic records and convert written records to electronic records."

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Legislative history of Law 17-175. — Law 17-175, the "Electronic Mail Public Record Clarification Amendment Act of 2008", was introduced in Council and assigned Bill No. 17-490 which was referred to the Committee on Workforce Development and Government Operations. The Bill was adopted on first and second readings on March 4, 2008, and April 1, 2008, respectively. Signed by the Mayor on April 22, 2008, it was assigned Act No. 17-359 and transmitted to both Houses of Congress for its review. D.C. Law 17-175 became effective on June 13, 2008.

Editor's notes. — Uniform Law: This section is based upon § 17 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4917. Acceptance and distribution of electronic records by governmental agencies.

(a) Except as otherwise provided in § 28-4911(f), the Mayor shall determine whether, and the extent to which, a governmental agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a) of this section, the Mayor, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(3) Control processes and procedures as appropriate to ensure adequate

preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in § 28-4911(f), this chapter does not require a governmental agency of the District of Columbia to use or permit the use of electronic records or electronic signatures.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Section references. — This section is referenced in § 28-4918 and § 51-111.

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Delegation of Authority. — Delegation of Digital Signature Authority to Chief Technology Officer, see Mayor's Order 2005-45, March 3, 2005 (52 DCR 2870).

Delegation of Authority for Acceptance and Distribution of Electronic Records by District Government Agencies, see Mayor's Order 2009-118, June 25, 2009 (56 DCR 6867).

Uniform Law: This section is based upon § 18 of the Uniform Electronic Transactions Act (1999 Act).

§ 28-4918. Interoperability.

The Mayor, in adopting standards pursuant to § 28-4917, may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of the District of Columbia. If appropriate, those standards may specify differing levels of standards from which governmental agencies of the District of Columbia may choose in implementing the most appropriate standard for a particular application.

(Oct. 3, 2001, D.C. Law 14-28, § 3502(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 64, 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) addition of section, see § 3202(b) of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 28-4901.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 28-3904.

Editor's notes. — Uniform Law: This section is based upon § 19 of the Uniform Electronic Transactions Act (1999 Act).

CHAPTER 50. ELECTRONIC MAIL SPAM DETERRENCE.

§ 28-5001. Definitions.

For the purposes of this chapter, the term:

(1) "Assist in the transmission" means actions taken by a person to procure, enable, finance, or otherwise actively support the transmission of a commercial electronic mail message by another person, if the person or entity providing the assistance knows or should have known that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates this chapter. The term "assist in the transmission" shall not include activities of any person or entity related to the design, manufacture, or distribution of any technology, product, or component that has a commercially significant use other than to violate or circumvent this chapter.

(2) "Commercial electronic mail message" means an electronic mail message sent for the purpose of encouraging the purchase, rental of, or investment in, property, goods, intangibles, or services.

(3) "Electronic mail" means an electronic message or computer file containing an image of a message that is transmitted between 2 or more computers, electronic terminals, or cellular telephones, and includes electronic messages that are transmitted within or between computer networks.

(4) "Electronic mail service provider" means any entity that is an intermediary in sending or receiving electronic mail or that provides to end-users of electronic mail services the ability to send or receive electronic mail.

(5) "Header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.

(Sept. 11, 2008, D.C. Law 17-230, § 2, 55 DCR 8311; Mar. 25, 2009, D.C. Law 17-353, §§ 245(b), (e), 56 DCR 1117.)

Effect of amendments. — D.C. Law 17-353 validated previously made technical corrections in the section designation, the introductory language, and par. (1).

Legislative history of Law 17-230. — Law 17-230, the "Spam Deterrence Act of 2008", was introduced in Council and assigned Bill No. 17-34, which was referred to the Committee of Public Service and Consumer Affairs. The Bill was adopted on first and second readings on June 3, 2008, and July 1, 2008, respectively. Signed by the Mayor on July 17, 2008, it was assigned Act No. 17-450 and transmitted to both Houses of Congress for its review. D.C. Law 17-230 became effective on September 11, 2008.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 28-3151.

§ 28-5002. Prohibitions.

(a) A person or entity shall not:

(1) Transmit, or assist in the transmission of, a commercial electronic mail message that:

(A) Falsely identifies electronic mail transmission information, including header information, or other routing information; or

(B) Contains false or misleading information in the subject line; or

(2) Transmit, or assist in the transmission of, a commercial electronic mail message using a third party's Internet address, domain name, or identity without the third party's consent for the purpose of transmitting electronic mail in a manner that makes it appear that the third party was the sender of the message or that results in responses to the message being directed to the third party.

(b) The prohibitions contained in this section shall apply to any person or entity who transmits, or who assists in the transmission of, a commercial electronic mail message:

(1) From a computer located in the District of Columbia;

(2) To an electronic mail address held by a resident of the District of Columbia;

(3) To an electronic mail service provider with equipment or its principal place of business in the District of Columbia; or

(4) To a domain name registered to a resident of the District of Columbia.

(Sept. 11, 2008, D.C. Law 17-230, § 3, 55 DCR 8311; Mar. 25, 2009, D.C. Law 17-353, § 245(c), 56 DCR 1117.)

Effect of amendments. — D.C. Law 17-353 validated a previously made technical correction in the section designation.

Legislative history of Law 17-230. — For Law 17-230, see notes following § 28-5001.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 28-3151.

§ 28-5003. Civil relief; damages.

(a)(1) Any person or entity who receives an electronic mail message that violates a provision of this chapter, whose equipment is used in the transmission or receipt of such a message, or whose property or person is otherwise injured by reason of a violation of a provision of this chapter may seek recovery for any damages sustained and the costs of suit. For the purposes of this section, damages shall include the loss of profits.

(2) In addition to the relief provided in subsection (a) of this section, a person, other than an electronic mail service provider, shall also recover attorneys' fees and costs, and may recover, in addition to actual damages, liquidated damages of $500 for each commercial electronic mail message transmitted in violation of this chapter or $50,000 per day, whichever is less.

(3) In addition to the relief provided in subsection (a) of this section, an electronic mail service provider may also recover attorneys' fees and costs, and may elect, in addition to actual damages, to recover liquidated damages of $100 for each commercial electronic mail message transmitted in violation of this chapter or $500,000 per day, whichever is less.

(b) At the request of any party to an action brought pursuant to this section, the court may, in its discretion, conduct all legal proceedings in such a way as to protect the secrecy and security of the computer, computer network, computer data, computer program, and computer software involved to prevent

possible recurrence of the same or similar act by another person and to protect any trade secrets of any party.

(c) Nothing in this chapter shall be construed to:

(1) Require a provider of Internet access service to block, transmit, route, relay, handle, or store certain types of electronic mail messages;

(2) Prevent or limit, in any way, a provider of Internet access service from adopting a policy regarding commercial or other electronic mail, including a policy of declining to transmit certain types of electronic mail messages, or from enforcing such policy through technical means, through contract, or pursuant to any remedy available under any other provision of federal or District law; or

(3) Render lawful any such policy that is unlawful under any other provision of law.

(d) The Attorney General of the District of Columbia may enforce the provisions of this chapter pursuant to authority granted in § 28-3909.

(Sept. 11, 2008, D.C. Law 17-230, § 4, 55 DCR 8311; Mar. 25, 2009, D.C. Law 17-353, § 245(d), (e), (f), 56 DCR 1117.)

Effect of amendments. — D.C. Law 17-353 validated previously made technical corrections in the section designation, subsecs. (a), (c), and (d).

Legislative history of Law 17-230. — For Law 17-230, see notes following § 28-5001.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 28-3151.

Chapter 51. Works of Fine Art.

§ 28-5101. Definitions.

For the purposes of this chapter, the term:

(1) "Art dealer" means a person engaged in the business of selling works of fine art other than a person exclusively engaged in the business of selling goods at public auction.

(2) "Artist" means the creator of a work of fine art.

(3) "On consignment" means delivered to an art dealer for the purpose of sale or exhibition to the public by the art dealer other than at a public auction.

(4) "Work of fine art" means an original art work which is:

(A) A visual rendition, including a painting, drawing, sculpture, mosaic, or photograph;

(B) A work of calligraphy;

(C) A work of graphic art, including an etching, lithograph, offset print, or silk screen;

(D) A craft work in materials, including clay, textile, fiber, wood, metal, plastic, or glass; or

(E) A work in mixed media, including a collage or a work consisting of any combination of subparagraphs (A) through (D) of this paragraph.

(Mar. 12, 2011, D.C. Law 18-310, § 2, 57 DCR 12392.)

Legislative history of Law 18-310. — Law 18-310, the "Artist Protection Act of 2010", was introduced in Council and assigned Bill No. 18-451, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on November 9, 2010, and November 23, 2010, respectively. Signed by the Mayor on December 9, 2010, it was assigned Act No. 18-631 and transmitted to both Houses of Congress for its review. D.C. Law 18-310 became effective on March 12, 2011.

§ 28-5102. Art dealer and artist; relationship.

If an art dealer accepts a work of fine art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of fine art:

(1) The art dealer shall be, with respect to that work of fine art, the agent of the artist;

(2) A trust shall be created;

(3) The work of fine art shall be trust property and the art dealer shall be a trustee for the benefit of the artist until the work of fine art shall be sold to a bona fide third party; and

(4) The proceeds of the sale of the work of fine art shall be trust property

and the art dealer shall be a trustee for the benefit of the artist until the amount due to the artist from the sale is paid.

(Mar. 12, 2011, D.C. Law 18-310, § 3, 57 DCR 12392.)

Section references. — This section is referenced in § 28-5103 and § 28-5104.

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5103. Trust property.

(a) If a work of fine art is trust property under § 28-5102 when initially received by the art dealer, it shall remain trust property, notwithstanding the subsequent purchase of the work of fine art by the art dealer, directly or indirectly, for the art dealer's own account until the purchase price is paid in full to the artist.

(b) If the art dealer sells a work of fine art which is trust property under § 28-5102 when initially received by a bona fide third party before the artist has been paid in full, the work of fine art shall cease to be trust property and the proceeds of the sale shall be held in trust by the art dealer for the benefit of the artist to the extent necessary to pay any balance due to the artist. The trust of the proceeds of the sale shall continue until the artist is paid in full.

(Mar. 12, 2011, D.C. Law 18-310, § 4, 57 DCR 12392.)

Section references. — This section is referenced in § 28-5104.

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5104. Trust property; art dealer's creditors.

Property which is trust property under §§ 28-5102 and 28-5103 shall not be subject to the claims, liens, or security interests of the creditors of the art dealer. The provisions of this section shall be given effect over any contrary provision of the Uniform Commercial Code.

(Mar. 12, 2011, D.C. Law 18-310, § 5, 57 DCR 12392.)

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5105. Art dealer required to obtain written contract.

(a) An art dealer may accept a work of fine art on a fee, commission, or other compensation basis, on consignment from the artist who created the work of fine art only if, prior to or at the time of acceptance, the art dealer enters into a written contract with the artist establishing:

(1) The value of the work of fine art;

(2) The time within which the proceeds of the sale are to be paid to the artist if the work of fine art is sold; and

(3) The minimum price for the sale of the work of fine art.

(b) If an art dealer violates this section, the Superior Court of the District of

Columbia may, at the request of the artist, void the obligation of the artist to the art dealer or to a person to whom the obligation is transferred, other than a holder in due course.

(Mar. 12, 2011, D.C. Law 18-310, § 6, 57 DCR 12392.)

Section references. — This section is referenced in § 28-5108.

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5106. Art dealer; duties.

(a) An art dealer who accepts a work of fine art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of fine art may use or display the work of fine art or a photograph of the work of fine art or permit the use or display of the work of fine art or a photograph of the work of fine art only if:

(1) Notice is given to users or viewers that the work of fine art is the work of the artist; and

(2) The artist gives prior written consent to the particular use or display.

(b) An art dealer who accepts a work of fine art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of fine art shall compensate the artist for loss or damage to the consigned work of fine art.

(Mar. 12, 2011, D.C. Law 18-310, § 7, 57 DCR 12392.)

Section references. — This section is referenced in § 28-5108.

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5107. Waiver void.

Any portion of an agreement which waives any provision of this chapter shall be void.

(Mar. 12, 2011, D.C. Law 18-310, § 8, 57 DCR 12392.)

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

§ 28-5108. Penalty.

An art dealer who violates § 28-5105 or § 28-5106 shall be liable to the artist in an amount equal to the actual damages, if any, including the incidental and consequential damages, sustained by the artist by reason of the violation, plus reasonable attorneys' fees.

(Mar. 12, 2011, D.C. Law 18-310, § 9, 57 DCR 12392.)

Legislative history of Law 18-310. — For history of Law 18-310, see notes under § 28-5101.

CHAPTER 52. UNIT PRICING REQUIREMENTS.

§ 28-5201. Short title.

This chapter may be cited as the "Unit Pricing Requirement Act of 2012".

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — Law 19-282, the "Consumer Protection Amendment Act of 2012," was introduced in Council and assigned Bill No. 19-581. The Bill was adopted on first and second readings on Dec. 4, 2012 and Dec. 18, 2012, respectively. Signed by the Mayor on Jan. 25, 2013, it was assigned Act No. 19-647 and transmitted to Congress for its review. D.C. Law 19-282 became effective on April 23, 2013.

§ 28-5202. Definitions.

For the purposes of this chapter, the term:

(1) "Combination packages" shall mean a package intended for retail sale, containing 2 or more individual packages or units of dissimilar commodities.

(2) "Commodity" shall mean any food, drug, cosmetic, or other article, product, or commodity of any kind or class that is:

(A) Customarily produced for sale at retail for consumption by individuals for purposes of personal care or in the performance of services ordinarily performed in or around the household; and

(B) Usually consumed or expended in the course of that use or performance other than by wear or deterioration from use.

(3) "Person" shall mean both plural and the singular and includes individuals, partnerships, corporations, companies, societies, and associations.

(4) "Unit price" or "unit pricing" shall mean the retail price of an item expressed in dollars and cents per unit.

(5) "Variety packages" shall mean a package intended for retail sale, containing 2 or more individual packages or units of similar, but not identical, commodities. Commodities that are generically the same, but that differ in weight, measure, volume, appearance, or quality, are considered similar but not identical.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5203. Application.

Except for random and uniform weight packages that clearly state the unit, each person who sells, offers, or displays for sale a consumer commodity at

retail shall provide the unit price information in the manner prescribed in this chapter.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5204. Terms for unit pricing.

The declaration of the unit price of a particular commodity in all package sizes offered for sale in a retail establishment shall be uniformly and consistently expressed in terms of:

(1) Price per kilogram or 100 grams, or price per pound or ounce, if the net quantity of contents of the commodity is in terms of weight;

(2) Price per liter or 100 milliliters, or price per dry quart or dry pint, if the net quantity of contents of the commodity is in terms of dry measure or volume;

(3) Price per liter or 100 milliliters, or price per gallon, quart, pint, or fluid ounce, if the net quantity of contents of the commodity is in terms of liquid volume;

(4) Price per individual unit or multiple units if the net quantity of contents of the commodity is in terms of count; or

(5) Price per square meter, square decimeter, or square centimeter, or price per square yard, square foot, or square inch, if the net quantity of contents of the commodity is in terms of area.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5205. Exemptions.

This chapter does not apply to:

(1) Prepackaged food that contains separately identifiable items that are separated by physical division within the package;

(2) Any item sold only by prescription;

(3) Any item subject to the packaging or labeling requirements of the federal Bureau of Alcohol, Tobacco and Firearms or to any pricing requirements under federal law;

(4) Any item actually being sold through a vending machine;

(5) Any item delivered directly to a retail sales agency without passing through warehousing or other inventory facility used by the agency;

(6) Commodities packaged in quantities of less than 28 grams (one ounce) or 29 milliliters (one fluid ounce) or when the total retail price is 50 cents or less;

(7) When only one brand of a particular commodity in only one size is offered for sale in a particular retail establishment;

(8) Variety packages;

(9) Combination packages; or

(10) A person with less than $30 million in gross volume of sales of consumer commodities and to whom at least one of the following applies:

(A) During the preceding calendar year, sold a gross volume of consumer commodities of less than $750,000;

(B) Is not part of a company which consists of 10 or more sales agencies in or out of the District of Columbia;

(C) Derives less than 15% of its total revenues from consumer commodities subject to this chapter; or

(D) Is owned and operated by not more than one individual and the members of the person's immediate family.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5206. Pricing.

(a) The unit price shall be to the nearest cent when a dollar or more. If the unit price is under a dollar, it shall be listed:

(1) To the tenth of a cent; or

(2) To the whole cent.

(b) The retail establishment shall have the option of listing the unit price as outlined in subsection (a)(1) or (2) of this section, but shall not use both methods of listing the unit price.

(c) The retail establishment shall accurately and consistently use the same method of rounding up or down to compute the price to the whole cent.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Section references. — This section is referenced in § 28-5207.

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5207. Presentation of price.

(a) In any retail establishment in which the unit price information is provided in accordance with the provisions of this chapter, that information may be displayed by means of a sign that offers the unit price for one or more brands or sizes of a given commodity by means of a sticker, stamp, sign, label, or tag affixed to the shelf upon which the commodity is displayed, or by means of a sticker, stamp, sign, label, or tag affixed to the consumer commodity.

(b) Where a sign providing unit price information for one or more sizes or brands of a given commodity is used, that sign shall be displayed clearly and in a non-deceptive manner in a central location as close as practical to all items to which the sign refers.

(c) If a single sign or tag includes the unit price information for more than one brand or size of a given commodity, the following information shall be provided:

(1) The identity and the brand name of the commodity.

(2) The quantity of the packaged commodity; provided, that more than one package size per brand is displayed.

(3) The total retail sales price.

(4) The price per appropriate unit, in accordance with § 28-5206.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5208. Uniformity.

(a) If different brands or package sizes of the same consumer commodity are expressed in more than one unit of measure, the retail establishment shall unit price the items consistently.

(b) When metric units appear on the consumer commodity in addition to other units of measure, the retail establishment may include both units of measure on any stamps, tags, labels, signs, or lists.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5209. Civil penalties.

Any person who violates any provision of this chapter, or any regulation promulgated pursuant to this chapter, may be assessed a civil penalty not to exceed $500 for each violation.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

§ 28-5210. Rules.

The Mayor, pursuant to subchapter I of Chapter 5 of Title 2 [§ 2-501 et seq.], may issue rules to implement the provisions of this chapter.

(Apr. 23, 2013, D.C. Law 19-282, § 2(c), 60 DCR 2132.)

Legislative history of Law 19-282. — See note to § 28-5201.

LexisNexis®

POCKET NOTICE CARD

This Replacement Volume includes the material appearing in the current Supplement and, therefore, does not require a pocket part supplement. This card is included as a reminder that there is no Supplement for this volume at this time.

Place this card in the pocket of the volume

Matthew Bender & Company, Inc.
Editorial Offices
701 East Water Street, Charlottesville, VA 22902

www.lexisnexis.com/support
Customer Service: 1-800-833-9844
Pin 0006999992104